



**Lisibale v Kamau & another (Cause 1425 of 2016)  
[2022] KEELRC 12888 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12888 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1425 OF 2016  
L NDOLO, J  
OCTOBER 13, 2022**

**BETWEEN**

**VICTORIA TOROSA LISIBALE ..... CLAIMANT**

**AND**

**TIMOTHY NGOTHO KAMAU ..... 1<sup>ST</sup> RESPONDENT**

**WINFRED KAMAU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is before me is a notice of motion dated January 3, 2022, seeking revival of the suit herein and substitution of Victoria Torosa Lisibale (deceased) with Protenziana Shiyayo Kibayi.
2. The motion is supported by two affidavits, one sworn by the proposed substitute, Protenziana Shiyayo Kibayi and the other by the claimant's counsel, John Mwariri. It is based on the following grounds:
  - a. That the claimant died on May 1, 2019;
  - b. That at the time of the death of the claimant, her daughter, Protenziana Shiyayo Kibayi was not aware that her mother had filed this cause;
  - c. That the daughter, Protenziana Shiyayo Kibayi only became aware of the cause when she put her mother's SIM card in her phone upon which she received a call sometime in April 2021, from her mother's advocate, informing her of a hearing date of May 20, 2021;
  - d. That before April 2021, the daughter was not aware of a labour cause filed by her mother;
  - e. That the daughter was only issued with a death certificate after June 2021 and hence it was impractical for her to substitute her mother as a claimant before June 2021;



- f. That immediately upon learning of the case, the daughter attended court with her mother's advocate on the set hearing date of May 20, 2021 and informed the court of the predicament and the intention to substitute the deceased with herself;
  - g. That the claimant's advocate would not have taken a hearing date were he aware of the death of the claimant;
  - h. That the claimant's daughter has moved expeditiously and has obtained letters of administration *ad litem vide* Kakamega HC Succession Cause No E023 of 2021: In the Matter of the Estate of Victoria Torosa Lisibale to represent her mother's estate in the suit herein;
  - i. That in view of the fact that one year has lapsed and sufficient and justifiable reasons have been given as aforesaid, the ends of justice will be met if the suit herein is revived and the claimant's daughter, being a legal representative, is substituted in place of the claimant who is deceased;
  - j. That there has been no delay in prosecuting this case as the claimant and the respondent had engaged in negotiations at the behest of the respondent;
  - k. That there has been no delay in filing this application as the claimant's advocate was not aware of the claimant's death;
  - l. That it is only fair and just and in the interest of justice that the orders sought are granted.
3. Prior to the present application, the respondents had filed a notice of preliminary objection indicating that they would raise an objection to have the claimant's suit dismissed for reasons:
    - a. That order 17 rule 2(2) stipulates that a suit stands dismissed after two years with no step being taken;
    - b. That more than five (5) years have lapsed since the claimant filed suit herein and she has not taken any steps towards prosecution of the suit;
    - c. That setting down the suit for hearing after 5 years is an abuse of the court process;
    - d. That it is in the interest of justice and fairness that the court invokes the overriding objective and exercises its discretion to bring the proceedings to an end.
  4. The respondents responded to the claimant's application by a replying affidavit sworn by the 1<sup>st</sup> respondent, Stephen Ngotho Kamau, on February 28, 2022.
  5. Kamau depones that prior to the claimant's demise in 2019, the suit stood dismissed as neither she nor her advocate took any steps to prosecute it or take any directions to proceed with the hearing.
  6. The respondents maintain that the delay in prosecuting the suit between 2016 and 2019, prior to the claimant's demise was inordinate, inexcusable and unreasonable.
  7. Kamau admits that there were initial negotiations between the parties in 2016 but adds that no further negotiations had taken place.
  8. The respondents term the process of substituting the claimant as an afterthought, which will be prejudicial to them, as the evidence to be submitted will be purely hearsay.
  9. The claimant's application is premised on order 24 rule 3 of the *Civil Procedure Rules* which provides:
    1. Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies



and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

2. Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

10. The parties urged their respective positions by way of written submissions.
11. In the submissions filed on behalf of the respondents, reference was made to the decision in *Soni v Mohan Diary [1958] EA, 58* where it was held that for an applicant to succeed in having a suit revived, they must demonstrate sufficient cause that prevented them from seeking substitution within the set timeframe.
12. It was deponed and submitted on behalf of the claimant that the delay in seeking substitution was caused by lack of communication between the family of the deceased claimant and her advocate on record. On the one hand, the daughter of the deceased deponed that she was not aware that her mother had filed the claim and on other hand, the Advocate on record deponed that he was not aware that the claimant had passed on.
13. Looking at the circumstances of this case, against the background of a family having lost a mother, and the resultant difficulties associated with post mourning adjustments, particularly in a rural setting, where resources and means of communication are generally limited, I am satisfied that the delay in seeking substitution is excusable.
14. Regarding the delay in prosecuting the matter prior to the claimant's death, I will say two things; first, the court record indicates several instances where the claimant had moved the court, in between attempts at an out of court settlement, and this will explain why the matter had not been listed for dismissal for want of prosecution and second, it is a matter of public knowledge that hearing dates in this court are given on an ageing basis and the present claim has been part of a long waiting list. The claimant cannot therefore be blamed for delay in disposal of her case.
15. As to what value the proposed substitute will add to the claim, this is a matter of probative value to be determined at the trial.
16. In the end, I am persuaded to exercise discretion in favour of the claimant and thus allow the plea for extension of time for substitution of the deceased claimant, Victoria Torosa Lisibale with Protenziana Shiyayo Kibayi.
17. The costs of the application will be in the cause.
18. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 13<sup>TH</sup> DAY OF OCTOBER 2022**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mwariri for the Claimant



Mr. Lando for the Respondents

