



**Musyimi v Kaleli (Civil Appeal 80 of 2018)
[2023] KEHC 27406 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 27406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 80 OF 2018
DO CHEPKWONY, J
SEPTEMBER 29, 2023**

BETWEEN

JOSEPH MUTINDA MUSYIMI APPELLANT

AND

MWATHI KALELI RESPONDENT

RULING

1. This Court issued Notice to Show Cause why the Appeal should not be dismissed and the same was fixed for 22nd August, 2023. The Appellant filed a Replying Affidavit through his advocate, Gerald Andego Magani to the Notice to Show Cause which was sworn on 17th August, 2023 .
2. The Notice to Show Cause was issued after the court, on 26th June, 2023 perused the record herein observed that there had been no activity on the matter since 15th March, 2022, which was over one (1) year.
3. The Appellant’s position is that he filed the Appeal on 24th July, 2018 and the Record of Appeal was filed on 23rd September, 2019. He states that the Respondent passed on in the year 2020 and he was informed of the said death through a letter from the chief dated 24th February, 2020. He explained that his efforts to make an application for substitution was curtailed by the Covid-19 Pandemic.
4. He holds that when the matter came up for Mention on 14th June, 2022 ,the court file could not be traced until he received a call from the court officials and was informed of the new date of 26th July, 2023. According to the Appellant’s counsel, on the date of 26th July, 2023, he waited for the matter to be called out but could not go through due to internet challenge. It is his averment that the Appellant is ready and willing to prosecute the matter as he intends to substitute the deceased Respondent.



Analysis and determination

5. Having read through the Replying Affidavit filed by counsel for the Appellant, I have also read through the court record, on 5th March, 2020, Mr. Ambis Advocate holding brief for the Appellant's Advocate informed the court that the Respondent was deceased. That the Appellant then through Notice of Motion Application dated 9th June, 2020, moved the court seeking to have Beatrice Katuku Mwathe the widow to the deceased (Respondent) appointed as a legal representative of the deceased so as to proceed with the Appeal.
6. When the matter was placed before the court on 18th December, 2020, the application had not been served and it was adjourned to 17th May, 2021. Thereafter, it was adjourned to 21st September, 2021 and then to 18th November, 2021.
7. On the 18th November, 2021, the court marked the application as withdrawn which were the same orders given by the court on 15th March, 2022, which was the last day the matter was last before court, when the court directed that it be mentioned on 14th June, 2022 for the Appellant to inform the court whether he intended to proceed with the Appeal and confirm whether substitution of the deceased had been done.
8. The matter was again placed before this court on 20th June, 2023 and on 1st August, 2023 on which dates there was no appearance by either of the parties and or their counsel. This is when the court directed that a Notice to Show Cause issues, which forms the subject of this Ruling.
9. It is trite law that litigation must come to an end. This Appeal emanates from a suit that was filed way back in 1994. The Appeal was filed in the year 2018 and it has been pending before court roughly for close to 30 years. It is this court's view that the Appellant having had an interest in the appeal, had a duty to take all steps necessary to have the same prosecuted to finality. According to the Appellant, the Respondent died in the year 2020 and was informed of the death through letter from chief dated 24th February, 2020.
10. Under the *Civil Procedure Rules*, particularly under Order 24 Rule 4 (4), the law is that where a sole defendant dies and the cause of action survives, the court, on application is required to order for the legal representative of the deceased (defendant) to be made a party in the suit so that the suit can proceed. The law goes on to state that if such an application has not been made within one year then the suit abates. The said provision states as follows:-
 4. Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 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 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) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
 - (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.
11. In this case, the Appellant filed the application dated 9th June, 2020 but the same was marked as withdrawn by the court on 18th November, 2021 and 15th March, 2022. Therefore, as it stands there is



no such application that has been made for substitution of the Respondent and neither is there proof that there was a succession cause instituted for the Estate of the Respondent.

12. It therefore follows that the Appeal herein has abated for want of substitution of the deceased Respondent by operation of the law. This was the position in the case of *Titus Kiragu – v- Jackson Mugo Mathai* (2015)eKLR where it was held that:

“It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law.”

13. In the upshot, the court finds that even if it was to allow the Appellant to proceed with the Appeal, the same has already abated and it would be an academic exercises to set aside the Notice to Show Cause issues herein. The Appeal therefore stands abated with no orders as to costs.

It is so ordered.

RULING DELIVERED, DATED AND SIGNED AT KIAMBU THIS 29TH DAY OF SEPTEMBER, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Magani counsel for the intended Appellant

No appearance for and by the Respondent

Court Assistant - Martin

