



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 763 OF 2004

AMBROSE MATOGO.....PLAINTIFF/APPLICANT

-VERSUS-

BENEDICT M. LEMISI.....1ST DEFENDANT/RESPONDENT

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

PATRICK OCHALA.....3RD DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant has brought the Notice of Motion dated 6th August, 2020 supported by the grounds set out on its face and the facts stated in the affidavit of advocate **Ivan Kipkoech Rono**. The applicant sought an order for the reinstatement of the application dated 15th October, 2018 and filed in court on 17th October, 2018.
2. In resisting the Motion, the 2nd defendant/respondent put in Grounds of Opposition dated 13th August, 2020 and put forward the following grounds:
 - i. The application is frivolous, an abuse of the court process and not merited.*
 - ii. The counsel for the plaintiff was removed from the case on 10th July, 2018 and the file handed over to the client. The advocate cannot depone on matters which took place after the withdrawal of the brief, especially the application filed on 17th October, 2018 and its dismissal on 30th October, 2018.*
 - iii. The applicant has not given explanation on the events that took place during the intervening period for the court to exercise its discretionary power.*
 - iv. The suit herein has abated as no substitution was done within the period allowed by law.*
 - v. And on such grounds as shall be adduced at the hearing of the application.*
3. The 3rd respondent similarly put in the replying affidavit sworn by advocate **Baraka Xavier Francis** to oppose the Motion.
4. The applicant rejoined with the supplementary affidavit of **Ivan Kipkoech Rono**.
5. The Motion was canvassed through written submissions filed by the applicant, and the 2nd and 3rd respondents. From the record, it is apparent that the 1st defendant did not file any documents in response to the Motion or participate at the hearing of the Motion.
6. I have taken into consideration the grounds presented on the face of the Motion, the facts deponed in the affidavits supporting and challenging the same, the Grounds of Opposition and the competing written submissions and authorities cited.
7. A brief background of the matter is that the Ambrose Matogo (“the deceased”) instituted a suit against the 1st defendant and the 2nd and 3rd respondents vide the plaint dated 15th June, 2004 and sought for general and special damages arising out of a road traffic accident.
8. Upon the request of the applicant, an interlocutory judgment was entered against the 1st defendant on 5th April, 2005 for failure to enter

appearance upon service of summons. Subsequently, the matter proceeded for hearing of the suit before the deceased died on 28th June, 2017.

9. Thereafter, various applications were filed on behalf of the applicant which precipitated the bringing of the instant Motion.

10. Before I consider the merits of the Motion, I am enjoined to address two (2) preliminary issues which were raised by the respondents.

11. The first preliminary issue for determination has to do with whether the suit has abated. In its Grounds of Opposition, the 2nd respondent argues that the suit abated since no substitution was done within the legal timelines. The 2nd respondent reiterated this averment in its written submissions, further submitting that the applicant has not demonstrated that a limited grant *ad litem* were ever sought and obtained.

12. The above position was restated in the replying affidavit of Baraka Xavier Francis save to add that the applicant ought to have sought the extension of time for substitution of the deceased with the necessary legal representative but did not.

13. In echoing the above, the 3rd respondent in his submissions contends that following the death of the deceased, no application was made by the legal representative of his estate both within and outside the stipulated timelines and that the purported applications made by the applicant are bad in law since they were filed in the absence of the limited grant *ad litem*. The 3rd respondent cites *inter alia*, the case of **Hawo Shanko v Mohamed Uta Shanko [2018] eKLR** in which the court held that:

“...It is the Limited grant which gives the plaintiff the locus to stand before the Court and argue the case. It does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same. One has to first obtain a limited grant that will give him/her the authority to file the suit...”

14. In response, Ivan Kipkoech Rono states on behalf of the applicant that the suit never abated since the application for substitution was filed within the stipulated one (1) year period from the date of death of the deceased, pursuant to the provisions of Order 24, Rule 3 of the Civil Procedure Rules.

15. The applicant’s submissions support the aforementioned averments.

16. From my perusal of the record, it is not in dispute that the deceased died on 28th June, 2017 during which time the suit was in the course of hearing. The record shows that soon thereafter, the firm of Naikuni, Ngaah & Miencha Advocates filed the application dated 24th July, 2017 seeking to substitute the name of the applicant with that of Eunice Mumbi Matogo, the purported legal representative of his estate.

17. There is however nothing on the record to indicate that the applicant was directed by the court to file a formal application seeking to amend the application to include the *ad litem*, as alleged in the instant Motion. Contrary to the averments made in the instant Motion and its supporting affidavit, when the matter came up in court on 24th October, 2017 the court noted that the purpose of the mention was unclear and therefore ordered that the file be returned back to the registry.

18. From the record, it is apparent that the application of 24th July, 2017 was never heard or determined. Suffice it to say that the record shows that the applicant subsequently filed another application on 17th October, 2018 and sought for leave to amend the aforementioned application of 24th July, 2017. The application filed on 17th October, 2018 was ultimately dismissed by the court for want of prosecution on 30th October, 2018.

19. The relevant provision on the revival of suits upon death of a party is **Section 2 of the Law Reform Act Cap. 26 Laws of Kenya** which expresses that:

“(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate: Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.”

20. From the foregoing, I am convinced that the present suit would ordinarily survive the deceased since it is a claim arising out of the tort of negligence.

21. The provisions of **Order 24 of the Civil Procedure Rules** are similarly relevant as they provide for the abatement of suits in the following manner, under **Rule 1**:

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

Rule 3 goes on to provide thus:

“(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.”

22. It is clear that where a suit ordinarily survives a deceased person, the same shall abate in the absence of an application by the legal representative.

23. In the present circumstances and as earlier noted, the application of 24th July, 2017 for substitution was made but it is apparent that it was never heard or determined. This was followed over one (1) year later by the application filed on 17th October, 2018 which was eventually dismissed.

24. Upon my perusal of the record and proceedings, there is nothing to indicate that Eunice Mumbi Matogo; who is purported to be the legal representative of his estate; obtained letters of administration or the limited grant ad litem at the time of filing the initial application. If at all she did, it remains unclear when they were obtained since no indication has been given or a copy of the same provided. The 2nd and 3rd respondents also indicated that no such documents were ever served upon their respective advocates and the record seems to support this position.

25. I therefore concur with the averments of the 2nd and 3rd respondents that an application for substitution must be made by the legal representative to the estate of a deceased person and in this instance, the applicant has not availed the requisite documents to support the assertion that Eunice Mumbi Matogo was the legal representative of the estate of the deceased at the time of filing the application dated 24th July, 2017.

26. Even if we were to assume that the limited grant *ad litem* of letters of administration were subsequently obtained in respect to the estate of the applicant, the one (1) year timeline for applying had lapsed by the time the second application was filed on 17th October, 2018 and there is no indication that an extension of time was sought and obtained.

27. Consequently, and in the absence of contrary evidence, I am only left to find that the suit has abated.

28. The second preliminary issue touches on the legal representation of the applicant.

29. The 2nd respondent in particular argues in its Grounds of Opposition that advocate Ivan Kipkoech Rono cannot depone on matters that took place after the withdrawal of the brief from the firm of Naikuni, Ngaah & Miencha Advocates, whereas the applicant avers that though it is true that the file was taken from the aforesaid firm of advocates and assigned to a different firm of advocates, the applicant decided to re-instruct the firm of Naikuni, Ngaah & Miencha Advocates to once again take conduct of the matter.

30. From my study of the record, it is evident that the firm of Naikuni, Ngaah & Miencha Advocates was at all material times on record for the applicant. There is nothing to indicate that a notice of change of advocates was ever filed in the matter when the applicant engaged a different firm of advocates.

31. Be that as it may, I observed that the aforesaid firm of advocates prepared and filed all the applications referenced in this ruling and the deponent who swore the affidavits in support of the instant Motion is an employee of the said firm. Consequently, I see nothing to preclude him from deponing to the facts stated in the respective affidavits.

32. However, having already found that the suit has abated, there is no need for me to address the merits of the Motion.

33. The upshot is that the suit having abated, the motion is without any substratum. It is ordered struck out and dismissed. Each party to bear their own costs.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 17th day of December, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... **for the Plaintiff/Applicant**

..... **for the 1st Defendant**

..... **for the 2nd Defendant/Respondent**

..... for the 3rd Defendant/Respondent