



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NO. 3274 OF 1994**

**NAOMI WAIRIMU KIBUGI .....PLAINTIFF**

**VERSUS**

**NJERI KIBUGI & 3 OTHERS .....DEFENDANT**

**Coram: Mwera J**

**Njiru for plaintiff**

**Koceyo for defendant**

**Njoroge court clerk**

**RULING**

The chamber summons dated 22.11.10 was filed under the now – repealed Order 1XB rule 8 of Civil Procedure Rules, and section 3A Civil Procedure Act with 2 prayers:

- i) that the order given on 12/10/10 be set aside; and
- ii) the plaintiff be granted leave to oppose the defendant/respondent’s application dated 8/7/10.

In the grounds it was stated that on 12/10/10 when the application dated 8/7/10 came up for hearing the plaintiff’s counsel had travelled to Meru to attend a funeral. He had nonetheless instructed one Mr. Nyamweya to hold his brief. But Mr. Nyamweya was held up in another case in Room 12 and with that non-attendance was due to circumstances requiring sympathy, for which the plaintiff should not be punished. Appended to the application was the plaintiff’s supporting affidavit in which she said that she had been informed that her counsel had gone to a funeral on 12/10/10. Accompanied by Mr Kinyua, the advocate’s court clerk, the plaintiff came to court and waited outside Chambers No. 14, for her case to be called out. She did not hear her name called out. She did not enter the chambers and later she learnt that her application before court had been allowed in her absence.

Mr. Njiru the advocate who was absent on 12/10/10 swore an affidavit that he indeed went to attend a funeral in Meru and he had asked Mr. Nyamweya Advocate, to hold his brief. Mr Njiru exhibited a copy

of funeral announcements in the Daily Nation of 6.10.10 with several photographs of deceased persons. Counsel did not state the name of his deceased nephew. Neither did Mr. Nyamweya, Advocate, swear an affidavit that Mr. Njiru has asked him to hold his brief on that day. May it be added that the routine used to call out causes listed for a given day before Chambers No. 14 may not be perfect, but what happens is that the sitting begins with the court clerk announcing loudly outside the Chambers that all counsel and/or parties in the listed causes get into the Chambers. And once all are inside the causes are called one after another. Where one or both/all parties does/do not answer, the clerk goes out and again loudly calls out the cause. If there is no appearance, due orders are recorded. The plaintiff deponed that she did not hear her cause being called out and neither did she get Mr. Kinyua the court clerk with whom she was to support her on that account! But be that as it may.

The defendant swore a replying affidavit saying that the 1<sup>st</sup> defendant was deceased. There have been no moves to substitute her. So the case against her had abated. The order of 12.10.10 stated just that. The property in issue was in the name of the deceased defendant as per the land certificate exhibited. The prayers sought should not be granted.

In her submission the plaintiff urged this court to accept the explanation by Mr Njiru that he did not attend court because of the burial of his nephew, whose name is now given as Roy Kimathi Mbabu. This court should exercise its discretion here in her favour, in the interest of justice despite the mistakes of her counsel. Parties here should have opportunity to argue the application dated 8/7/10. Land is in the centre of all this so the plaintiff desires to have a hearing. And that considering the order under review, the suit still subsists against the surviving defendants.

The defendants on their part maintained that the 1<sup>st</sup> defendant died, was not substituted after one year and so the suit against her abated. But it can continue against the other defendants with no prejudice.

The application of 8/7/10 by the defendants had the prayer that since the 1<sup>st</sup> defendant died on 26.1.96, and so the suit against her ought to be marked as having abated. When the matter came up on 12/10/10 for hearing inter partes the plaintiff's counsel did not attend court because, as he explains, he was bereaved. Much as the court was not given affidavit evidence by Mr Nyamweya, Advocate, that he was to hold Mr Njiru's brief but he was held up in Room 12 or another affidavit from Mr. Kinyua, Mr. Njiru's court clerk that he was all the time outside Chambers No. 14 on that 12/10/10, the court nonetheless accepts that Mr. Njiru was attending a funeral in Meru and so could not attend court.

However, what would be the prejudice to be suffered by the plaintiff if her prayers are not granted? In this court's view, none at all or none has been demonstrated. The 1<sup>st</sup> defendant died and for over a year she was not substituted. She was among other defendants. Reinstating the application of 8/1/10 for arguments inter partes will not change the death of the 1<sup>st</sup> defendant or that the suit against her abated because she was not substituted as per the law. And here both sides are agreed that the suit may continue with the surviving defendants. In her submission the plaintiff said:

**“ The affidavit of Jemima Wanjiru is wrong on the law of abatement. Suits where there are several defendants do not abate on the death of one defendant. Mulla's Code of Civil procedure 16<sup>th</sup> Edition page 3030, 3031 states:**

**“A suit does not abate upon the death of a defendant even if his legal representatives are not brought to record if the right to sue survives as against the remaining defendants.”**

And the defendants submitted:

**“Any attempts to substitute the 1<sup>st</sup> defendant have not been made and neither party in this suit will be prejudiced if the suit can continue against the other defendants.”**

The court ordered on 12.10.10:

**“That the suit herein as against the 1<sup>st</sup> defendant/applicant be and is hereby marked as having abated.”**

Not that the suit has also abated as against the remaining defendants(see the old Order XXIII rule 4 Civil Procedure Rules). So where is the problem? Nowhere. And with that this application is dismissed with costs. Parties to proceed to process the suit for trial.

Delivered on 24.2.11.

**J. W. MWERA**

**JUDGE**