



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 106 OF 2016

WYCLIFFE KHANJILA MULUMIA PLAINTIFF

VERSUS

PETER MULUMIA SINDANI 1ST DEFENDANT

BEATRICE N. MULUMIA

LUMBASI SHILUNJI SILAS 2ND DEFENDANT

R U L I N G

What calls for my determination is the Notice of Motion by **WYCLIFFE KHANJILA MULUMIA** (the plaintiff) dated 9th August 2021 and premised under the provisions of **Sections 1A, 1B, 3A and 3B** of the **Civil Procedure Act** as well as **Order 24 Rule 4(1)** and (2) of the **Civil Procedure Rules** in which he seeks the following orders: -

- 1. Spent**
- 2. That this Honourable Court be pleased to extend time within which to substitute the 1st defendant who is deceased.**
- 3. That consequent to the grant of prayer (2) above, this Honourable Court be pleased to substitute the 1st defendant PETER MULUMIA SINDANI (deceased) with BEATRICE N. MULUMIA.**
- 4. The costs of the application be in the cause.**

The application in premised on the grounds set out therein and is also supported by the plaintiff's affidavit dated 9th August 2021.

The gist of the application is that the deceased 1st defendant passed away on 31st March 2017 but his widow **BEATRICE N. MULUMIA** has been unwilling to take out Letters of Administration in respect to his Estate. That it was not until citation proceedings were filed in **BUNGOMA CMCC CITATION CAUSE No 483 of 2017** that the widow filed succession proceedings vide **BUNGOMA CMCC SUCCESSION CAUSE No 260 of 2018**. Subsequently, on 15th January 2021, Grant of Letters were issued to **BEATRICE N. MULUMIA** as the Administratrix of the Estate of the deceased 1st defendant.

That the failure to substitute the deceased 1st defendant within the statutory period was therefore neither deliberate nor intentional and no prejudice will be caused to the defendants.

When the application was placed before me on 28th October 2021, I did not certify it as urgent. I directed that it be canvassed by

way of written submissions. Only the plaintiff has filed submissions and there is no response to the application.

I have considered the application, the supporting affidavit and the annexures thereto as well as the submissions by **MR MURUNGA** Counsel for the plaintiff.

Annexed to the application are the following documents: -

1. Citation in Bungoma Chief Magistrate Citation Cause No 483 of 2017.

2. Grant of Letters of Administration issued to BEATRICE N. MULUMIA in Bungoma Chief Magistrate Succession Cause No 260 of 2018.

Order 24 Rule 4(1) (2) (3) of the Civil Procedure Rules provides that: -

4(1) “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 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.”

(2) “Any person so made a party may make any defence appropriate on his character as legal representative of the deceased defendant.”

(3) “Where within one year no application is made under sub rule (1), the suit shall abate against the deceased defendant.”

It is clear from the above provisions that the suit as against the deceased 1st defendant abated by operation of the law. There is therefore no suit pending as against the said deceased in which BEATRICE N. MULUMIA as the Administratrix of his Estate can be substituted as a defendant.

However, order 24 Rule 7(2) allows for the revival of an abated suit for sufficient cause. The plaintiff has only sought for orders to extend time and substitute the deceased 1st defendant. There is no prayer for the revival of the suit and an order for substitution of a deceased party before the revival of the abated suit would be a nullity in law. This Court will not have any jurisdiction to proceed on the basis of a suit which no longer exists at least in so far as the deceased 1st defendant is concerned. My view therefore is that in the absence of a revived suit, the prayers sought cannot be granted. An abated suit must first be revived before any application for substitution can be made. The plaintiff ought to have combined the prayers sought in the Notice of Motion together with a prayer seeking the revival of the suit.

The Notice of Motion dated 9th August 2021 is therefore incompetent. It is struck out with no orders as to costs.

BOAZ N. OLAO.

J U D G E

21ST MARCH 2022.

Ruling dated, signed and delivered at **BUNGOMA** on this 21st day of March 2022 by way of electronic mail in keeping with the COVID – 19 pandemic guidelines.

BOAZ N. OLAO.

J U D G E

21st March 2022.



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