



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 2851 OF 1989

DOUGLAS MUNIDA.....PLAINTIFF/RESPONDENT

VERSUS

EZEKIEL KAGWIRI.....DEFENDANT/APPLICANT

LAND REGISTRAR-KIAMBU..... DEFENDANT/RESPONDENT

RULING

The application before this Court is dated the 19/6/13. It is a Notice of Motion brought under Order 24 rule 4 (1) & (3) of the Civil Procedure rules. The 1st defendant applicant seeks the following orders that:

1. The court be pleased to issue an order that this suit has dilated.
2. That costs be provided for.

The application is based on the 3 grounds stated on the face of the application that;

1. The 1st defendant died on the 31st day of October 2005.
2. There has not been any substitution of the parties .
3. It is only fair just that the orders sought be issues.

The application is supported by the affidavit of Kaburu Muriti who depones as follows that he has had the conduct of the matter on behalf of the 1st defendant; that the 1st defendant died on the 31st October 2005 and that it is now a period of more than 7 years and no application for substitution has been filed. That the court should make a declaration to the effect that this suit has abated by virtue of the death of the 1st defendant. That the suit does not continue against the 2nd defendant.

The application was opposed by the 1st plaintiff/respondent. His counsel filed grounds of opposition stating that the application is incompetent as the advocate does not state who has given the instructions in view of the fact that the 1st defendant is dead. This ground was what the plaintiff's counsel argued in court. Miss Osoro further submitted that order 24(1) clearly states that the suit shall abate only against the deceased defendant and that the suit has not abated against the 2nd defendant and that counsel for the 1st defendant is not on record for the 2nd defendant. Mr. Kaburu response stated that the 2nd defendant never entered appearance and that what he has deponed in the affidavit are facts within his knowledge.

I have considered the submissions of counsels in court. Mr. Kaburu has clearly stated that he has had conduct of this suit since 2002. He has attached a copy of the death certificate of Hezekiah Kagwiri Robert which shows that the 1st defendant died on the 1st of November 2005. The court record of 7/11/05

shows that Mr. Kandere who was holding brief for Dr. Khaminwa for the plaintiff told the court that the 1st defendant had passed on a week before the 7/11/05.

The provisions of order 24 (4) (1) are clear. Order 24 (4) (1) states that

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 surviving 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.

(3) where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

My understanding of this is clear is that once a defendant dies and the cause of action does not survive a continue against the surviving defendant an application must be made to cause the legal representation of the deceased defendant to be made a party.

Sub-rule (3) states that where within one year no application has been made under sub-rule (1) then the suit shall abate as against the deceased defendant.

The application before me is not incompetent. Counsel has deponed facts within his know he is a concerned and diligent officer of the court.

The facts he has depend are within his knowledge. I find that since there has been no application to substitute the 1st defendant since 2005 when he died the suit has surely abated. I find merit in the application. The suit has abated. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this **4th** Day of **April** 2014

R.E. OUGO

JUDGE

In the presence of:

.....PLAINTIFF/RESPONDENT

.....1ST DEFENDANT/APPLICANT

.....2ND DEFENDANT/RESPONDENT

.....COURT CLERK