Charterhouse Bank Limited v Tanna (Suing as the Administrator of the Estate of Vijay Kumar Shah) & another (Civil Appeal E216 of 2023) [2025] KEHC 1139 (KLR) (Commercial and Tax) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1139 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E216 OF 2023

PM MULWA, J

FEBRUARY 27, 2025

BETWEEN

CHARTERHOUSE BANK LIMITED ..... APPELLANT

AND

KARISHMA SHAH - TANNA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF VIJAY KUMAR SHAH) ..... 1ST RESPONDENT

THE STATUTORY MANAGER OF CHARTERHOUSE BANK .... 2ND RESPONDENT

JUDGMENT

Background

1. This appeal stems from a ruling made by Hon. W.K. Micheni on 7th August 2023. The late Vijay Kumar Ratilal Kanti Shah filed a suit in May 2008, seeking Kshs 10,000,000.00 plus interest from the appellant for money allegedly deposited in a call deposit account. The appellant denied the existence of such an account or any deposits. After the plaintiff's death in December 2017, the 1st respondent sought to substitute the deceased and extend the time for substitution, which the trial court initially allowed despite the case having abated.

2. The appellant appealed to the High Court against the trial court ruling allowing the substitution. Later, the 1st respondent filed a Notice of Motion application on 20th November 2021 to revive the suit and to add Dilesh Somchand Bid as a second plaintiff. The court granted the revival but denied the enjoinment of the second plaintiff. The appeal challenges these decisions.

The Appeal

3. The appellant, dissatisfied with the trial court's decision to allow the respondent's application to revive the abated suit, filed a Memorandum of Appeal on 6th September 2023. The appellant is challenging the ruling on the following grounds:

    i. In holding that the 1st Respondent had explained the delay to warrant the court's discretion to revive the abated suit, the Learned Magistrate made a fundamental error of law and fact in failing to appreciate:

        a. That the suit abated on account of failure to take steps, within one year of 3rd December 2017, to implead the legal representative of the deceased Plaintiff.

        b. That the 1st Respondent had not established that the deceased's legal representative was prevented by sufficient cause from continuing with the suit within 1 year of the Plaintiff's death.

        c. The Learned Magistrate considered extraneous considerations of the explanation tendered for the delay for the period after the suit had abated.

        d. That the 1st Respondent had not offered any reasonable or plausible explanation to warrant the exercise of the trial court's discretion to revive the abated suit.

    ii. The Learned Magistrate ignored the overwhelming evidence of the circumstances warranting the conclusion that the delay was on account of deliberate inaction, indifference or negligence on the part of the 1st Respondent.

    iii. The Learned Magistrate erred in failing to take into consideration the prejudice occasioned to the Appellant by the grant of the orders for revival of the suit.

    iv. The Learned Magistrate erred in failing to take into consideration the Appellant's submissions.

4. The appellant proposes that the Court allow the appeal, set aside the ruling and/or orders delivered on 7th August 2023, and substitute them with an order dismissing the Notice of Motion application dated 20th November 2021. The appellant also seeks to be awarded the costs of the appeal.

5. The parties have canvassed the appeal through written submissions, which I have carefully considered alongside the Memorandum of Appeal and the record of appeal.

6. In advancing the appeal, the Appellant cites the cases of Said Sweilem Ghithan Saanum v The Attorney General & 5 Others (2015) and Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 Others (2015). The appellant contends that the 1st respondent failed to establish sufficient cause for not continuing the suit within the required timeframe before it abated. And that the trial magistrate misapplied the law regarding the revival of an abated suit, particularly referencing Order 24 Rules 3 and 7 of the Civil Procedure Rules.

7. The appellant also submits that the trial magistrate failed to consider important extraneous factors, including delays in returning the court file from the appellate court after the suit had already abated. The appellant asserts that the focus was wrongly placed on the delay before the abatement, while the delay after the suit abated was overlooked. Additionally, the appellant argues that the trial magistrate failed to recognize the prejudice suffered due to the delay.

8. The 1st respondent argues that the trial magistrate correctly exercised the judicial discretion judicially in allowing the application for revival having evaluated the reasons adduced for the delay. She urged the

court not to interfere with the trial court's finding unless it is shown it was arrived at erroneously. The appellant has failed to demonstrate the prejudice to be served by the revival of the suit as the witnesses' statements to be relied on are already filed.

Analysis and determination

9. This being a first appeal, the duty of this Court is as re-stated in the case of Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where it was held in part that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

10. It is trite law that the Appeal Court may only interfere with the exercise of discretion by a trial court in the circumstances set out in Mbogo v Shah [1967] EA 93 as follows:

> " A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

11. In the instant appeal, the central issue raised is whether the trial court properly exercised its discretion in allowing the revival of the abated suit, especially in light of the procedural rules that require sufficient cause to be shown for the delay before the suit abated.

12. After carefully considering the reasons provided by the 1st respondent for the delay in applying to revive the suit, it is clear from the record that the suit had already abated by the time the grant of letters of administration was issued to the personal representative. The law is explicit that the substitution of a deceased party in a suit can only be done by, or with the permission of, the legal representative of the deceased's estate.

13. The delay in substitution, which occurred following the issuance of the certificate of confirmation of grant on 14th November 2018, was not due to negligence but was a result of the necessary legal procedure to appoint a personal representative. While the 1st respondent could have sought a special grant of administration ad colligenda bona defunct to expedite the process, she chose to wait for the court to make a full grant of representation. This decision was not an error, and she cannot be faulted for it.

14. Though the procedural delay is regrettable, it was an essential step to ensure the continuation of the suit with a properly authorized party.

15. In addressing the delay in filing the application seeking revival of the suit, the trial magistrate considered several critical factors, including the delay caused by the return of the court file from the appellate court.

16. I believe the trial magistrate's decision to regard this delay as sufficient cause is sound and appropriate in the context of the case. The law requires that the explanation be rational, logical and convincing. In this case, the reasons advanced for the delay, particularly the procedural necessity of waiting for the court file, are plausible and do not raise any unreasonable gaps or doubts in the sequence of events.

17. The Court of Appeal in the case of The Hon. Attorney General v the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 defined 'sufficient cause or good cause' in law to mean:

> " The burden placed on a litigant (usually by court, rule or order) to show why a request should be granted or an action excused. See Black's Law Dictionary, 9th edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

18. In this case, the delay caused by procedural requirements and the return of the court file is both reasonable and justifiable. The 1st respondent's application to revive the suit was not due to neglect or lack of diligence but was a result of necessary legal processes. I am persuaded that the trial court exercised its discretion judiciously in concluding that there was sufficient cause for the delay in applying for revival.

19. As an appellate court, I can only disturb the trial court's decision if it is shown to be erroneous in principle or law. After carefully reviewing the procedural history, legal principles, and circumstances surrounding the delay, I find that the trial magistrate was correct in concluding that there was sufficient cause for the delay. The delay was not caused by the 1st respondent's negligence but by factors beyond their control, such as the need to substitute the deceased party and the delay in the return of the court file from the appellate court.

20. The appellant's assertion that his submissions were not considered is incorrect. A review of the court ruling clearly shows that the trial magistrate gave due consideration to the arguments raised by the appellant. In any case, as was held in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR:

> " ...Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' 'marketing language', each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

21. In light of the above, I find the appeal is bereft of merit and the same is dismissed with costs.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Ms. Migiro for Appellant

Mrs. Maina for Respondent

Court Assistant: Carlos