



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

E.L.C CIVIL CASE NO. 71 OF 2015

(Formerly Nyeri HCCC NO. 39 OF 2010)

GLADYS NYAMBURA GATERE RESPONDENT

(Suing for herself and on behalf of GATERE KINYUA (DECEASED))

VERSUS

MARGARET WAMBUI MUGO APPLICANT

RULING

1. On **25th May, 2014** the advocate for the applicant herein filed a party and party bill of costs of an even date seeking Kshs.102, 535/= from the respondent being costs incurred in defending the case herein.
2. Upon being served with the bill of costs, the advocate for the respondent filed the notice of preliminary objection dated **9th July, 2014** challenging the applicant's bill of costs on the grounds that the applicant died before delivery of judgment hence not able to institute and prosecute the bill without been substituted. The respondent contends that since the applicant has not been substituted, as by law required, the bill of costs is incompetent and a suitable candidate for striking out.
3. The notice of preliminary objection was disposed of by way of written submissions.
4. In the submissions filed on behalf of the respondent, it is reiterated that the applicant's bill is unsustainable the same having been filed after the applicant passed on and without first appointing an administrator for her estate. In that regard reference is made to the case of **Makhecha & Co. Advocates vs. Midco International (K) Ltd (2009) e KLR** where it was observed:-

“...Getting back to the instant case, Mr. Wambungu Gitonga was appointed to wind up the deceased advocate's law firm by Pradeep Ian Makhecha, the Administrator of the estate of the deceased Advocate. That Appointment was lawful as long as it was brought in at the right time. Unfortunately it was not. The appointment ought to have been introduced the moment the advocate passed on, before any step was taken in the matter. That means that the moment he passed on, which was before the Bill was taxed, the entire process ought to have begun afresh. The mistake which has occurred in this case is that Wambungu Gitonga proceeded with the taxation as if Makhecha Advocate was still alive. As correctly observed by Mr. Gitau, that firm was a single practitioner's firm which means that the firm

died with the death of the proprietor. The appointment by Pradeep Ian Makhecha did not cure the defect as the taxation took place after the death of the Advocate and before the said appointment. Being a single practitioner it is also my view that under Section 45 of the Law of Succession Act, the deceased advocate ought to have been substituted before the Bill was taxed. In the circumstances the entire proceedings from the date the deceased advocate passed on to current date are defective and cannot be sustained.” (Emphasis supplied).

5. On behalf of the applicant, it is submitted that the respondent’s notice of preliminary objection cannot pass for a notice of preliminary objection properly so called. In this regard it is contended that whether or not the applicant passed on before the judgment which is the subject matter of the impugned Bill of Costs was delivered, is a question of fact to be determined by way of evidence.

6. In alternative to the foregoing, submission and without prejudice thereto, counsel for the applicant submits that even if the applicant passed on before judgment was passed, that fact is not a bar to execution proceedings because under **Order 24 rule 10** of the Civil Procedure Rules, execution proceedings are not subject to the requirement for substitution. In that regard reference is made to the case of **Agnes Wanjiku Wang’ondu v. Uchumi Supermarket Ltd (2008) e KLR** where it was held:-

“...So, clearly, the requirement for substitution in order 23 Rule 4 does not apply to proceedings in execution of an order as was the case before the lower court....In my view, therefore, it was perfectly legitimate for the Appellant to seek “substitution” in the lower court, and the lower court erred not only in dismissing the application but holding that the suit had abated.”

7. It is further submitted that the notice of preliminary objection is pre-mature because the time for substitution of the applicant has not lapsed.

Analysis and determination:-

8. Whereas the respondent’s notice of preliminary objection is premised on the allegation that the respondent passed on before the applicant’s bill was filed, no evidence whatsoever has been presented to the court to prove that fact.

9. It is trite law that a matter in respect of which evidence is required to prove cannot be the basis of a preliminary objection. In this regard see the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** where Sir Charles Newbold stated:

“... A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

10. In the circumstances of this case, the question as to whether the applicant died during the pendency of the bill is a question of fact for which evidence is required. That being the case, applying the principles in the case of Mukisa Biscuit Manufacturing Co. Ltd, the respondent’s objection does not meet the threshold of a preliminary objection properly so called.

11. That notwithstanding, there being no dispute as to the question of the applicant’s death, the issue of the propriety of the proceedings conducted after the applicant passed on cannot be ignored or wished away. Following the demise of the applicant, the rights accruing to her or any obligations owing from her can only be enjoyed or enforced by the administrator of her estate. There being no such administrator appointed, as by law required, I agree with the respondent’s advocate that the bill of costs hereto is incompetent. In this regard, see the decision in the case of **Makhecha & Co. Advocates vs. Midco International (K) Ltd** (supra). Also see **Order 24 Rule 3(1)** which provides as follows:-

“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.”

12. In the circumstances of this case, it is not in dispute that the deceased person was not substituted with a legal representative, as by law required. Failure to substitute the deceased with a legal representative rendered the proceeding conducted following the death of the applicant bad in law and devoid of any legal merits.

13. The upshot of the foregoing is that the bill that is the subject of the preliminary objection herein is unsustainable, the same having been lodged in blatant violation of the law concerning conduct of proceeding where one of the parties passes on before the conclusion of the proceedings. Consequently, I strike it out with no order as to costs.

Dated, signed and delivered at Nyeri this 22nd day of September, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Ombongi h/b for Mr. Nderi for the defendant

N/A for the plaintiff

Court Assistant - Lydia