



REPUBLIC OF KENYA



Housing Finance Company of Kenya Limited v Muriu (Deceased) (Civil Appeal 281 of 2011) [2024] KEHC 419 (KLR) (Civ) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 419 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL 281 OF 2011**

**JN NJAGI, J
JANUARY 24, 2024**

BETWEEN

HOUSING FINANCE COMPANY OF KENYA LIMITED APPELLANT

AND

NELLY NYAGUTHII MURIU (DECEASED) RESPONDENT

RULING

1. The Appellant/Applicant herein has filed an application dated 30th May 2023 seeking for orders that:
 1. The Honourable court be pleased to revive the appeal herein.
 2. The Honourable court be pleased to grant an extension and/or enlargement of time to file an application to join the Respondent's legal representative herein Anthony Ndua Thuo
 3. The Respondent herein Nelly Nyaguthii Muriu (now deceased) be substituted with Anthony Ndua Thuo, the legal representative of the deceased's Estate.
 4. The costs of the application be in the cause.
2. The application was premised on grounds on the face of the application and supported by the affidavit of the Legal Manager- Litigation of the Applicant, Hedaya Malesi.
3. The grounds in support of the application are that the Respondent herein passed away on 18th May 2011 after the appeal in this matter had been filed but that the cause of action survives the deceased. Further that the Applicant did not know of the passing on of the Respondent until the year 2022. That they later on traced the Respondent's son, Anthony Ndua Thuo, who moved the Succession Court for a grant of letters of administration and was issued with a grant of letters of administration ad litem on



4th May 2023. It was their prayer that the said Anthony Ndua Thuo be substituted as a representative of the estate for the deceased in this appeal.

4. The application was opposed by the Intended Respondent, Anthony Ndua Thuo vide his replying affidavit sworn on 22nd September 2023 wherein he deposes that his mother died on 18/5/2011 whereas the judgment in the matter was delivered on the 31/5/2011 and the appeal filed on 24/6/2011. Therefore, that the appeal was filed more than a month after the death of his mother. That it is not true that his mother died after the appeal had been filed.
5. The Intended Respondent further says that the issue of the death of his mother was communicated to the court in the presence of the advocate for the Applicant on the 8/7/2011. More so that there was communication between the advocates for the deceased and the Applicant that the deceased had passed on as shown by annexures ANT 5. That it was not true that the Applicant got to know of the death of the deceased in 2022. That it was clear from the court record that the Applicant went to slumber and was woken up by the Notice to Show Cause from the court dated 29/6/2022 on why the appeal should not be dismissed for want of prosecution.
6. The Intended Respondent deposes that the applicant did not take action towards revival of the suit for a period of more than 10 years. That the period was inordinate and no explanation has been given for the delay. That the suit has abated and no sufficient cause has been shown for reviving it. Therefore, that the application should be dismissed with costs.

Submissions

7. The Advocates for the Applicant relied on the provisions of Order 24 Rule 7(2) that deals with revival of an abated suit and submitted that it moved without delay to file the instant application on the 30/5/2023 after the issuance of limited grant of letters of administration ad litem to the Respondent's legal representative on the 4/5/2023. The Applicant further cited the case of Mourice Maina L. Muhanga & another v Mufoyongo M. Muhanga (Dcd) & another (2017)eKLR where the court declined to revive a suit owing to delay in filing the application for substitution following the issuance of letters of representation
8. The Applicant cited the case of John Muthee Matumo v Thomas Gerishon & 4 others (2022) eKLR where the court observed that an application for revival of an abated suit can only be made after a legal representative has been appointed, otherwise such an application would be premature. The Applicant urged the court to allow the application.
9. The Advocates for the Intended Respondent on the other hand submitted that the appeal was filed after the death of the deceased. That the appeal is in the circumstances a nullity having been filed against a dead person. In support of this proposition, the Intended Respondent relied on the Court of Appeal decision in Geeta Bharat Shah & another v Omar Said Mwatayari & another (2009) eKLR where the court held that judgment could not be entered against a dead person.
10. The Intended Respondent further submitted that vide the provisions of Order 24 Rule 4 of the Civil Procedure Rules, an application to substitute a deceased person ought to be made within one year of the death of the deceased otherwise the suit abates by operation of the law. It was submitted that the appeal in this case has abated.
11. The Intended Respondent, submitted that an abated suit can be revived under the provisions of Order 24 Rule 7(2) of the Civil Procedure Rules where it is proved that the applicant was prevented by any sufficient cause from continuing with the suit. That in this case no sufficient cause has been shown as the applicant was made aware of the death of the deceased on 8/7/2011 when the court was informed



of the same. The Intended Respondent faulted the Applicant for failing to take action for a period of more than 10 years. It was consequently submitted that the Applicant is not deserving the equitable relief that it seeks as it has not shown sufficient cause for the court to grant the application.

12. In response to the submission by the Applicant that an abated suit can only be revived after a legal representative has been appointed, the Intended Respondent submitted that although that is true, the Applicant had the option of moving the court under section 54 of the *Law of Succession Act* as read with the Fifth Schedule for the court to appoint a nominee of the deceased to be issued with limited grant for the purpose of continuing with the suit. The Intended Respondent in this respect cited the case of *Muriithi Ngwenya v Gikonyo Macharia Mwangi & 2 others* (2018) eKLR where the court noted as follows:

The Applicant is seeking to substitute Lucy Wambui Gikonyo in place of 1st Defendant. Other than the mention of her being a wife of over 50 years, no evidence has been tabled to show that she indeed is a person contemplated by the above definition, that is to say, the legal representative of the estate of the 1st Defendant. The rule requires substitution of a Defendant with a party clothe with legal representation.

11. Can this Court permit the substitution of the 1st Defendant by the said Lucy Wambui Gikonyo? In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the *Law of Succession Act*. The Law of Successions Act provides the procedure to be followed in the application for such a grant, and the various forms a grant may take including letters of administration. Section 54 of the Act provides that a Court may limit a grant of representation which it has jurisdiction to make in any of the forms described in the Fifth Schedule. The Fifth Schedule provides as follows at paragraph 14 with respect to grants of administration limited to suit:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

13. The Intended Respondent urged the court to dismiss the application.

Analysis and Determination

14. I have considered the grounds in support of the application and the submissions by the respective advocates for the parties. The issue for determination is whether the applicant has adduced sufficient explanation warranting the suit being revived.
15. The application is made pursuant to the provisions of Order 24 Rules (1), (4) and (7) of the Civil Procedure Rules, 2010, that provide as follows:

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

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



- I. Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.
 - II. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
 - III. Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.
 - IV. Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4.]
 - V. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
- Effect of abatement or dismissal [Order 24, rule 7.]

1. Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
2. The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.

16. There is no dispute in this matter that the deceased died on the 18th May 2011. A certificate of death marked ANT 2 was annexed to the replying affidavit of the Intended Respondent proving that fact.
17. Further to that, the court record indicates that the appeal herein was filed on the 26th June 2011. It is then abundantly clear that the appeal was filed after the death of the deceased, contrary to the averment by the applicant that the deceased died after the appeal was filed.
18. A suit filed against a dead person is a nullity. In *Geeta Bharat Shah & another v Omar Said Mwatayari & another* (supra), where the defendant was dead when the suit was filed the Court of Appeal held that; In the result, as *Bharatkumar Nathalal Shah* was already dead by the time the suit was filed, we hold the view that the suit was a nullity and Mr. Oddiaga, is with respect right in conceding the appeal in respect of him on that score. We see no merit in directing that he be allowed to file defence as he is not there to do so and the administrators to his estate cannot in law take over the matter as it was filed after he was already dead.
19. Since the deceased herein was dead when the appeal was filed, the appeal is a nullity.
20. Even if the appeal was validly before the court, the Applicant had the option of moving the court under Order 24 (4) (as cited above), within one year of the death of the deceased for the personal representative of the deceased to be made a party to the suit. The Applicant did not move the court within that time and therefore the suit stood abated by operation of the law at the end of the one year.



21. The Applicant has moved this court under the provisions of Order 7 Rule 4 seeking to revive the abated suit. The Rule requires them to show sufficient cause why they did not file the application within reasonable time.
22. The explanation given by the Applicant for the delay is that they only learnt of the death of the deceased in 2022. However, this was a lie because the proceedings of the court of 8/7/2011 indicate that Counsel appearing for the Respondent, Mr. Wanjohi informed the court on that day in the presence of the advocate for the Applicant, Mr. Ongalo, that his client had died. Besides that, there was exchange of correspondence between the advocates for the deceased and the Applicant starting from the year 2011 showing that the deceased had passed on. There is then no truth that the Applicant learnt of the death of the deceased in the year 2022. That information came to their knowledge in the year 2011.
23. The instant application was filed on or about 30th May 2023. That makes it a period of about 11 years after the death of the deceased. The question then is whether the Applicant has shown sufficient cause for the delay in filing the application for a period of 11 years.
24. In the case of BML v WM [2020] eKLR, the Court of Appeal cited with approval the Supreme Court of India in Civil Appeal 1467 of 2011 Parimal vs Veena Bharti (2011), where ‘sufficient cause’ was defined as follows:

“Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been ‘not acting diligently ...”
25. Further, in the case of The Hon Attorney General v the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 ‘sufficient cause’ was defined as:-

“Sufficient cause” or “good cause” in law means: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 doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”
26. The Applicant argued that they could not file the application before the legal representative for the Respondents/deceased had obtained grant of letters of administration. Whereas the personal representative of a deceased person has to first obtain grant of letters of administration before he/she is made a party to the suit, the Applicant has not shown that they made any effort for a period of 11 years to have a representative of the deceased being issued with a grant of letters of administration. They did not invoke the provisions of Section 54 and the Fifth Schedule of the Law of Succession Act of which the Fifth Schedule provides as follows in Paragraph 14:

When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.
27. The deceased was a former employee of the Applicant. It is therefore most likely that they had the contact of her next of kin. They also had the contact of her advocates. There is then no reason why



they did not approach the court for a period of 11 years for the purposes of the court nominating a personal representative of the estate of the deceased to continue with the pending suit. It is the Plaintiff in a suit who has the duty of moving the court for the purposes of his case being heard. It is clear in this case that the Applicant went to sleep after the death of the deceased and took no action for a period of 11 years. I consider a period of that length to be inordinate and unreasonable. In the premises, the Applicant has not shown sufficient cause for reviving the suit.

28. The upshot is that the appeal is a nullity, having been filed after the death of the deceased and even if it were validly before the court, no sufficient cause has been shown for reviving it. There is in the premises no merit in the application dated 30th May 2023. The same is dismissed with costs to the Intended Respondent, Anthony Ndua Thuo.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF JANUARY 2024.

J. N. NJAGI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr. Mbaluto for Appellant/Applicant

Mr. Wanjohi for Intended Respondent

Court Assistant – Amina

30 days Right of Appeal

