



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 91 of 2005

CECICLIA WACHUKA MUCHUKU &
KENNEDY IVIA WAMBUA.....LEGAL REPRESENTATIVES
OF THE DECEASED
RESPONDENT/APPLICANTS

AND

MUCHUKU GITUMA.....RESPONDENT/DECEASED

VERSUS

KENYA POWER & LIGHTING COMPANY.....RESPONDENT/APPELANT

RULING

The respondent in this application, the Kenya Power and Lighting Company Limited was aggrieved by an award of the lower court to the plaintiff in NKR.CMCC No.57/2003, Muchuku Gituma, in the sum of Kshs.641,792.50 and preferred this appeal on 18th May, 2005. However on 9th January, 2007 the said Muchuku Gituma died. It was not until 8th February, 2008, one year and one month later that a grant of representation in respect of his estate was obtained by the applicants in the present application. In the application brought on 21st April, 2008, the applicants want the court to declare that the appeal has abated for the reason that one year after the death of Muchuku Gituma, no application has been made to join the deceased's legal representative in the appeal in place of the deceased. The respondent filed a replying affidavit but did not attend to canvass it despite service of the hearing notice. In the affidavit it is averred that having deposited the decretal sum in the joint names of counsel for the parties ordered by the court as a condition for stay of execution, the court file disappeared. When their efforts to trace the file failed, they filed an application for reconstruction. While that application was pending the instant application was filed. The respondent has also averred that the decretal sum deposited in the joint account has mysteriously been withdrawn without counsel for the respondent's knowledge.

I have considered the forgoing arguments. By dint of **Order 23 rule 4** (erroneously shown in the application as **rule 3**) where within one year following the death of a defendant, no application is made to join his legal representative in the suit in place of the deceased defendant, the suit "*shall*" abate as against the deceased defendant.

Order 23 rule 10 aforesaid provides that:

“10. In the application of this Order to appeals, so far as may be, the word “*plaintiff*” shall be held to include an appellant, the word “*defendant*” a respondent and the word “*suit*” an appeal.”

The law on abatement of suits apply also to appeals. The respondent in this appeal having died and one year later there was no application to substitute him in the appeal with his legal representatives, the applicants herein, by operation of the law the appeal abated. The only recourse would have been for the applicants to apply for the revival of the appeal under **Order 23 rule 8(2)** aforesaid – but can they?

The only thing left in this appeal is the ascertainment of how the decretal sum deposited in the joint names of counsel was withdrawn. That may be suitably dealt with by the police if forgery or fraud is suspected.

This application is allowed. I make no order as to costs.

Dated, Signed and Delivered at Nakuru this 30th day of July, 2010.

W. OUKO

JUDGE