



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**

**Civil Case 649 of 2001 (OS**

**HARRISON CHARLES KIMERIAH.....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA.....DEFENDANT**

**R U L I N G**

By a chamber summons brought under Order XXIII Rule 3 (1), 8(2), Order XLIX Rule 3A & 5 of the Civil Procedure Rules, Section 3, 3A and 95 of the Civil Procedure Act, and Section 29 of the Law of Succession Act. Faith Wanjiru Kimeria, the widow of the plaintiff and administrator of his estate, seeks to have the plaintiff's suit which abated, revived and an order substituting her in place of the deceased plaintiff in order to enable her prosecute the suit.

In her supporting affidavit sworn on 23<sup>rd</sup> October 2007, the applicant explains that the deceased plaintiff, passed on, on the 4<sup>th</sup> January 2005, and that she obtained Letters of Administration to the estate on 25<sup>th</sup> January 2006. She explains that the delay in obtaining the letters of administration was because she was ill immediately after her husband's funeral. She was also left with outstanding medical Bills arising from her husband's prolonged illness and subsequent death, and her own illness, such that she was unable to raise the required legal fees for the application for grant of Letters of Administration.

The applicant pleads with the court that unless the suit is revived the plaintiff's estate stands to lose the suit property which has been the matrimonial home for the last 30 years. Counsel for the applicant cited ***HCCC No.370 of 1994 (Nakuru) Rosemary Bunny vs Gichuru Kamotho & Another***, in which Kimaru J. granted a similar application taking into consideration the persistence of the applicant and the need to allow the applicant an opportunity to be heard on merit.

He also relied on the case of ***Ngambi Muthira Meme vs Patrick Musunga & Another HCCC (Eldoret) Case No.56 of 2000***, in which Ibrahim J. ruled that economic or financial factors can constitute a sufficient cause for purposes of Order XXIII Rule 8 (2) of the Civil Procedure Rules, and found delay of two years in obtaining Letters of Administration excusable.

The defendant opposed the application. In a replying affidavit sworn by Joseph Kania, the defendant's Manager Legal Services, it is contended that the application is incompetent. It is contended that the plaintiff having died on 4<sup>th</sup> January 2005, his suit abated after one year by virtue of Order XXIII Rule 3 (1) of the Civil Procedure Rules, no application having been made to revive the suit.

It is further contended that the applicant brought a similar application dated 27<sup>th</sup> January 2006, seeking similar orders and that the reasons given for the delay in that application did not include prolonged illness now being advanced. It is contended that the application was dismissed by Waweru J. as the applicant failed to explain why she did not seek substitution within the stipulated time. It is contended that the applicant is guilty of abusing the due process of the court by bringing another application and not having appealed against the previous order of dismissal.

Relying on the case of *Benjamin Sipitali Mungwana vs Norah Khaoya Shem & Others of 1989*, the court has been urged to find that the inordinate delay was not explained. Relying further on *Kenya Farmers Co-operative Union Limited vs Charles Murgor (deceased) t/a Kaptabei Coffee Estate [2005] e KLR HCCC (Nrb.) No. 1671 of 1994*, it is submitted that the application for substitution of the applicant cannot be considered before revival of the suit as there was no suit in existence in which she can be substituted.

Having considered this application, the submissions of counsels and the authorities cited, I find that it is not disputed that the deceased plaintiff died on 4<sup>th</sup> January 2005, and that no order for substitution was made within one year of the plaintiff's death. It is also clear from the court record that the applicant herein brought an application dated 27<sup>th</sup> January 2006 and an amended chamber summons dated 11<sup>th</sup> May 2006 for revival of the suit and substitution of the plaintiff. That application was dismissed in a ruling dated 15<sup>th</sup> August 2007, delivered by Waweru J. It is obvious that the applicant has now come back with a similar application as that dealt with by Waweru J. I am afraid the applicant is caught up with the doctrine of *res judicata* as the issue of revival of the suit and substitution of the plaintiff has already been dealt with by Waweru J. The applicant cannot ignore that order and seek to have the issue determined afresh in another application. The only way the issues can be revisited is through an application for review under Order XLIV of the Civil Procedure Rules. That however, is not the application before me. Alternatively, the applicant could appeal against the order of Waweru J.

For this reason, I find that the chamber summons dated 31<sup>st</sup> October 2007, is incompetent. It is accordingly struck out and dismissed.

Orders accordingly.

***Dated, signed and delivered this 30<sup>th</sup> day of November 2007.***

**H. M. OKWENGU**

**JUDGE**