



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 88 OF 2012

RICHARD MWANGI MUTURI.....CLAIMANT

-VERSUS-

OSERIAN DEVELOPMENT COMPANY LIMITED.....RESPONDENT

RULING

1. The application before me is the Notice of Motion dated 2.11.2018 brought by the legal representative of the deceased claimant. It is brought under Order 51 rule 1 & 4 and Order 12 rule 7 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and Article 50 (1) and 159 of the Constitution and it seeks the following orders:

- (a) Reinstatement of the claimant's suit for hearing on merit
- (b) Costs be in the cause.

2. The application is premises on the grounds set out on the body of the motion and is supported by the affidavit sworn by the applicant's counsel Mr. Paul Mwangi Ndung'u.

3. The application is opposed by the respondent vide the Grounds of Opposition filed on 21.11.2018.

Applicants case

4. The applicant contends that the claimant died on 10.10.2016 and the widow notified his counsel in October 2017. Thereafter she applied for grant of letter of succession and applied to substitute the deceased by the Notice of Motion dated 15.5.2018. However, the court observed that the suit had already abated and she withdrew the application so as to apply for the revival of the suit. Thereafter the court file disappeared until 16.10.2018 when it was mentioned in court and the court marked the same as abated.

5. The applicant contends further that she is not to blame for the dismissal of the suit and prayed for mercy. She further prayed for the suit to be reinstated and be granted an opportunity to prosecute it because in her view the suit has high chances of success. She further states that the application was made without undue delay. The claimant relied on **Peterson Gichohi v. Maina Johana Miano [2016]eKLR** where Waitthaka J granted similar application and ordered substitution without application for extension of time.

Respondent's case

6. The respondent opposed the application on ground that the orders sought are not tenable, that the application is an abuse of the court process; that no sufficient cause has been shown to warrant issuance of the orders sought; and that the application is fatally defective and ought to be dismissed with costs.

7. The respondent submitted that under Order 24 rule 3(2), a suit abates by operation of the law when the substitution is not made within one year after the death of the party. She submitted that since 10.10.2016 when the claimant died the suit abated in October 2017.

8. She further urged that under Order 24 rule 3(2) of the Civil Procedure Rules, the court has power to extend the time within which to substitute a deceased party upon sufficient reasons being shown. However, the respondent contended that the instant application is not for extension of time to substitute the deceased claim.

9. She further urged that the delay in bringing the application from the time when the applicant obtained grant of letters of administration on 24.1.2018 to 6.11.2018 when she filed the instant application is inordinate and not explained. She therefore prayed for application to be dismissed with costs.

10. The respondent relied on **Joseph Gachuhi Muthanji v Mary Njuguna [2014]eKLR** and **Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company & 2 others [2017]eKLR** where the Court of Appeal held that revival and substitution of a deceased party must be preceded by an application for extension of time within which to substitute the deceased party.

Analysis and determination

11. There is no dispute that the suit herein abated in October 2017. The issues for determination are;

- (a) Whether the application herein is fatally defective and incompetent
- (b) Whether the suit should be reinstated.

Whether the application is fatally defective and incompetent

12. Order 24 Rule 7 (2) provides that:

“The plaintiff or the person claiming to be legal representative of a deceased plaintiff . . . may apply for an order to revive a suit which has abated; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit, . . . upon such terms as to costs or otherwise as it thinks fit.”

13. In dealing with a similar issue in **Rebecca Mijide Mungola & Another v Kenya Power & Lighting Co. Ltd.[2017]eKLR**, the Court of Appeal held that the reason why the suit abates is the failure by the legal representative to apply for substitution within one year. The court went further to hold that before any application for revival of the abated suit can be made competently, the applicant must first apply for extension of time within which to do substitution of the deceased claimant, followed by the application for substitution and lastly the application for revival based on sufficient cause being shown.

14. The court expressed itself thus:

“The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be enjoined in the proceedings. Again, it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view, there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted.”

15. The foregoing precedent is binding on me and as such I must follow the same by agreeing with the respondent that the application is incompetent for being brought prematurely.

Whether the suit should be reinstated/revived

16. In view of the foregoing finding, I decline to consider the application on merits and proceed to dismiss it with costs.

Dated, signed and delivered in Nairobi this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE