



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE**

Civil Case 3175 of 1997

HENRY KAYIBE MUKABI.....PLAINTIFF/APPLICANT

Versus

THE HON. ATTORNEY GENERAL.....DEFENDANT/RESPONDENT

RULING

Henry Kayibe Mukabi filed this suit in this Court on 17th December 1997 by a Plaint also dated 17th December 1997.

In this Notice of Motion dated 26th May 2009, the Applicant is still stated to be Henry Kayibe Mukabi (alleged deceased) but the intention of the Notice of Motion is to make one Fredrick Khaunya Mukabi, said to be a son of a deceased by the name **HENRY KAIBE MUKABI MUBASHI**, be substituted as Plaintiff in this suit on the ground that the Plaintiff in this suit, whose name the Applicant gives as **HENRY KAIBE MUKABI MURISHI**, died on 2nd December 2007. The Applicant is making that application armed with a Limited Grant of Letters of Administration (ad litem) issued under Section 54 of the Law of Succession Act (Cap 160 Laws of Kenya) and the 5th Schedule thereof.

The Notice of Motion is opposed by the Defendant, The Attorney General, represented by a Senior Litigation Counsel, Mr. Rotich Cherogony, who relying on the Grounds of Opposition filed on 24th September 2009 and dated 11th September 2009, pointed out that the suit herein is already abated and that therefore there can be no substitution of a party according to Order XXIII Rule 3(2) of the Civil Procedure Rules.

If the Plaintiff in the suit died on 2nd December 2007, substitution of the Plaintiff should have been done before 1st December 2008. Since no substitution had been done, from 2nd December 2009 this suit stood abated as one year from the date of death had lapsed.

A grant of Letters of Administration issued on 9th January 2009 and an application for substitution filed on 26th May 2009 are not therefore acceptable.

Surprisingly, learned Counsel M/s Lusweti representing the Applicant does not seem to see much in Order XXIII Rule 3(2) of the Civil Procedure Rules and therefore thinks this court can grant the orders prayed for in the Notice of Motion without regard to Order XXIII Rule 3(2) of the Civil Procedure Rules. Starting with Rule 3 (1), the provisions are as follows:

“3(1)

Where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving Plaintiff or Plaintiffs alone, or a sole Plaintiff or sole surviving Plaintiff dies and the cause of action survives or continues, the court, an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased Plaintiff is concerned, and, on the application of the Defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased Plaintiff.”

There are provisions of the law providing for enlargement of time to file application for substitution but as I have remarked earlier, the Applicant’s Counsel does not seem to think much of those provisions. In the circumstances therefore, we are where we are to-day and I must agree with what the learned Senior Litigation Counsel is saying – that this suit has abated.

I should however point out that apart from the problem of abatement, there are other problems in this suit the Plaintiff’s Counsel did not care to be careful about. Firstly, according to the Plaintiff in this suit dated 17th December 1997, the name of the Plaintiff is **HENRY KAYIBE MUKABI**. But the name of the deceased in the limited grant obtained on 9th January 2009 claimed to be a grant in the estate of the Plaintiff in this suit being alleged to have died, is in the name of **HENRY KAIBE MUKABI MUBASHI**. That name is different from the name in the Plaintiff in that:

(a) The name KAYIBE is not same as the name KAIBE.

(b) The name in the Limited Grant of Letters of Administration has an addition “MUBASHI” which is not found in the Plaintiff.

(c) No effort has been made to bring a reconciliation in those names like using the term “alias” in the Limited Grant of Letters of Administration.

This is a suit in a Court of Law and Proceedings, especially where Advocates are handling them, should be proper, clearly avoiding inconsistencies and ambiguity as in law the name **KAYIBE** is different from the name **KAIBE** leading to two different persons and more so where the name **KAIBE** has an additional name **MUBASHI** which is not found in the Plaintiff.

The second further problem in this matter is that the Limited Grant of Letters of Administration being relied upon in this Notice of Motion was issued to the Applicant for the purpose of **filing suit** only. The Applicant’s Counsel when addressing me added that the grant was also for **defending** or **continuing the suit**. But clearly those are not found in the said Grant, an official legal document the Applicant is relying upon in this Notice of Motion.

It means therefore that this is a limited grant issued on 9th January 2009 for the purpose of **filing suit** while the suit in question had already been filed way back in 1997. It is a useless Limited Grant of Letters of Administration issued to the Applicant in this Notice of Motion. To be properly blamed in that connection are the Applicant’s Advocates who petitioned for and obtained that grant from the High Court at Bungoma. If the Applicant before me petitioned, in person, for that grant, he is himself to blame fully.

It further means that even if this Notice of Motion were filed in time, this particular limited grant could not have entitled and enabled the Applicant to be substituted as Plaintiff in the suit since what the Applicant claimed was going to do in the suit, namely;

“Filing Suit”;

had already been done by the Plaintiff who is now being alleged to have died.

A third further problem in this suit is that, the Plaintiff **HENRY KAYIBE MUKABI** had, as can be

seen from, paragraph 2 of the Plaintiff, filed this suit as

“the Administrator

of the estate of.....

Kenneth Makokha Mukabi (.....the Deceased)”

Since in the circumstances, a grant of Letters of Administration was necessary, let me assume that Henry Kayibe Mukabi had obtained such grant for the estate of his then deceased son Kenneth Makokha Mukabi when Henry Kayibe Mukabi filed this suit in 1997: In short, he filed this suit as

The Administrator of the Estate of the Late Kenneth Makokha Mukabi.

If Henry Kayibe Mukabi subsequently died, it does not necessarily mean that, in law, the Administrator of the Estate of Henry Kayibe Mukabi automatically becomes the Administrator of the Estate of the late Kenneth Makokha Mukabi to be entitled to be substituted in this suit as Plaintiff in place of Henry Keyibe Mukabi. That is because in law for the Administrator of the Estate of Henry Kayibe Mukabi to also become Administrator of the Estate of the late Kenneth Makokha Mukabi a separate and fresh petition or Application has to be made to that effect in the matter of the Estate of Kenneth Makokha Mukabi thereby exposing that Petitioner/Applicant to either success or failure depending on whether there is objection to such a petition/application.

It means therefore that in so far as this Notice of Motion dated 26th May 2009 was being made based on a grant issued to Fredrick Khaunya Mukabi on 9th January 2009 while at the same time the said Fredrick Khaunya Mukabi was not the Administrator of the Estate of the late Kenneth Makokha Mukabi, this Notice of Motion is grossly misconceived.

From what I have been saying above therefore, there are four reasons why this Notice of Motion before me dated 26th May 2009 is untenable. Each one of the four reasons is alone strong enough to form the basis of dismissing this Notice of Motion. It follows that the said Notice of Motion cannot stand and the same is hereby dismissed with costs to the Defendant/Respondent.

Dated this 9th day of October 2009.

J.M. KHAMONI

JUDGE

Present:

Wandabwa, Advocates for the Applicant

Attorney General the Respondent

Court Clerk: Florence Bojwony