



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL SUIT NO. 79 OF 2002

BILHA GAHUYA AKATSA
PLAINTIFF/APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL

NELSON MULANDA (DECEASED)

ANJELILNA SHIKOKOTI (Legal Representative of NELSON MULANDA)...
DEFENDANTS/RESPONDENTS

RULING

1. By a Notice of Motion dated 24/6/2014 BILHA GAHUYA AKATSA (the applicant) moved this court seeking the following orders;

- 1. *This Honourable Court be pleased to extend the period within which the defendant who is deceased should be substituted and revive the suit herein.***
- 2. *The deceased defendant be substituted for ANJELINA SHIKOKOTI above named as his legal representative and be made a party to this suit.***

2. The applicant also prays for costs of the application.

3. The application is based on the grounds on the face of the motion and on the applicant's affidavit sworn on 24/6/2014. The applicant deposed that upon learning of the demise of Nelson Mulanda the defendant herein, she promptly lodged a citation against Anjelina Shikokoti the deceased's widow. Unknown to the applicant the said Anjelina Shikokoti had obtained a Grant of representation on behalf of the deceased estate on 21/10/2010 but did not disclose this fact to the applicant. This fact was only disclosed to the applicant on 3/6/2014 in court.

4. The applicant then filed this application on 24/6/2014 seeking to substitute the deceased with the legal representative of that estate. The applicant therefore prays that since the cause of action survives the death of the defendant, it is fair and just that the application be allowed and the suit be revived and be heard on merit.

5. Anjelina Shikokoti, the legal representative of the deceased's estate opposed the application and filed a replying affidavit sworn on 15/10/2014. The legal representative deposed that her husband who

was the defendant herein passed on 16/1/2009, and that before his death, he had filed an application seeking the dismissal or striking out of the suit herein for want of prosecution or for not disclosing a reasonable cause of action, a demonstration that the applicant was already guilty of laches.

6. The respondent admits that she applied for and obtained letters of Administration for the deceased's estate in HC/Succession Cause No. 137 of 2009 but says the grant is yet to be confirmed. The respondent asserts that the orders sought cannot be granted because she lacks legal capacity. The respondent further states that the suit abated on 16/1/2010 and the court marked it abated on 24/5/2014. The respondent therefore says that there has been inordinate delay in making the application and no good reasons have been given to warrant grant of the application.

7. When this application came up for hearing on 12/2/2015, Mr. Amasakha was for the applicant while Mr. Tarus was present for the defendant, the Attorney General. Mr. Tarus informed the court that he had no interest in the application and left Mr. Amasakha to move his application. Counsel for the respondent did not attend though duly served.

8. Mr. Amasakha, counsel for the applicant, submitted that the application sought to have the defendant now deceased substituted by **ANJELINA SHIKOKOTI**, the legal representative of the Estate of the deceased defendant. Counsel more or less reiterated the contents of the applicant's affidavit emphasizing that they cited the respondent on 12/10/2011 upon learning of the demise of the defendant but the respondent did not disclose to them that she had already obtained letters of Administration and that she was the legal representative of the deceased Estate.

9. According to counsel, it was not until 3/6/2014 that they discovered that the respondent had been granted letters of Administration for the Estate of the deceased defendant on 21/10/2010. They thus moved to file the present application for the orders being sought. Counsel submitted that the suit herein relates to land and that it is in the interest of justice that the application be granted so that the respondent is enjoined in the suit as the 2nd respondent and the suit be revived to meet the ends of justice.

10. The applicant has moved this court seeking an order substituting **NELSON MULANDA** (deceased) with **ANJELINA SHIKOKOTI** (the respondent) who is the legal representative of the deceased and also an order reviving the suit herein. It is the applicant's case that she was not aware of the demise of the 2nd defendant and as soon as she became aware, she moved to cite the widow believing this would prompt her to take out letters of administration for the Estate of the deceased defendant. This was on 11/10/2011.

11. The respondent did not disclose that she had on 21/10/2010 been granted letters of Administration of the Estate of the 1st defendant, a fact that the applicant did not know of until 3/6/2014. Upon learning of this, the applicant filed the present application on 1/7/2014 seeking to substitute the deceased with the legal representative of the estate and an order reviving the suit.

12. The intended defendant (respondent) has opposed this application saying that there was indolence on the part of the plaintiff and further that the suit has abated. It has also been argued on behalf of the respondent that the court officially marked the suit as having abated on 24/5/2010 and that there has been inordinate delay in bringing this application.

13. I have perused the record, but I have not come across an order made on 24/5/2010 marking the suit as abated. The only order I have come across is one made on 9/7/2009 when the suit was stood over generally. I note that the respondent has not challenged the effort made by the applicant in trying to

have the legal representative of the estate of the deceased come forward for purposes of substituting the deceased defendant.

14. Indeed, I have seen the citation which was dated 11/10/2011 and filed in court on 12/10/2011 citing the respondent as legal representative of the deceased estate. This has not been denied by the respondent. The respondent has herself admitted that she was granted letters of administration of the deceased Estate on 21/10/2010 but has not intimated that she ever disclosed this to the applicant or her advocate. The contention by the applicant that they became aware of the fact on 3/6/2014 remains uncontroverted.

15. Under **Order 24 rule 4 (3)** of the **Civil Procedure Rules, 2010**, where within one year no application is made to cause the legal representative of the deceased defendant to be made a party to the suit, the suit abates as against that deceased defendant. The respondent says, and this is clear from the certificate of death attached to her Replying affidavit, that her husband died on 16/1/2009, which means the suit abated as against the 2nd defendant one year after his date of death, that is sometime on 15/1/2010.

16. However, **Order 24 rule 7 (2)** under which the applicant has moved this court provides as follows;

O.24 r.7(2) "The plaintiff or the person claiming to be the legal representative of the 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."

17. The import of this sub-rule is that if the plaintiff shows sufficient cause why he could not continue the suit, the court has an obligation to revive the suit or set aside the dismissal order.

18. In this case, the applicant has shown that she tried to cite the respondent to no avail and once she became aware that the respondent was the legal representative of the deceased 2nd defendant's estate, she moved to file the present application which was done in less than a month. I do not think there was inordinate delay in filing this application. The applicant tried to act within her means but the respondent was not forthcoming.

19. This being a matter involving land, an emotive issue in this country, it is important that parties be heard and their cases be decided on merit. This court is minded of the overriding objective under **Section 1A** of the **Civil Procedure Act, (Cap. 21)**, Laws of Kenya namely just and expeditious determination of cases in what has been called the oxygen (O₂) Principle whose aim is to ensure that courts render substantive justice.

20. I am satisfied that the applicant has had sufficient cause for not continuing this suit and this application must succeed.

21. Consequently, the application dated 24/6/2014 is allowed. ANJELINA SHIKOKOTI is hereby made the 2nd defendant in place of NELSON MULANDA (deceased). The suit herein is also revived and will proceed to hearing and final determination.

22. There will be no order as to costs.

Dated and delivered at Kakamega this 24th day of March, 2015

E. C. MWITA

JUDGE



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