REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO. 8 OF 2019

JENIFAR ATIENO MAGAMBO (Suing as the legal representative of

MAGAMBO OREKO) …….....…….....…..……. APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD …….…….....…….....……. RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. S. K. Onjoro (S.R.M.) delivered in Kisii CMCC No. 943 of 2004 on 21st December 2018)

JUDGEMENT

1. Aggrieved by the trial court's decision to dismiss his suit on the grounds that it had abated, the appellant filed the memorandum of appeal dated 28th January, 2019 to challenge that judgment.

2. The parties canvassed the appeal by way of written submissions which I have duly considered alongside the memorandum and record of appeal.

3. Magambo Oreko (deceased) sued the respondent for damages for breach of a contract to cultivate and buy sugarcane from his land. He died on 11th June 2005 and his widow Jenifar Atieno Magambo made an application to substitute him. That application was heard and disallowed in a ruling dated 11th May 2011, in which the court also found that the suit had abated.

4. The record shows that the appellant filed an application for review of the orders dated 11th May 2011. The appellant also sought orders for substitution of the deceased plaintiff and for revival of the suit. That application was allowed by consent on 23rd January 2017. The appellant therefore contends that the issue of the abatement of the suit had already been dealt with and the trial court lacked jurisdiction to determine that issue. Since the suit proceeded to trial, this court is urged to find that the case was proved and award damages, costs and interest.

5. The respondent counters that when the Magambo Oreko died, the appellant filed an application to substitute him and have the suit revived. The court heard that application and dismissed it, holding that the suit had abated. The respondent argues that no appeal was preferred from the court's order therefore the hearing that took place thereafter was an exercise in futility as the court had already declared itself *functus officio* by its ruling dated 11th May 2011.

6. The respondent also contended that the appellant had not been able to prove his case that the respondent had failed to harvest three crop cycles of sugarcane on his field in contravention of the agreement between the parties. The respondent submits that the appellant did not adduce proof that he maintained and developed the cane to maturity. He was also unable to prove that his field could yield 135 tons of cane per cycle.

7. In case the court is of a contrary view, the respondent urges the court to find that the appellant ought to have mitigated his loss by delivering the cane to the respondent's factory, a miller or crush it in a juggery. The case of ***African produce Ltd v Kisorio Civil Appeal No. 264 of 1999*** is cited in support of this argument. However, in the event that the court finds the appellant entitled to an award, the respondent urges the court to award damages in line with clause 11(1) of the contract and deduct the services provided by the miller.

8. The main issue arising for determination is whether the trial court erred in finding that the suit had abated.

9. **Order 24 Rule 3(1)(2)**and **Order 24 Rule 7 (2)** of the **Civil Procedure Rules**, provide as follows;

3. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

7(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.

10. The process to be followed in making an application under the foregoing provision was expounded by the Court of Appeal in the case ***Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 Others Civil Appeal No.16 of 2015 [2015] eKLR*** thus;

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.

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.

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "sufficient cause" from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.

11. In ***Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 others Civil Appeal No.283 of 2015 [2017] eKLR*** the Court of Appeal emphasized the need to apply for extension of time as follows;

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...

Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, ***it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party.*** Order 24 *must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it.* ***The proviso to* rule 3(2) *to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings.*** *Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers.* ***But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted...****[Emphasis added]*

12. A careful analysis of the application that was allowed by consent shows that the appellant overlooked the vital step of making an application for extension of time.

13. When the initial plaintiff, Magambo Oreko passed away on 11th June 2005, the suit abated 12 months thereafter since there was no application by a legal representative of his estate to substitute him. The appellant's first attempt to substitute the deceased plaintiff was made through an application filed on 8th February 2011, more than 5 years after the death of the deceased. That application was dismissed by the trial court on 11th May 2011 on the grounds that the delay of almost five year was inordinate and unreasonable.

14. The appellant did not prefer an appeal to that decision. She instead elected to file an application for review vide an application dated 17th January 2017 and filed on 23rd January 2017 in which she sought the following orders;

a. That the order dated 11/5/2016 dismissing the Notice of Motion dated 8/2/2011 be reviewed there being error apparent on the face of the record and the said order be set aside;

b. That the suit herein be revived.

c. That the applicant Jenifar Atieno Magambo be made a party to this suit as plaintiff in place of Magambo Oreko, who is now deceased;

d. That the costs of this application be provided for.

15. The grounds advanced for review of the courts orders was that the appellant had made an application for substitution "*but the same was not allowed on grounds that now need to be reviewed as there was an error apparent on the face of the record, the court having failed to acknowledge that the exercise was merely administrative and not judicial*."

16. Strangely, the respondent's counsel consented to the application being allowed. In my considered view, both the application dated 8th February 2011 and the one dated 17th January 2017 were incompetent for the reason that the applicant did not seek an extension of time. Additionally, no reasons were ever given for the failure to make the application within the stipulated time. The initial application was made 5 years after the death of the plaintiff and the subsequent application was made more than a decade later. Given the fact that the appellant had been issued with the grant *ad litem* on 30th November 2005 it was necessary for her to give a justifiable reason for the delay.

17. The reasons given for the review of the court's orders for 11th May 2016 were equally flimsy as there was no error apparent on the face of the record and abatement of the suit was by operation of the law and not by any doing of the court. The trial court was therefore right in holding that the suit had long abated. The subsequent proceedings and hearing of the suit after the abatement of the suit were a nullity as the suit ceased to exist.

18. For the foregoing reasons, I find that this appeal is unmerited. I hereby dismiss it with costs to the respondent.

Dated, Signed and Delivered at Kisii this 26th day of February, 2020.

A. K. NDUNG'U

JUDGE