



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.373 OF 2013

[Formerly HIGH COURT CIVIL CASE NO.564 OF 2007]

- JOSEPH K MULI.....1ST CLAIMANT**
- CHARLES M MIANO 2ND CLAIMANT**
- JULIUS M MAINA..... 3RD CLAIMANT**
- JOSEPH K KAMAU..... 4TH CLAIMANT**
- ISAYA O BARAZA.....5TH CLAIMANT**
- ELAKA M KINGELU.....6TH CLAIMANT**
- CHARLES K KAHIGA..... 7TH CLAIMANT**
- OBADIAH K WAWERU..... 8TH CLAIMANT**
- RICHARD KYALO MULI..... 9TH CLAIMANT**
- HASSAN O AKIBAYA10TH CLAIMANT**

VERSUS

**DEUTCHE GESELLSCHAFT FUR TECHNISCHE ZUSAMMENARBEIT GmbH,
 GTZ- INTERNATIONAL SERVICES (GTZ-IS) RESPONDENT**

RULING

1. By application and Notice of Motion dated 26th January, 2016 the applicant, Florence Wanjiku Maina, the legal representative of the estate of Julius Maina Mariga, the 3rd claimant is seeking for orders that;

- 1. Time be and hereby extended for the applicant to be substituted as the 3rd plaintiff [claimant] in the place and instead of Julius M Maina now deceased.*
- 2. That Florence Wanjiku Maina be joined as Third plaintiff in this suit in the place of Julius Mariga Maina, now deceased within such extended time and applicant be deemed to have been duly joined as plaintiff in this suit.*

3. *costs of this application be in the cause.*

2. The application is supported by the applicant and her affidavit and avers that she is the daughter to the 3rd claimant the late Julius Mariga Maina who died on 22nd December 2013 during the pendency of this case and the death certificate is attached to the application. It took some time to obtain the Death Certificate and further more time to file application with the Family Division of the High Court to obtain Letters of Administration *ad litem* to the deceased estate. In The High Court Succession Cause No.2604 of 2014 the Letters of Administration were granted on 9th September 2015 by which time one (1) year had lapsed after the 3rd claimant's death.

3. Ms Maina also avers that she is desirous of being joined as a claimant in this suit in order to pursue her father's claim on behalf of his estate.

4. The respondent filed Grounds of Opposition to the application and on the basis that where the 3rd claimant Julius Maina Died on 22nd December 2013 and his claim abated on 22nd December 2014. There exists no suit to make the orders sought. The application made is time barred as it is made 2 years after abatement of the suit by the 3rd claimant and the court lacks jurisdiction to grant the orders sought. No sufficient cause has been set out to warrant the grant of the orders sought and the delay has been inordinate. The application for Letters of Administration 2 years after death of the 3rd claimant is not sufficiently explained.

Submissions

5. The applicant submits that in view of the death of the 3rd claimant on 22nd December 2013 and the fact that the applicant obtained letter of Administration *ad litem* on 9th setpember 2015, and by application of Order 24 Rule 3(1) and (2) of the Civil Procedure Rules, there is no in filing the application for extension of time to have a substitution of the deceased. Whereas the law contemplates that such an application should be made within one (1) year of death, under Order 24 Rule (2), of the Civil Procedure Rules a suit is not filed within a year of death, there is also the condition that the *court may, for good reason on application, extend time* such good or sufficient reason has not been addressed by the applicant.

6. In **Kenya Farmers' Co-operative Union Limited versus Charles Murgor (deceased) t/a Kaptabe Coffee Estate, and HCCC N.1671 of 1994; and Wallace Kinuthia versus Anthony Ndung'u & 2 Others (Nbi ELC No.542 of 1999)** the court held that with the death of a party, and where within one years no application is made under order 24 Rule (1), the suit shall abate and there is no provision for revival.

7. Under order 24 Rule (2) there is provision for extension of time for substitution in relations to a deceased party. The time to substitute a deceased plaintiff is not capped under the sub rule. The suit continues to survive the deceased. The High Court in **Shirji Builders versus Ogola (Nbi HCCC No.158 of 1999)** the court held that a deceased plaintiff personal representative for whom suit has abated can revive is under what is now order 24 Rule 7(2) of the Civil procedure Rules. There is now provision for extension of time to substitute a deceased plaintiff even after the one year time lapse provided that there are good reasons to do so.

8. In this case there is good reason for the applicant to be allowed and extension of time to apply for substitution of the 3rd claimant as held in **Camilo Durani versus M/s Alamin & D.J. K Ltd 7 another, HCCC No.7 of 1993 (Mombasa).**

9. The respondent submits that the legal representative of the estate of the 3rd claimant is seeking orders that time be extended for her to be substituted as the 3rd claimant in place and instead of Julius Mariga Main now deceased. Under Order 24 Rule (2) of the Civil Procedure Rules, a party can file an application for extension of time to allow substitution of a claimant/plaintiff under sub-Rule (3). Where no application is made by a legal representative to substitute a deceased plaintiff within one (1) year the suit

abate. Ignorance of the law or negligence of the advocate does not amount to sufficient reason to warrant extension of time as held in **Camilo Durani case**, cited above. The court has no jurisdiction to hear a suit that has abated by operation of the law as held in **Wallace Kinuthia Ndung'u case**, cited above.

10. The applicant's application is time barred having been made 2 years after the fact of death of the 3rd claimant/plaintiff. Order 24 Rule 3(2) provides that the court may for good reason on application extend time and although courts have discretion to extend time for good cause, the applicant has failed to disclose sufficient reasons to warrant the exercise of such discretion. In *Shirji Builders versus Ogada* the court held that it was not practicable to revive a suit that had abated by operation of the law.

11. In this case the delay by the applicant in obtaining letter of administration until 9th September 2015 does not excuse the failure to file application for substitution within time. In **Benjamin Sipitali Mungwana versus Norah Khaoya Shem & 2 others [2005] eKLR** the court held that the delay in obtaining letters of administration did not show sufficient cause preventing the applicant from continuing the suit. The application has therefore not met the standards for the grant of the orders sought.

Determination

12. In the main, the applicant Ms Florence Wanjiku Maina, being the legal representative of the Estate of the 3rd claimant, Julius Maina is seeking to have time extended so as to be substituted as the 3rd claimant in the place of her deceased father, the 3rd claimant/plaintiff. Also that she should be joined as third party in these proceedings in the place of the deceased, Julius Maina.

13. In this case, the court on 29th May 2014 was faced with a similar application such as this one save that, in the 1st and 7th plaintiffs application, the court held that;

As provided in Order 24 Rule 3(2) of the Civil Procedure Rules, 2010 substitution of a deceased plaintiff must be done within one year failing which the claim abates. The proviso of Rule 3(2) grants the court the power to extend the time on application, and for good cause.

In the present case there is no application for extension of time. Even if such application were to be assumed by the fact of the application by the applicants to be made, no reason has been given for the inordinate delays in filing the application or obtaining letter of administration. Both applicants have delayed by more than two years to file applications to be enjoined as parties. The inordinate delay should have been sufficiently explained.

14. The 3rd claimant, now deceased, died on 22nd December 2013 when the Civil Procedure Act, 2010 and the Rules thereon were applicable. Order 24 therefore apply.

15. Both parties agree that in such a scenario, the legal representative to the estate of the deceased claimant/plaintiff can substitute such a party upon application and where the court has extended time to do so in the event one (1) year has lapsed without such substitution. This is what the Rules requires to be done.

16. What is contested is that, the applicant seeking to be substituted must lodge such application without delay and give good and sufficient reasons for the delay for not filing application for substitution within one year.

17. Has the applicant then moved without delay and is the delay reasonable? The applicant Ms Maina sets out in her affidavit that upon the demise of her father, the late Mr Julius Maina, it took her time to obtain the Death Certificate and upon getting one, she had to go through the Rigours of filing application with the High Court, Family Division for the Letters of Administration. That caused her delays and immediately she was able to have the Letters of Administration, she moved the court without delay.

18. Where the death of the 3rd claimant occurred on 22nd December 2013, the Letters of Administration

was applied for under High Court Succession Cause No.2604 of 2014. From the application, the court issued the Letter *ad litem* on 9th September 2015. It is common cause that once the court is seized of a matter, sometimes a party may not be able to control the pace at which the matter can progress even in an urgent matter. What is clear in the applicant's case is that when the court issued the Letters of Administration *ad litem* on 9th September 2015, less than 4 months later on 26th January 2016 this court was moved to extent time to enable the applicant be substitute in place and instead of the 3rd claimant, now deceased. Such I find is not inordinate delay.

19. Order 24 Rule 3(2) requires that an applicant seek the extension of time where suit has abated and demonstrate *good reason* as to why the court should exercise its discretion and extent time;

(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.

20. I therefore agree with the findings in the case of **Kenya Farmers' Co-operative Union Limited versus Charles Murgor** to the extent that;

Under Order 23, Rule 4(1) of the Rules [now Order 24 Rule 3], where a sole defendant dies and the cause of action survives or continues the court, on application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit...

... under Rule 8(2) of the same Order 23 the plaintiff can apply for an order to revive a suit which has abated; and if he proves 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.

21. As noted above, this court has addressed a similar matter with regard to the 1st and 7th claimant but declined the substitution as the applicants had not applied for extension of time. That loophole is now addressed by the applicant herein and I find the reasons that prevented the immediately filing of the application for substitution within good time to be reasonable and justified. I also find that upon the death of the 3rd claimant, the applicant did not just sit back easy, she did something by obtaining the Death Certificate and with it, in 2014 moved the High Court Family Division with her application for Letters of Administration which were granted by the Court on 9th September 2015. The delays are therefore explained and this being a court of justice, the claim for the 3rd claimant, Julius Maina should not abate.

Application dated 26th January 2016 is hereby allowed; Time is hereby extended and Florence Wanjiku Maina substituted as the 3rd claimant/plaintiff in the place and instead of Julius Mariga Maina now deceased. Costs in the cause.

Dated and delivered in open court at Nairobi this 13th day of February, 2017.

M. MBARU

JUDGE

in the presence of:

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