



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 89 OF 2007

GABRIEL MUTISO MAANDA.....PLAINTIFF

VERSUS

DAVANIS SUPPLIERS LIMITED.....1ST DEFENDANT
DAVID MUNDAL.....2ND DEFENDANT
EVANS MATUNDA.....3RD DEFENDANT
THE COMMISSIONER OF LANDS.....4TH DEFENDANT
EXPORT PROCESSING ZONE AUTHORITY.....5TH DEFENDANT

RULING

1. The plaintiff in this suit is deceased. By a chamber summons dated 30th August 2010, the applicants Beatrice Mutiso and Amos Mutiso, the administrators of the estate of the deceased, pray to be substituted as the plaintiffs in the suit.
2. From the supporting affidavit of the administrators to the estate sworn on even date, it is averred that the deceased died intestate on 27th December 2008. A certificate of confirmation of grant was issued by the High Court at Mombasa on 20th April 2011. It is also averred that the deceased plaintiff had obtained judgment against the 1st, 2nd, 3rd and 4th defendants which the applicants cannot enforce unless they are substituted as plaintiffs.
3. The application is opposed. There is a replying affidavit of David Mundui, a director of the 1st defendant, dated 25th November 2011. There are also grounds of opposition by the 5th defendant dated 1st December 2011. The principal objection is that on 19th March 2010 the court marked the plaintiff's suit as abated. Accordingly, there is no suit to which substitution of plaintiffs can be made. The 1st, 2nd, 3rd and 4th defendants concede that their defences had been struck out and judgment entered against them in the sum of Kshs 4,243,500. They however state that they obtained a stay of execution on 26th November 2008.

4. I take the following view of the matter. The two applicants are the legal representatives of the deceased by virtue of the certificate of confirmation of the grant issued by the High Court at Mombasa on 20th April 2011. It is also not in dispute that the deceased died on 27th December 2008. The application for substitution was only filed on 28th October 2011. That was over 2 years and 10 months or thereabout since the passing away of the plaintiff.

5. Order 24 rule 1 of the Civil Procedure Rules provides that the death of the plaintiff shall not cause the suit to abate. However, under rule 3 (2) an application for substitution of the deceased plaintiff must be made within one year unless the court for good reason extends the time. The present application has thus been made out of time and there is no application to extend such time.

6. Fundamentally, the court on 19th March 2010 made the following order;

“Upon the death of the plaintiff on 27th December 2008, and there being no apparent steps taken by his personal representatives, this suit is hereby marked as abated”.

That order has not been set aside. There is thus no suit at the moment to which the applicants can be substituted. The substratum of the application has thus collapsed. Granted those circumstances, I am not persuaded to grant the prayers sought. The order that then commends itself to me to grant is to dismiss the chamber summons dated 30th August 2010. In view of the predicament that the applicants find themselves in, I decline to order any costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of January 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Applicants.

Ms Nandwa for the 1st Defendant.

Ms Nandwa for the 2nd, 3rd and 4th Defendants.

No appearance for the 5th Defendant.

No appearance for Attorney General.