



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT MACHAKOS**  
**CIVIL CASE 56 OF 2006**

**EVA KATULA REUBEN..... PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH MAWEU NGUKA..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**LUKENYA RANCHING & FARMING**

**CO-OPERATIVE SOCIETY LTD .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Application before me is dated 21.10.2008 and the Applicant, Eva Katula Reuben seeks orders under Order XXIII Rule 1, 3, and 4 of the Civil Procedure Rules that leave be granted for Elizabeth Kaluki Maweu, the legal representative of the estate of Joseph Maweu Nguka (deceased) to be substituted in place of the deceased aforesaid for purposes of defending the suit herein and in which the Applicant is the Plaintiff.
2. It also sought that if the substitution is allowed, then the suit which has abated be revived and for it to proceed for hearing and determination.
3. The Applicant contends that the above orders are necessary because on 10.12.2007 she received information that the 1<sup>st</sup> Defendant had died on 6.5.2007. That subsequently on 11.7.2008, Elizabeth Kaluki Maweu was granted limited letters of administration for purposes of proceedings in this suit. That since the cause of action against the 1<sup>st</sup> Defendant survives as against his legal representative, and since the dispute relates to property now in the custody of the legal representative, then the orders sought should be granted as prayed.
4. The Application is strenuously opposed and the advocate for the Respondent in her grounds of opposition and in submissions states that since the suit against the 1<sup>st</sup> Defendant had abated, the Plaintiff cannot by dint of Order XXIII Rule 4(1) apply to substitute a deceased Defendant nor can she seek to revive the suit. That she can proceed as against the 2<sup>nd</sup> Defendant and in any event that the Application is badly drafted and framed and should be rejected on all limbs.
5. There are two issues that cannot be contested viz;

i. That the 1<sup>st</sup> Defendant died more than a year ago and the suit against him may have abated on or around 6.5.2008.

ii. That his spouse, Elizabeth Kaluki Maweu obtained a grant of letters ad litem and specifically limited to proceedings in HCCC NO. 56/2006 which is the present suit.

6. To that extent therefore the issue should have been easy to resolve but is there any law that resolves the present predicament that the Plaintiff finds herself in? Order XXIII Rule 1 of the Civil Procedure Rules provides as follows:-

***“The death of a Plaintiff or Defendant shall not cause the suit to abate if the cause of action survives or continues.”***

7. There is no doubt in my mind that from what is pleaded in the Plaint, the cause of action which rotates around the true ownership of land known as Mavoko Town Block 3/2862 which is still registered in the names of the 1<sup>st</sup> Defendant survives the 1<sup>st</sup> Defendant. The prayer for ***“rectification of the allotment and titles register in favour of the Plaintiff”*** can and should reasonably be a prayer that his legal representative can defend and meet within the law.

8. Order XXIII Rule 4(21) (2) and (3) then provides as follows

***“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.***

***(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.***

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

9. It is clear in this case that when no application was made within one year of the 1<sup>st</sup> Defendant's death, the suit as against him abated and again there is no dispute on the point.

10. Order XXIII Rule 8(1) and (2) provide as follows:-

***“8.(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.***

***(2) The Plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”***

11. The Rule specifically relates to an application by the ***“Plaintiff or the person claiming to be the legal representative of a deceased Plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff”*** as the persons qualified to seek revival of a suit which has abated. What such a person must show is that he was prevented by any sufficient reason from continuing the suit.

12. In Mullahs Code of Civil procedure, 16<sup>th</sup> edition. Vol. 3 at page 3064 it is stated as follows:-

***“The provisions of Order 22, which are only procedural, ought not to be subjected to narrow construction and hyper-technical contentions, having the effect of deflecting the court of justice. If, from the facts and circumstances of a case, sufficient cause for the delay in seeking substitution of legal representatives of the deceased party was obvious, the court would be justified in granting the relief, ignoring the fact that the affidavit neither mentioned the cause of condoning delay nor prayed for setting aside the abatement. The prayer should be treated as being implicit in the application for impleading the legal representatives.”***

13. Order 22 of the Indian Code of Civil procedure is titled, “**Death, Marriage and Insolvency of Parties**” and is a progressive equivalent of our Order XXIII of the Civil Procedure Rules. In the case before me, it is obvious that the Plaintiff has intentions of proceeding with the suit and is allowed by law to substitute the deceased 1<sup>st</sup> Defendant with his legal representative who was appointed vide Succession Cause No. 407/2008 for the express purpose of defending the proceedings herein. It would be a travesty of justice to allow the suit to proceed against the 2<sup>nd</sup> Defendant only when from the pleadings, the 1<sup>st</sup> Defendant had a duty to respond to the claim against him. His legal representative is obligated by section 82(1) of the Law of Succession Act to defend the claim to the land in dispute and to protect the interests of the 1<sup>st</sup> Defendant upon his demise.

14. In the end, both on the law and the facts, the Application before me is merited and Elizabeth Kaluki Maweu shall substitute her late husband as 1<sup>st</sup> Defendant and she shall be referred as his personal representative in this suit and having so done, the suit which has abated is revived as prayed.

15. Each party shall bear its own costs.

16. Orders accordingly.

Dated and delivered at **Machakos** this **27<sup>th</sup>** day of **May 2009**

**Isaac Lenaola**

**Judge**

In the presence of: Mrs Nduva for Applicant

Mr. Kimeu h/b for Mrs Nzei for Respondent

**Isaac Lenaola**

**Judge**