



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 298 OF 2011

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

TANATHI WATER SERVICES BOARD.....RESPONDENT

AND

NOL-TURESH PIPELINE BULK

WATER SUPPLY COMPANY LIMITED.....INTERESTED PARTY

RULING

Before me, for determination is the claimant's application dated 16th November 2018. It seeks the following orders –

1. That this Application be certified urgent.
2. That the deceased SIMON MUSYOKI MUIA the grievant herein be substituted by the legal representatives of the Estate of the deceased who are MONICA MUSYOKI and FESTUS NGONGO MUIA.
3. That MONICA MUSYOKI and FESTUS NGONGO MUIA be made nominal parties and be allowed to proceed with the suit for and on behalf of the Estate of SIMON MUSYOKI MUIA (Deceased).
4. That the Court do give such directions as to hearing and disposal of the claim.
5. That the costs of this Application be in the cause.

The grounds in support of the application are that –

1. That the grievant herein SIMON MUSYOKI MUIA died on 15th December 2012 intestate.
2. That MONICA MUSYOKI and FESTUS NGONGO MUIA obtained letters of administration ad litem to enable them to be substituted as nominal parties in place of the grievant SIMON MUSYOKI MUIA.
3. That it has become necessary to substitute SIMON MUSYOKI MUIA with MONICA MUSYOKI and FESTUS NGONGO MUIA who are the legal representatives of the deceased's estate as parties to this suit to protect the Estate of the deceased from being wasted and alienated.
4. That the Rules of procedure require that such an Application be made to Court before substitution can be done.
5. That no prejudice will be occasioned on the Respondents if the Orders sought herein are granted.
6. That it is in the interest of justice that the orders sought herein are granted.

7. That other grounds to be advanced during the hearing of this Application.

The application is supported by the affidavit of MONICA MUSYOKI in which she reiterates the grounds in support of the application.

The respondent opposes the application and filed a replying affidavit of JANE SEIN in which she deposes that although the deceased died on 16th December 2012 as per death certificate letters of administration were obtained on 1st September 2015, after the suit abated on 16th December 2013. She deposes that the application for revival of the abated suit has never been made and no reason has been given for failure to do so. Further, that the application for substitution cannot be made without first reviving the suit. That the application is misconceived and fatally defective, that the claimant is not keen on persecuting the suit and that the respondent ought to be relieved from being tied to a suit which the claimant has lost interest in.

The application was disposed of by way of written submissions. I have considered the application together with grounds and affidavit in support thereof. I have further considered the replying affidavit and submissions of both parties.

The law as provided for under Order 24 Rule 1-3 of the Civil Procedure Rule is as follows –

ORDER 24 – DEATH AND BANKRUPTCY OF PARTIES

[Order 24, Rule 1.] No abatement by pay's death if right survives.

The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

.....

[Order 24, Rule 3].] Procedure in case of death of one of several plaintiffs' or of sole plaintiff.

(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 sub rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to 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.

Under Order 24 Rule (3) the court has wide discretion to expand the time for substitution of a deceased party to a suit. I have taken cognisance of the fact that the claimant is a trade union acting in person and has filed suit on behalf of the deceased grievant as well as other grievants. There is no prejudice the respondent is likely to suffer as a consequence of allowing the application as the case against it by the grievants has not been determined. I have also considered the fact that the file has been active and has been in court since it was filed in 2011. It is my opinion that this is a good case for the court to exercise its discretion in favour of the claimant and not to lock out the legal representatives of the deceased grievants on a question of legal technicality.

For these reasons, I allow the application and order the substitution of SIMON MUSYOKI MUIA (deceased) with MONICA MUSYOKI and FESTUS MUSYOKI.

There shall be no orders for costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE