Kimanthi v Francis Kalwa t/a Kalwa & Co Advocates; Credit Bank (Garnishee) (Civil Case 462 of 2012) [2023] KEHC 128 (KLR) (Commercial and Tax) (20 January 2023) (Ruling)

Neutral citation: [2023] KEHC 128 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 462 OF 2012

A MABEYA, J

JANUARY 20, 2023

BETWEEN

MULI KIMANTHI ..... PLAINTIFF

AND

FRANCIS KALWA T/A KALWA & CO ADVOCATES ..... DEFENDANT

AND

CREDIT BANK ..... GARNISHEE

RULING

1. Before court is the application dated September 21, 2021. it is brought under order 51 rule 1, order 23 rules 1, 2, 3 &10 of the *Civil Procedure Act* Cap 21, Laws of Kenya.

2. The application sought an order Nisi against account number 0021006000630 held by the garnishee, Credit Bank on behalf of the judgment debtor for the decretal sum of Kshs 517,000/- together with interest. It further sought that the garnishee and judgment debtor show cause why the garnishee should not pay the decretal sum to the decree holder.

3. The grounds for the application were set out on the face of the motion and on the supporting affidavit of Amos Wandago.

4. The applicant's contention was that the decretal sum together with interest and cost stood at Kshs 517,000=/ and the same had remained unsatisfied despite numerous reminders to the judgment debtor to settle the same. That the garnishee held the funds for the judgment debtor and the applicant was apprehensive that the judgment debtor might withdraw the same.

5. The respondent opposed the application vide the replying affidavit of Francis Kalwa dated October 24, 2022. He stated that the chief from Kilembwa sub location where the plaintiff came from informed him via a telephone call that the plaintiff had died on July 19, 2018. That the chief further informed him that he had not issued the chiefs letter for purposes of succession therefore the family had not taken out letters for administration.

6. It was therefore contended that there was no substitution for the plaintiff on the court record. That therefore, the suit stood abated and as at the time of the judgment there was no suit capable of sustaining the judgment. That it was three years since the death of the plaintiff and no action had been taken to bring the suit to life.

7. The respondent simultaneously with the replying affidavit raised a preliminary objection dated October 24, 2022. The grounds for the objection were that the suit had abated on July 19, 2019 since the plaintiff had died on July 19, 2018 and that the judgment was delivered long after the suit had abated. That there had been no effort to extend time or revive the suit and that the letters of administration had not been obtained with respect to the deceased estate.

8. The application was canvassed by way of written submissions which I have considered.

9. A preliminary objection was defined in the *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 to consist a point(s) of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.

10. The preliminary objection is grounded on the fact that the suit had abated one year after the plaintiff died on July 19, 2018 as the estate of the deceased had not obtained any letters of administration or made any effort to revive the suit.

11. In *Attorney General & another v Andrew Maina Githinji & another* [2016] eKLR, the court held that:-

> " The test to be applied in determining whether the appellants' preliminary objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa Case (supra). That is first, that the preliminary objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained."

12. In this regard, it is trite that a preliminary objection is premised on a point of law and based on the assumption that the facts pleaded are correct. In the present case, the objection is grounded on the fact that the plaintiff died on July 19, 2019 and that therefore the suit had abated.

13. I have perused the record and there is no proof that the plaintiff was deceased. The respondent did not provide a letter from the chief to confirm that the plaintiff was deceased or a death certificate to prove the allegations. It was upon the respondent to prove that fact which he did not. In this regard, the objection cannot be said to raise a pure point of law and for this reason it is not sustainable.

14. The other issue is whether the applicant has made out a case for the orders sought. The applicant has moved the court seeking to have the garnishee and the judgment debtor attend court to show why the garnishee should not pay the decretal sum of Kshs 517,000/-.

15. The respondent opposed the application stating that the suit had abated since the plaintiff had died and the personal representatives had not taken out letters for administration. The respondents case is grounded on the fact that the respondent had a telephone call with the area chief who told him that the plaintiff had passed on and the family had not commenced succession for the deceased's estate.

16. Order 24 rule 1 of the *Civil Procedure Rules, 2010* provides that the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

17. According to the applicant the suit abated in July 19, 2019 one year after the plaintiff died and the cause of action did not survive.

18. In *Isaya Masira Momanyi v Daniel Omwoyo & anor* [2017] eKLR, it was stated as follows: -

> " It is trite law that the estate of a deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who has been issued grant of letters of administration has capacity to represent the estate of a deceased person."

19. In *Rebecca Muide Mungole & another v Kenya Power & Lighting Company Limited & 2 others* (2017) eKLR, the court held: -

> " The sequence of the application under this procedure of what should happen in case of the death of a plaintiff and the cause of action survives or continues, is plain. Speaking generally, by operation of the law, a suit will automatically abate where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within one year following his death. According to rule 3(2) the defendant is only required to apply for an award of costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff. But as was observed by this Court in Said Sweilam (supra) the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience, an order of the court is necessary for a final and effectual disposal of the suit."

20. Similarly, the Court of Appeal in the case of *Said Swailem Gheithan Saanum –v- Commissioner Of Lands (Being sued through the Attorney General & 5 others) Malindi* CA Civil Appeal No 16 of 2015), stated as follows: -

> " There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.
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> Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action."

21. In view of the foregoing, there is a judgment on record in favour of the plaintiff. The applicant seeks to enforce against the said judgment. The respondent has not disputed the decree and there has been no evidence of any payment done. The respondent relies on order 24 rule 1 of the *Civil Procedure Rules, 2010* to prove that he is not entitled to pay the decretal amount since the suit had abated. It is trite that he who alleges must prove. There is no evidence before court to show that the plaintiff is deceased. The telephone call made to the chief is not enough evidence.

22. In the premises, the court finds that the application by the applicant is merited and is allowed as prayed.

23 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

A. MABEYA, FCIArb

JUDGE