



**Machogu Surveying Consultancy Limited v Kambi t/a Nyandoro  
& Co Advocates (Commercial Civil Suit E303 of 2022)  
[2024] KEHC 10237 (KLR) (Commercial and Tax) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10237 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL SUIT E303 OF 2022**

**PM MULWA, J  
AUGUST 15, 2024**

**BETWEEN**

**MACHOGU SURVEYING CONSULTANCY LIMITED ..... PLAINTIFF**

**AND**

**YABESH NYANDORO KAMBI T/A NYANDORO & CO  
ADVOCATES ..... DEFENDANT**

**RULING**

1. The plaintiff/applicant filed suit against the defendant vide a plaint dated 4<sup>th</sup> August 2022 seeking judgment for Kshs. 30,030,000/- plus costs and interest. The suit was defended.
2. It would appear that the defendant died on 10<sup>th</sup> February 2023 and the applicant has filed a Notice of Motion dated 2<sup>nd</sup> February 2024 seeking for substitution of the defendant with Jane Ndandoro.
3. The application is based on the grounds inter alia; that the defendant passed away on or about 10<sup>th</sup> February 2023, the intended defendant is his widow and there is need to substitute the defendant with the duly appointed and/or constituted legal administrator thereof.
4. The application is further supported by the plaintiff in his affidavit where he deponed that the intended defendant is a wife of the deceased defendant. That as per the deceased's obituary he was survived by a widow Jane Nyandoro and three children.
5. The intended defendant opposed the application vide a replying affidavit sworn on 22<sup>nd</sup> February 2024. While admitting that she was the wife of the deceased defendant who passed away on 10<sup>th</sup> February 2023, she contended that the plaintiff/applicant has disregarded the procedure on substitution of



- deceased persons, it being a matter of law. That the fact of her being the widow of the deceased does not automatically entitle her to take up his place in any litigation before taking out letters of administration.
6. The intended defendant further averred that the deceased having passed away on 10<sup>th</sup> February 2023, a period of more than a year ago, by dint of the law the suit herein had abated. She urged the court to find the application incompetent and vexatious and strike it out.
  7. Both parties filed written submissions which mirrored their arguments in the respective affidavits.
  8. While concluding his submissions, the plaintiff/applicant urged the court to substitute the deceased and allow the instant suit to proceed and, in the alternative, make a finding that the instant suit has not abated and make an order extending the time for substitution to allow the applicant file the requisite proceedings to compel the widow and/or any other interested party to take up representation over the deceased's estate.
  9. On its part the defendant submitted that the application ought to be dismissed for being incompetent and lacking in merit. That the plaintiff made the application well aware that the respondent, though being the widow of the deceased is not the administratrix of his estate. And that the suit should be struck out with costs as the same has abated.

### **Analysis and Determination**

10. I have considered the application herein, the rival affidavits and the submissions of parties as well as the authorities cited in support of the respective positions. The issue that commends itself for determination is whether the plaintiff/applicant merits the prayers sought in the application.
11. Order 24 rule 4 (4) of the Civil Procedure Rules provides as follows;
  - (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 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.
  - (2) ...
  - (3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant (emphasis is mine).
12. This provision of the law makes it clear on what happens when a defendant or one of the defendants dies and the cause of action survives or continues. Upon an application made, the Court shall cause the legal representative of the deceased to be made a party or to be substituted in place of the deceased party to proceed with the case.
13. Section 2 of the *Civil Procedure Act* defines 'a legal representative' as "...a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued".
14. The applicant is seeking to substitute Jane Nyandoro in place of defendant. Other than the mention of her being a widow of the deceased defendant, no evidence has been tabled to show that she indeed is a person contemplated by the above definition. The rule requires substitution of a defendant with a party clothed with legal representation.
15. The question then begs; can this Court permit the substitution of the defendant with the said Jane Nyandoro? 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. It is amazing how the applicant and counsel had the temerity to bring about the instant application knowing too well that Jane Nyandoro was a stranger to this suit.

16. As stated herein above, the law is clear on the procedure for one to assume legal standing and be substituted in place of a deceased party. The argument that the obituary had indicated that the deceased was survived by a widow Jane Nyandoro, as the reason why she is sought to be substituted, is to say the least pedestrian.
17. The Law of Succession 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 thereof 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. Paragraph 14 of the schedule deals with grants of administration limited to suit, and provides:

“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.” (emphasis is mine)
18. The applicant in the instant suit has failed to follow the afore-stated procedure in seeking a legal representative of the deceased defendant’s estate. The applicant is at liberty to so cite the intended substitute as per the provisions of the relevant law for the purposes of the pending proceedings. No material has been presented to this Court that indeed Jane Nyandoro is such legal representative of the deceased defendant nor whether the applicant has filed citation proceedings in that regard.
19. The application must be made within one year in default of which the suit shall abate as against the deceased Defendant. In *Kenya Farmers’ Cooperative Union Ltd. v Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) eKLR* it was held that a Court has no jurisdiction to order for substitution or to hear and determine a suit that has already abated by operation of law.
20. In the case at hand, the defendant died on 10<sup>th</sup> February 2023 and the present application was filed on 2<sup>nd</sup> February 2024, at least eight (8) days before the suit would abate. But even then, the applicant seems not to have been ready for substitution for failure to follow the procedure laid down by the law. It still remains in doubt whether he is in compliance.
21. Be that as it may, and for the reasons I have set out above, I find the application dated 2<sup>nd</sup> February 2024 incompetent and lacking in merit. The same is dismissed with costs to the respondent.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 15<sup>TH</sup> DAY OF AUGUST 2024.**

.....

**P. MULWA**

**JUDGE**

**In the presence of:**



Mr. Owino for Plaintiff/Applicant

Ms. Namai for Defendant/Respondent

Court Assistant: Lilian

