REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.376 OF 1999

EUNICE KIRUNDA KINYUA.....APPLICANT

-VERSUS-

JOSEPHAT MWATHI KIBIRI.....RESPONDENT

RULING

1. The application before me filed by the defendant/applicant on 31st May, 2017 is expressed to be brought under **Orders 24 Rule**; **Order 45 Rule (1) and (2)** and **Order 51 Rule 1** of the **Civil Procedure Rules.** It seeks orders that:

i. Spent.

ii. That pending the hearing and determination of the application inter-partes or further orders of the court the Honourable Court be pleased to grant to the defendant/applicant an interim stay of execution of the judgment delivered on the 14th February, 2011, together with the orders granted on the 11th April, 2017 pursuant to the plaintiff/respondent's application dated 20th December, 2016.

iii. That the judgment delivered on the 14th February, 2011 and orders granted on the 11th April, 2017 pursuant to the plaintiff/respondent's application dated 20th December, 2016 be declared a nullity and the suit against the defendant/applicant's deceased father be declared as having abated exactly one year after his death.

iv. That such further and/or other relief be granted to the defendant/applicant as the court deems fit and expedient in the circumstances.

v. That the costs of the application be provided for.

2. The background to the instant application is a Civil Suit No.376 of 1999 in which **Eunice Kirunda Kinyua** (then plaintiff and now applicant) sued **Josphat Mwathi Kibiri** (then defendant and now respondent). In the suit she sought a declaration that she was the legal owner of five (5) acres of land comprised in **Nyandarua/Olkalau/Central/39** and an order of perpetual injunction to restrain the defendant from trespassing into the said 5 acres of the suit property. The suit was heard and determined by **Ouko J**(as he then was) and in his judgment delivered on 4/2/2011 granted the following orders:-

i. Declared that the Plaintiff is the lawful owner of the five acres of NYANDARUA/OL KALOU CENTRAL/39

ii. Ordered that the said portion of the property be transferred to the Plaintiff on behalf of the estate of the deceased.

iii. Ordered that there shall be a perpetual injunction to restrain the defendant, his family, agents as prayed in paragraph (b) of the plaint.

iv. Ordered that costs of the suit will be borne by the defendant.

3. Following the judgment, the defendant appealed to the Court of Appeal vide Civil Appeal No.244 of 2012. The said appeal was subsequently marked withdrawn under Rule 95 of that court's Rules on 7th December, 2016. On 17th January, 2017 the plaintiff **(now respondent)** filed an application dated 20th December, 2016 seeking orders aimed at executing the judgment and decree. Specifically, she sought orders that the District Surveyor excise 5 acres out of Nyandarua/Olkalou Central/39 and that the Nyandarua District Land Registrar issue title in respect thereof to her. She also sought orders that the court authorizes the said officials to sign all documents necessary to

effect transfer and that the OCS provide security to facilitate the survey work.

4. By a ruling dated 11/5/2017 the court allowed the application upon being satisfied that there was a judgment and decree on record.

5. When the plaintiff/decree holder moved to execute by serving a notification of the intended visit of the District Surveyor to implement the court's orders of 11th April, 2017, the defendant moved to file the present application under certificate of urgency seeking orders (earlier stated) to have the entire suit declared as having abated exactly one year after the death of his father **Daniel Kibiri Muturi** (who was the original defendant)and the consequential judgment delivered on 14th February 2011 and subsequent orders granted on 11th April, 2017 declared a nullity.

6. The issue before me is whether the suit against the defendant can be declared to have abated and consequently that the judgment and consequential orders were a nullity.

7. The applicant has set out the history of the case in his supporting affidavit sworn on 30th May, 2017. He alleges that his father **Daniel Kibiri Muturi** (now deceased) was the registered proprietor of the suit land and that during the pendency of the suit he (the applicant) was made guardian *ad litem* when his father began to lose memory. The father died on 17th January, 2011 prior to the judgment being delivered on 14th February, 2011.

8. The application was opposed by the respondent/plaintiff through grounds of opposition dated 28th June, 2017. She listed the grounds:-

> ***i.*** *That the application was outrightly baseless, devoid of the backing of law and was otherwise an abuse of the process of the honourable court.*
>
> ***ii.*** *That the judgment was valid and enforceable since at the time of its delivery on 14th February, 2011, the suit had not abated as only one month had elapsed since the death of Daniel Kibiri Muturi therefore the mandatory period of one year required for a suit to abate, in the absence of substitution of a deceased party, as contemplated under Order 24 Rule 4(3) of the Civil Procedure Rules, 2010 had not passed.*
>
> ***iii.*** *That the judgment having been delivered during the pendency of the suit herein, the suit stands determined and concluded and there can be no abatement of a concluded suit.*
>
> ***iv.*** *That the only pending aspect of the dispute herein regards execution of the Decree arising from the Judgment which aspect, by virtue of Order 24 Rule 10 of the Civil Procedure Rules, 2010, neither requires substitution of a deceased party nor does it attract abatement of a suit.*
>
> ***v.*** *That the application was a brazen afterthought and a feeble attempt to deny the plaintiff her fruits of judgment.*

9. Pursuant to the court's directions the application proceeded by oral submissions and parties filed authorities to support their respective positions. **Mr. Mathea** for the applicant reiterated the averments in the applicant's supporting affidavit which sets out the history of the suit. He displayed the death certificate of the deceased to demonstrate that he passed away on 17th January, 2011, 28 days prior to the judgment date. He submitted further that the applicant filed an appeal to the court of appeal vide Nakuru Civil Appeal No.244/2012 but which appeal was withdrawn by the appellant's counsel after the respondent (in the appeal) challenged the *locus standi* of the appellant as he had not taken out letters of administration. After the withdrawal of the appeal, the plaintiff/respondent moved to enforce the decree. Counsel's argument is that there was no valid judgment or decree as the suit against the defendant abated upon his death as no substitution was made as provided for in **Order 24 Rule 14** of the **Civil Procedure Rules**. He further submitted that continued proceedings without substitution would amount to inter-meddling of a deceased person's estate under the law of Succession Act.

10. Counsel further argued that **Order 24 Rule 10** did not apply to the present case as the matter was now at the execution stage. While acknowledging that the issue could have been raised earlier, counsel submitted that abatement of a suit was a matter of law and can be raised at any stage. He relied on **Kenya Farmers Co-operative Union Ltd Vs. Charles Muigai [2005] eKLR** to support this proposition. In further submission, counsel stated that the judgment was irregular as the court was not informed that the defendant was deceased.

11. **Mr. Gatonye** for the respondent submitted that there was participation of both parties up to 15th January, 2010 when judgment was deferred to 14th January, 2011 but was delivered on 14th February 2011. The deceased died on 17th January, 2011, a month to the date of delivery. He submitted that that period was within one year and therefore the suit had not abated. He submitted that judgment was delivered during the subsistence of the suit – it had not abated. He relied on **Agnes Wanjiku Vs. Uchumi Supermarket Ltd. Nairobi Civil Appeal No.137 of 2002** where the court held that suit had been finalized. Counsel further urged the court to find that the application was an afterthought because the issue of the demise of the deceased defendant was being brought up through the present application. He stated that facts in the authorities relied on by the applicant were distinguishable.

12. In response, **Mr. Mathea** submitted that **Order 24 Rule 4** was not dependent on when a judgment was delivered. He discounted the respondent's submission that the defendant was represented in court arguing that a legal representative was different from an advocate.

13. **Order 24** provides that:-

> **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 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 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.

Rule 4 (3) where within an year no application is made under sub rule (1), the suit shall abate as against the deceased defendant.

14. In Agnes **Wanjiku Wangondu Vs. Uchumi Supermarket Ltd Nairobi Civil Appeal No.137 of 2002**, relied on by the respondent, **Visram J** (as he then was) held that **Order 23 Rule 11** (now Order 24 rule 10) did not require substitution in proceedings in execution of an order. In **Kenya Farmers Co-operative Union Ltd Vs. Charles Murgor (deceased) T/a Kaptabei Coffee Estate (2005) eKLR,** the court stated as follows:-

"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."

15. From the above persuasive authorities, it is clear that once a suit is completed and judgment rendered there is no need for substitution. It is also clear from order 24 Rule 1 that a suit does not abate of the cause of action continues.

16. In the present case, both parties were alive and well up till the court concluded the hearing and reserved the judgment to a future date. The defendant died a few weeks before the judgment was delivered. It is my view that under Order 24 Rule 1, the suit did not abate as the cause of action continued. What remained was execution which could be effected against the estate of the deceased. This is especially so because the judgment was delivered well within the one year period prescribed by order 24 rule 2.

17. The applicants submit that no execution can levied against them as to do so would be to intermeddle with the estate of the deceased. It is the court's view however that is a lame argument as nothing has stopped the applicants from taking out letters of administration to defend the interests of the deceased's estate. This argument cannot stand in the face of the finding that the cause of action survived the deceased.

18. Having found that the suit had not abated, the judgment and consequential orders cannot be irregular. In the result, I find that the application is not merited. It is dismissed with costs to respondent.

Orders according

Ruling signed at Garsen on 13th day of July 2018.

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R. LAGAT KORIR

JUDGE

Ruling delivered dated and Counter signed at Nakuru this 31st day of July, 2018.

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A.K NDUNGU

JUDGE

In the presence of

……..CA

……for applicant

……for respondent