

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 81 of 2003

ELIAKIM SAKA ODIPO ::::::::::::::::::::::::::::::::::: PLAINTIFF

V E R S U S

DISMUS KWEYU MALALASON ::::::::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

The defendant brought this application seeking orders that the suit herein be declared to have abated as against the plaintiff and that the same be dismissed. The application is supported by the defendant's affidavit sworn on 5th September, 2008. Mr. Ondieki, learned counsel for the defendant submitted that the plaintiff died on 21-7-2007 and a period of one year passed yet no application to substitute the plaintiff was made. Counsel relied on **Order XXIII Rule 4, 8 and 12** of the Civil Procedure Act.

Mr. Momanyi counsel for the plaintiff/respondent opposed the application and submitted that the respondent has already filed a Succession Cause and upon obtaining the letter of administration, he will apply to the court and substitute himself as the plaintiff.

Order XXIII rule III (2) is to the effect that if one year lapses after the death of the plaintiff and no application is made to substitute the deceased plaintiff, then the suit shall abate as far as the deceased plaintiff is concerned. Parties herein agree that the deceased plaintiff died on 21-7-2007. It is now over one year since he passed away until 5th September, 2008 when the current application was filed. It is therefore evident that this suit has abated as far as the plaintiff is concerned. I do grant prayer one of the defendant's application as prayed.

Defendant's second prayer is to have the suit dismissed. **Order XXIII rule 8** has same effect to a suit that has either abated or dismissed. However, **Order 8 (2)** allows a legal representative to apply to court and have a suit that has abated to be revived.

Mr. Francis Namatsi Saka has indicated to this court that he has filed Succession Cause **No.521 of 2008** and has exhibited the gazette notice which proves this fact. Although the applicant urged the court to ignore the affidavit as the same was filed out of time, I do find the affidavit relevant as what is annexed to the affidavit is proof of commencement of succession proceedings. I therefore extend the time for the filing of the affidavit of Francis Namatsi and deem the same to have been properly filed within time.

Since the deceased plaintiff's son has commenced succession proceedings I do not see the reason for dismissing this suit as already I have found that the same has abated. The deceased's son is therefore at liberty to apply and have the abated suit revived.

I do therefore order that this suit has abated as against the plaintiff as no application to substitute the deceased was made within one year from the time the plaintiff died. There shall be no order as to costs.

Date, delivered and signed at Kakamega this 23rd day of July, 2009

SAID CHITEMBWE

J U D G E