



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO 195 OF 2009

JOSEPH WACHIRA WAITHAKA.....PLAINTIFF/RESPONDENT

VERSUS

CHARLES MAINGI 1ST DEFENDANT

SAMUEL KIMANI MUCHIRI..... 2ND DEFENDANT

JEREMIAH MAINA MWANGI.....3RD DEFENDANT

FRANCIS MACHARIA.....4TH DEFENDANT

FR. JOHN MUNJU.....5TH DEFENDANT

RULING

1. By a Notice of Motion dated **15th July, 2013** the defendants (hereinafter referred to as “the applicants”) seek to, *inter alia*, dismiss the suit herein on the grounds that the plaintiff (respondent) died on **26th day of March, 2012**; that following the death of the respondent no step or steps have been made to substitute the respondent with a legal representative as by law required either within the time stipulated in law or at all and that no explanation has been provided for failure to substitute the plaintiff as by law required.

2. In the affidavit sworn in support of the application, the deponent, **Charles Maingi Macharia** (the first defendant applicant), has deposed that ever since the plaintiff passed on, they (the defendants) have been waiting patiently and faithfully for the plaintiff’s advocate to substitute the plaintiff as by law required to no avail; that it is now over a year since the plaintiff passed on yet the plaintiff’s advocate has not made the requisite substitution and/or bothered to give any explanation for the failure to effect the substitution; that since the suit herein has by operation of law abated, they are entitled to apply for the dismissal of the suit and seek the costs spent in defending it.

3. To prove the death of the plaintiff, the deponent has annexed to his supporting affidavit a copy of the certificate of death issued in respect of the plaintiff as annexure “**CCM 1**”.

4. When the application came up for hearing on **18th September, 2014** after the court was satisfied that counsel for respondent had been served with the hearing notice, as previously ordered, the court allowed the application to be heard *ex parte*.

5. Counsel for the applicants urged the court to rely on the submissions he had filed and allow the application as it was unopposed.

6. In the submissions filed in support of the application, two issues are framed for the courts determination to wit:-

- i. Whether the suit has abated? and
- ii. Whether the plaintiff/respondent should be condemned to pay the costs of the suit?

7. With regard to the first issue, reference is made to the cases of **Titus Kiragu v. Jackson Mugo Mathai & Another (2013) eKLR**; **Kenya Farmers Cooperative Union Ltd v. Charles Murgor (deceased) t/a Kaptabei Coffee Estate (2005) eKLR**; **M'mboroki M'arangacha v. Land Adjudication Officer Nyambene & 2 others (2005) eKLR** and argued that the suit herein automatically abated after one year lapsed without the plaintiff being substituted with his legal representative, as by law required.

8. In **Kenya Farmers Cooperative Union Ltd v. Charles Murgor (deceased) t/a Kaptabei Coffee Estate (2005) eKLR** H.P.G Waweru J. stated:-

“...In the instant case there was no application for substitution made within one year since the death of the defendant. Therefore as a matter of law the suit against him abated....It had abated on or about 23rd April, 1996, that is, one year since the death of the defendant... 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 a suit which has abated is really an exercise in futility...”

9. In the circumstances of this case, the case against the defendants' abated on or about **26th March, 2013**. That against the plaintiff (pursuant to the defendants counter-claim) also abated on the same date after the defendants failed to have the plaintiff therein substituted within the time stipulated in law. See Order **24 rule 3(2)** as read with rule 4(3).

10. On whether the plaintiff/respondent should be condemned to pay the costs of the suit, since the defendants had also lodged a claim against the plaintiff, by way of a counter-claim, which also abated following the death of the plaintiff, it would be unfair to condemn the estate of the deceased to meet the costs of the suit.

11. In view of the foregoing, the prayer for costs is denied. Parties to bear their own costs of the suit.

Dated, signed and delivered in open court at Nakuru this 30th day of January 2015.

L N WAITHAKA

JUDGE

PRESENT

Charles Maingi in person/defendant

N/A for the plaintiff

Emmanuel Maelo : Court Assistant.

L N WAITHAKA

JUDGE