



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 109 OF 2017**

**JACINTA MWENDE KIMANZI.....APPELLANT VERSUS**

**BARKER BENARD WAYNE.....RESPONDENT**

**AND**

**JANET BARKER.....APPLICANT**

**RULING**

1. The applicant filed the present application on 12<sup>th</sup> August, 2020 under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 24 Rule 4 Sub-Rules 1 and 3 and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. She seeks the following orders-

- (i) That the respondent herein be substituted with Janet Barker, the applicant herein;
- (ii) That the suit be marked as abated; and
- (iii) That costs of this application be provided for.

2. The application was brought on the grounds on the face of it and an affidavit sworn on 7<sup>th</sup> August, 2020 by Janet Barker. The appellant on 12<sup>th</sup> October, 2020 filed grounds of opposition dated 9<sup>th</sup> October, 2020 to oppose the said application.

3. The application was canvassed by way of written submissions. The applicant's submissions were filed on 3<sup>rd</sup> February, 2021 by the law firm of Stella Gitari & Associates Advocates while the appellant's submissions were filed on 16<sup>th</sup> February, 2021 by the law firm of Marende Necheza & Company Advocates.

4. Ms. Gitari, learned Counsel for the applicant submitted that the respondent had been sued by the appellant prior to his death which occurred on 1<sup>st</sup> December, 2017. She submitted that the applicant had been issued with letters of administration ad litem to prosecute the appeal herein on behalf of the estate of the respondent (deceased). The applicant's Counsel relied on the provisions of Order 24 Rule 4 Sub-Rule 1 of the Civil Procedure Rules which outlines the effect of death of one or several defendants or of the sole defendant to a matter in Court.

5. She cited the provisions of Order 24 Rule 4 Sub-Rule 3 which provides that if within one year of the death of a defendant no application is made under Sub-Rule 1, the suit shall abate against the deceased defendant. She also relied on the case of **Titus Kiragu vs Jackson Mugo Mathai** [2015] eKLR, where the Court held that it is not the act of the Court declaring the suit as having abated that abates the suit but operation of the law. Ms Gitari submitted that in the present case, more than three (sic) years had elapsed since the death of the respondent and in the absence of substitution, the suit against him abated. She urged this Court to allow the application dated 7<sup>th</sup> August, 2020 as prayed.

6. Mrs. Kyalo, learned Counsel for the appellant stated that the applicant is the deceased's widow who had taken out letters of administration as the legal representative of the deceased's estate. She submitted that the present appeal survives the deceased and it should continue once the applicant was substituted. The appellant's Counsel relied on the case of **Agrey Swaka Waswa vs Patrick Khaemba & others** [2020] eKLR, where the Court disallowed a similar application for want of locus since the respondents had not taken out letters of administration and submitted that in the present case, the applicant obtained grant of the letters of administration ad litem on 22<sup>nd</sup> July, 2020, hence she could substitute the deceased respondent.

**ANALYSIS AND DETERMINATION.**

7. This Court has considered the issues raised in the application dated 7<sup>th</sup> August, 2020, the grounds of opposition dated 9<sup>th</sup> October, 2020 and the written submissions filed by both Counsel. The issue for determination is if the application dated 7<sup>th</sup> August, 2020 has merit.

8. The applicant averred in her supporting affidavit that the appeal was instituted against the deceased respondent prior to his death. She further averred that she had been issued with letters of administration ad litem to prosecute the suit on behalf of the estate of the deceased and therefore prayed to substitute him. The applicant's case is that the respondent died more than 2 years prior to the filing of the present application and that the suit against him had since abated.

9. The appellant in her grounds of opposition stated that the appeal survives the death of the said respondent and his demise did not cause the suit to abate. She was of the view that the respondent's legal representative could substitute him by virtue of the letters of administration ad litem issued to her and the appeal could proceed.

10. It is imperative to note that the appellant opted not to file a replying affidavit in opposition to the application dated 7<sup>th</sup> August, 2020 but filed grounds of opposition. It is trite that grounds of opposition are general averments only addressing issues of law, but do not respond to factual issues raised. In the absence of a replying affidavit, what was deposed by the applicant is presumed to be true.

11. It has been held in numerous cases that failure to file a replying affidavit in contention of a fact amounts to an admission of facts. A case in point is **Crown Berger Kenya Ltd v Kalpech Vasuder Devan and another** Civil Case No. 246 of 2006 (UR), where the Court held as follows-

***"In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant. "***

12. Order 24 Rule 4 Sub-Rules 1 to 3 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) 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 sub rule (1), the suit shall abate as against the deceased defendant."***  
(emphasis added).

13. The law is very clear that the cause of action survives a deceased litigant for only one year and that is the timeline within which parties are at liberty to make applications for substitution of deceased persons with legal representatives of the estate of the deceased. Failure to do so leads to abatement of the suit against the deceased defendant by operation of the law.

14. The deceased respondent in this appeal died on 1<sup>st</sup> December, 2017 and no substitution was made. The application herein was filed on 12<sup>th</sup> of August, 2020 seeking to substitute the deceased respondent with the applicant and to have this suit marked as abated. It is evident that the application was filed after a period of more than two years since his death. In light of the provisions of Order 24 Rule 4 Sub-Rule 3, the appeal herein against the deceased respondent abated on 30<sup>th</sup> November, 2018. There was therefore no surviving cause of action against him as at 12<sup>th</sup> August, 2020 when the present application was filed.

15. It is my finding that there can be no substitution done unless the suit is revived in line with the provisions of Order 24 Rule Sub-Rule 2 of the Civil Procedure Rules, 2010. On the issue of abatement of suits, the Court in **Kenya Farmers' Cooperative Union Ltd. vs Charles Murgor (deceased) t/a Kiptabei Coffee Estate [2005] eKLR** held as follows;

***"In the instant case there was no application for substitution made within one year since the death of the Defendant. Therefore as a matter of law the suit as against him abated. When substitution was subsequently purportedly made on 5<sup>th</sup> March, 1998 there was no suit subsisting in which substitution could be made. It had abated on or about 23<sup>rd</sup> April, 1996, that is, one year since the death of the Defendant. The order of substitution was thus made in error. It was unlawful and ought not to have been entered.***

***It is to be noted that under Rule 8(2) of the same Order 23 the plaintiff can apply for an order to revive a suit which has abated; and if he proves that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit upon such terms as to costs or otherwise as it thinks fit. In the present case there was no application for revival of the suit which had abated by operation of the law.***

***The suit having abated on or about 23<sup>rd</sup> April, 1996, as seen above, the order of substitution of 5<sup>th</sup> March, 1998 was a nullity in law and of no effect. Equally, the subsequent hearing and judgment were null and void in law; the resulting decree was also equally a nullity. It is not a sufficient answer that the application has come too late in the day or that these issues ought to have been raised at the time of hearing the application for substitution or at the latest at the time of hearing of the suit. Of course it would have been best had these issues been raised as early as possible. But it is really a matter that goes to the jurisdiction of the court. Does the court have jurisdiction to order substitution (except in an application to revive the suit) where the suit has already abated by operation of the law? Obviously not. Does the court have jurisdiction to hear and determine a suit that has***

already abated by operation of the law? Certainly not. If a suit has abated, it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time.” (emphasis added).

16. Having considered the facts of the application herein and the applicable law, this Court holds that the application dated 7<sup>th</sup> August, 2020 is devoid of merit. The same is hereby dismissed with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 30TH DAY OF APRIL, 2021.**

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020, the ruling herein has been delivered through Teams Online Platform.

**NJOKI MWANGI**

**JUDGE**

**IN THE PRESENCE OF -**

**MR. ONDIEKI HOLDING BRIEF FOR MRS KYALO FOR THE APPELLANT**

**MS GITARI FOR THE APPLICANT**

**MR. OLIVER MUSUNDI – COURT ASSISTANT.**