



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 245 OF 2010

KABURI NJOROGE.....PLAINTIFF/APPLICANT

VERSUS

LUCY WANGUI NJUGUNA.....1ST DEFENDANT/RESPONDENT

BARCLAYS BANK OF

KENYA LIMITED.....2ND DEFENDANT/RESPONDENT

JOSEPH GIKONYO

T/A GARAM INVESTMENT.....3RD DEFENDANT/RESPONDENT

RULING

1. In a Ruling dated 28th April 2020, this Court held as follows:-

“3. Substitution required the Plaint to be amended by striking out the name of the deceased and replacing it with that of the personal representatives. As no period for amendment was specified then Order 8 Rule 6 of the Civil Procedure Rules 2010 applies. It reads;-

“Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period”.

4. An attempt by the Plaintiffs to file an Amended Plaint more than a year later is ineffectual because the time for formalizing the substitution lapsed on or about 3rd June 2014. The leave granted ceased to have effect on that day with the result that this suit would abate on the same day. For this order 24 Rule 3 is instructive;

Procedure in case of death of one of several plaintiffs or of sole plaintiff [Order 24, rule 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.”

2. Through a Notice of Motion dated 5th August 2020, Moses Njoroge Kaburi, George Murimi Kaburi and James Ndungu Kaburi named as

Plaintiffs seek to have the orders made on 28th April 2020 reviewed. The gist of the request for review is that the Plaintiffs were late in filing the Amended Plaintiff because the Court file was missing for a long time.

3. In the arguments made by Hon. Alice Wahome in support of the application, learned counsel argued that the Plaintiffs complied with the law, albeit late. Further that the order for abatement was made after the substitution was complete and that was an error on the part of the Court.

4. I would think that the applicants, by filing the Amended Plaintiff in which they sought formal substitution of the deceased, appreciated that this was a necessary step. In the impugned Ruling, the Court found that formalization needed to be made by 3rd June 2014 and that having not been done the suit abated.

5. I understand the law to be that abatement of a suit is automatic and by operation of the law and does not need an affirmative order by the Court to declare it so. In this regard the Court of Appeal in **Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR** clarified the limited role of the Court on abatement. The Court held:-

“The question in the appeal is essentially whether in seeking to revive an abated suit, the applicant must, in the first place seek extension of time within which to do so. This is a question of construction of Order 24 which provides for the procedure in case of death of one of several plaintiffs or of a sole plaintiff. Because of its importance we reproduce here below the pertinent part of that provision;

“24. 1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

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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 sub-rule (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.

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7. (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(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”.

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.

6. It being so, abatement of this suit happened on or about 3rd June 2014 by operation of law and the Amended Plaintiff supposedly filed on 10th July 2019 was filed in a cause of action that had abated. That was dead as a dodo.

7. The loss of the file may be a good base to seek resuscitation of the abated suit but that is not what the Applicants bespeaks in the current application.

8. I see no reason to review the orders made on 28th April 2020 and the Notice of Motion of 5th August 2020 is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 26th Day of October 2020

F. TUIYOTT

JUDGE

ORDER

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 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Miss Ngigi for Akedi for Plaintiffs.

Miss Kariuki for Miss Maina for the 1st Respondent.

Mbanji for the 2nd Respondent.