



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 2095 OF 2000

RICHARD NDERE JOHNSON PAUL.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA.....1ST DEFENDANT

SAMUEL KAHIGA MUIGAI.....2ND DEFENDANT

CHERI (K) LIMITED.....3RD DEFENDANT

COMMISSIONER OF LANDS.....4TH DEFENDANT

RULING

1. The Notice of Motion dated **29th January, 2016** was filed pursuant to **Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, as read with **Order 24 Rule 4 of the Civil Procedure Rules, 2010**, for a declaratory order to the effect that suit as against the 2nd Defendant has abated. It was further prayed that the costs of the application be provided for.
2. The application is premised on the grounds, *inter alia*, that since no application to join and/or substitute the 2nd Defendant had been filed with the one year period stipulated under **Order 24 Rule 4** of the **Civil Procedure Rules**, the suit has abated as against the 2nd Defendant, for which reason Counsel for the 2nd Defendant was under no obligation to attend the hearing of the suit scheduled for 11th July, 2016.
3. So far, there is no response to the application. Accordingly, the Court was urged to allow the application and grant orders as prayed therein.
4. I have perused and considered the grounds upon which the application is predicated as supported by the affidavit of **Kevin Wakwaya**, Counsel for the 2nd Defendant/Applicant. I have also perused the pleadings on record and the proceedings to date and note that this is a fairly old matter. It is further noted that this is not the first time the issue of abatement of the suit as against the 2nd Defendant is being raised. Indeed, on the **12th May, 2015** the Court expressed itself on the issue as follows:

“On the 20th June, 2014 the issue of the death of the 2nd Defendant was raised having been raised

on 6th May, 2014. On 20th June, 2014 the Court directed that the matter proceed as the Plaintiff has the liberty to proceed against parties he has sued. Indeed on 17th December, 2014 the Court gave a hearing date of 2nd April, 2015 but the matter did not proceed as the High Court of Kenya was not sitting on that day. The 2nd Defendant's advocates have had ample time to seek instructions. As the Plaintiff cannot be held hostage by the inaction of the 2nd Defendant's advocates, I hereby direct that the hearing in this matter will proceed..."

5. It was therefore mischievous for Counsel for the 2nd Defendant to come back to Court while those orders are still in place to seek the same intervention that the Court declined on **12th May, 2015**. If counsel has no instructions to continue acting herein for the 2nd Defendant then their option would be to seek leave to withdraw from so acting.

6. I note too that the instant application is expressed to have been brought under **Order 24 Rule 4(4) Civil Procedure Rules**. There is in fact no such provision. Be that as it may, Order 24 Rule 4 sub-rules (1) and (3) provide that:

“(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...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.

(3) Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.” (Emphasis added)

7. It is plain therefore that the application is untenable, not only on account of the Court order of **12th May, 2015** but also because the cause of action, from its very nature, subsists and continues against not only the surviving Defendants, but also against the 2nd Defendant's estate. Secondly, the 2nd Defendant's advocates are still on record and share the responsibility, as officers of the court, to apply for the substitution of the 2nd Defendant.

8. On account of the foregoing, it is my resultant finding that the Notice of Motion dated **29th June, 2016** is completely lacking in merit and is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2016

OLGA SEWE

JUDGE