REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 68 of 2007

CRESENT TRANSPORTATION CO. LTD……..APPELLANT
VERSUS

JOHN MUNYU KISOLO (Suing for and on behalf of the estate of

JAMES MATIVO MUNYU.....RESPONDENT

(BEING AN APPEAL FROM THE RULING DELIVERED BY THE HON. MRS IRERI, R.M ON 13/3/2007)

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JUDGMENT

On 6th April, 2000, **John Munyu Kisolo** as a personal representative of the estate of **James Malivo Munyu**, "*deceased*" filed suit seeking special damages of Kshs. 27,100/=, general damages under both Fatal AccidentS Act and Law Reform Act. He also prayed for costs and interest.

The suit was informed by the fact that on or about 3rd November, 1997 the deceased was involved in a fatal accident with motor vehicle registration number KAD 681K owned by the appellant along Nairobi-Mombasa road. The estate of the deceased attributed the accident wholly to the negligence of the driver, servant or agent of the appellant.

The appellant in his defence denied the negligence and the particulars thereof attributed to it. In the alternative it pleaded that the accident if at all, was caused solely and or substantially contributed to by the negligence of the driver of the motor vehicle that the deceased was travelling in. It proceeded to give the particulars of negligence it attributed to the driver of the said motor vehicle.

However, before the suit could be heard the personal representative of the deceased passed on. This was on 6th June, 2001. On 24th October, 2002, the wife of the deceased filed an application seeking to be substituted in place of the deceased plaintiff. When the said application came up for *interpartes* hearing on 25th June, 2002 the application was withdrawn with costs to the appellant.

On 8th October, 2003, the appellant filed an application under the then Order XXIII rule 3(2) seeking that the suit be declared to have abated. The said application came up for *interpartes* hearing on 17th March, 2004 when counsel for the respondent informed the court that they were aware that the suit had abated and saw no need to oppose the application. Indeed it was for that reason that they had not filed any papers in opposition to the application. The court then delivered its ruling on the spot allowing the application.

On 27th February, 2007 the suit strangely came up for hearing before **Hon. Ireri,** Resident

Magistrate. However, before commencement, **Mr. Mulwa** for the appellant sought the court's directions since the suit had already been marked as having abated on 17th March, 2002. However, **Mr. Mungata,** learned counsel for the respondent contended that he was not aware of the court order marking the suit as having abated. Further, that he had proceeded to the High Court in Succession Cause Number 289 of 1999 for substitution and continuance of the suit. In the premises the suit could not have abated.

In a ruling delivered on 13th March, 2007 the court held that though the suit had abated at different stages, there was an application for substitution for continuance already filed which overtook the order marking the suit as having abated. This holding triggered this appeal.

In a 6 point memorandum of appeal, the appellant complained that;-

1. The learned magistrate erred in fact and in law in finding that the plaintiff's application of substitution of parties should proceed.

2. The learned magistrate erred in fact in not finding that the plaintiff's application dated 23rd October, 2002 for substitution of parties was withdrawn on 13th August, 2003 in court and there was no application for substitution before the court.

3. The learned magistrate erred in law and in fact in not finding that the plaintiff's application for substitution of parties had been filed 1 year and 4 months after the death of the Personal Representative, contrary to the provisions of Order XXIII Rule 3(2) of the Civil Procedure Rules, in any event.

4. The learned magistrate erred in law and in fact in not finding that the plaintiff's suit had abated for non-compliance with Order XXIII Rule 3(2) as per the Court's order of 17th March, 2004 and there was no suit upon which the plaintiff's application was to proceed.

5. The learned magistrate erred in fact in finding that the order of the court that the plaintiff's suit had abated was overtaken by the application for substitution as she failed to appreciate that the application was withdrawn on 13th August, 2003 while the orders were made on 17th March, 2004.

6. The learned magistrate erred in law and in fact in not finding that the orders of the court dated 17th March 2004 to the effect that the suit had abated are unchallenged and still stand until they are set aside.

When the appeal came before me on 16th March, 2012 for plenary hearing, **Mr. Muli** and **Ms Thiongo** for **Mr. Mungata,** learned counsel agreed to canvass the same by way of written submissions. The same were subsequently filed and exchanged. I have carefully read and considered them.

In law a suit abates if the plaintiff or defendant dies during the currency of the suit and is not substituted within one (1) year of his death. In the instant case, the plaintiff died on 6th June, 2001. The deceased plaintiff ought to have been substituted on or before 5th June 2002 if the suit was to survive. This was not done. Instead on 24th October, 2002 the wife of the deceased sought to be substituted. This was 4 months after the suit had automatically abated by operation of law. The counsel for the intended plaintiff appreciated this fact. That informed his decision to withdraw the application that he had mounted on behalf of the wife of the deceased in that regard.

As a formality, the appellant subsequently filed an application to have the suit declared abated. It was not opposed. Indeed counsel for the respondent informed the court that he was aware that the suit had abated by operation of law and that is why he had not bothered to fight the application. On the basis of the foregoing the court formally declared the suit as having abated. Having made such declaration and the order having not been appealed or reviewed and set aside, the court could not revisit the subject and purport to allow the respondent to prosecute his case. The suit had ceased to exist and no orders could be

made on the same in the absence of a successful application to revive it.

It is instructive to note that when the suit was marked as abated, the respondent was presented by counsel. For the respondent to fix the case for hearing when knowing very well that it had abated and no attempts had been made to revive it smacks of abuse of court process and mischief. Further, since the suit was non-existent, it follows that the order of the learned magistrate to allow the respondent to proceed with the case subsequently were a nullity and an error of jurisdiction. In the case of **Kenya Farmers Co-operative Union Ltd vs Charles Murgor** (deceased) t/a **Kaptabei Coffee Estate (2005) EKLR,** the Court held that where there was no application for substitution made within one year, the suit abates by operation of the law. The court had no jurisdiction to order substitution except in an application to revive such an abated suit. It therefore matters not that the respondent had in the meantime filed a petition for limited grant in the High Court in Succession Cause Number 218 of 1999. What is of importance is that the application for substitution is filed in the suit before the expiry on one year following the death of a party sought to be substituted. In any event the grant issued in the aforesaid succession cause was a ***"Limited Grant of Letters of Administration ad colligenda bona under section 67(1) of the Act.*** Such grant is limited to collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the same until further representation. It does not donate to the petitioner jurisdiction to file and prosecute the suit on behalf of the deceased as is the case here.

Finally, the learned magistrate erred in law by finding that the respondent's application for substitution should proceed when there was no such application on record. It is not disputed that the application seeking to substitute the respondent was withdrawn on 25th June, 2003 on the ground that the suit had already abated, which fact was acknowledged by the respondent's advocate on record on that day. It is common ground that the application was allowed. It is also command ground that the respondent has not sought to challenge and set aside the court's ruling aforesaid nor has it made an application to revive the suit. It was therefore an error on the part of the learned magistrate to have allowed the respondent to proceed with the hearing of the suit on the grounds that the application for substitution for continuance was already filed and on record, overtaking the orders of 17th March, 2004.

The upshot of the foregoing is that the appeal is allowed, the order of the learned magistrate dated 13th March, 2007 is set aside. The appellant shall have the costs of this appeal.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **15TH** day of **OCTOBER, 2012.**

ASIKE-MAKHANDIA
JUDGE