



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case 154 of 1998

MUSYOKA MWANGANGI.....PLAINTIFF/APPLICANT

VERSUS

REUBEN CHAMBI MUIITHYA.....DEFENDANT

AND

1. DORCAS MWIKALI CHAMBI )

2. FRANSISCA SYOMBUA CHAMBI).....RESPONDENTS

**R U L I N G**

1. The application before court is the chamber summons dated 26/09/2006 which is brought under Order 23 Rule 4(1) and 12 of the Civil Procedure Rules (CPR) and Section 3A of the Civil Procedure Act (Cap 21) seeking orders:?

(i) ***THAT the defendant herein, RUEBEN CHAMBI MUIITHYA, who died on 8/6/2006 be substituted with his legal representatives, DORCAS MWIKALI CHAMBI and FRANCISCA SYOMBUA CHAMBI.***

(ii) ***THAT costs of this application be paid by the Respondents hereinabove named.***

2. The application is premised on the following facts as set out on the face of the application:?

(a) ***Judgment in the suit herein was entered in favour of the plaintiff (for Kshs.522,520, costs of the suit and interest) on 14/11/2002.***

(b) ***Costs of the suit were taxed at 74,635, by consent***

(c) ***Decretal sum has todate accrued interest at court rates, and to date stands at around Kshs.1,017,077.05.***

(d) ***Before the deceased's death, the deceased's insurance company – United Insurance Company Limited, had paid to the plaintiff (through his advocates on record) a total of Kshs.350,000 leaving unpaid a sum of around Kshs.667,077.15.***

(e) ***The respondents above named are the defendant's legal representatives, and therefore the***

**right persons to be brought into these proceedings in the place of the now deceased defendant.**

**(f) The suit herein has NOT abated, as the same was at execution stage when the deceased died.**

3. The application is also supported by the sworn affidavit of **MUSYOKA MWANGANGI**, the plaintiff/applicant who says that judgment was entered for the plaintiff as against the defendant on 14/11/2002 for Kshs.522,520/= in damages, costs of the suit and interest as per the judgment of the court annexed to the affidavit and marked “**MM1**”. He says that after the judgment, the costs of the suit were taxed by consent of the parties at Kshs.74,635/=-, and that a sum of Kshs.350,000/= was paid out by the defendant’s insurer, M/s United Insurance Co. Ltd. who also gave several bouncing cheques for the now principal outstanding sum of Kshs.667,077/15 after off-setting the paid amount of Kshs.350,000/=-. The deponent says further that the defendant died on 8/06/2005 and that the two respondents herein were issued with the Letters of Administration Intestate as per the annexure marked ‘MM 3’. The grant was issued on 16/09/2005 to Dorcas Mwikali Chambi and Francisca Syombua Chambi. The deponent says that since the suit herein was at execution stage, the same did not abate upon the death of the defendant.

4. The application is opposed. The Replying Affidavit is sworn by Dorcas Mwikali Chambi (Mwikali) who says that she has the authority of her co-respondent to make and swear the affidavit. The court has however not been given any evidence of the authority which Mwikali talks about, as none has been filed in the cause. While not denying that she and Francisca Syombua Chambi (Syombua) are administrators of the estate of Rueben Chambi Muithya, she says that the applicant has been locked out of laying any claim on the deceased’s estate since he did not seek to do so before confirmation of the grant and distribution of the deceased’s estate and further that the claim is not payable since it was not raised within one year of the death of the deceased original defendant. The respondents seek to rely on the provisions of Order 23 Rule 4(3). Rule 4(1) of the order provides for the procedure in case of death of one or several defendants or of sole defendant and says that in such a case, 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. Sub-rule 4(3) says that such an application for substitution shall be made within a year otherwise the suit shall abate. It is the respondents’ contention that the applicants’ application for substitution is inordinately delayed and overtaken by events.

5. Mrs. Nzei who appeared for the applicant contended that the main issue in this matter is whether the suit against the defendant indeed abated by virtue of the provisions of Order 23 Rule 4(3) of the CPR. She argued that the suit did not abate since the suit was already at execution stage and that the execution of judgment could only be statute barred if the same is not carried out within 12 years of the judgment. Mrs. Nzei relied on Rule 11 of Order 23 which provides that:?

**“Nothing in rules 3,4 and 8 shall apply to proceedings in execution of a decree or order”.**

6. Mrs. Nzei submitted further that section 4(4) of the Limitation of Actions Act does in fact buttress her client’s contention that this suit has not abated because the defendant died after judgment had been passed, and that the 12 year limitation period is yet to elapse. Mrs. Nzei cited to the court the case of **Morjaria –vs- Abdalla [1984] KLR 490**, a case in which the Court of Appeal dealt with the issue of substitution of a party following death. In the said case, the respondent filed a suit in the High Court in which he obtained judgment in default of appearance (and thereafter judgment after formal proof) against the appellant and his wife, Hariben. After Hariben died, the parties entered a consent order by which the appellant was substituted for Hariben in his capacity as the administrator of her estate. After this, an application for setting aside of the judgments was continued with the parties as substituted. The High Court however refused to grant orders to set aside the judgment and the appellant appealed. Before the hearing of the appeal however, the appellant too died and his son, Bhavin applied to be substituted under rules 42 and 96 of the Court of Appeal Rules. The High Court had granted two limited grants in the case in favour of Bhavin, the first of which was a “**grant ad colligenda bona and the second empowering him, among other things, to represent the deceased in [this] appeal”**. The application was opposed on the ground that Rule 96 of the Court of Appeal Rules only permitted the substitution of a party to whom has been given a full grant of probate or letters of administration, and not a limited grant. The Court held, *inter alia*, that

***“Rule 96 of the Court of Appeal Rules only enables the court to appoint as a party to an appeal a person who has been properly made a legal representative by the High Court in exercise of its jurisdiction to grant representation conferred by the Law of Succession Act (cap 160).***

7. The court also held that the words “**pending suit**” in paragraph 14 of the Fifth Schedule to the Law of Succession Act are wide enough to cover a pending appeal, and consequently the High Court has power under that paragraph to grant representation for the purpose of a pending appeal.

8. On his part, Mr. Makau Junior contended on behalf of the respondents that the applicant’s application has been overtaken by events since the deceased’s estate has already been distributed. Mr. Makau contended further that apart from the fact that the suit has abated, there was a stay order given on 24/01/2007 of all matters in which the defendant was insured by M/s United Insurance Co. Ltd., until the matter in Nairobi HCCC No. (O.S) 1345 of 2005 was heard and determined. It was also contended on the respondent’s behalf that the instant application was brought after undue delay. Mr. Makau relied on the case of **Dhanesvar V Mehta –vs- Manilal M. Shah [1965] EA 321** in which an application for substitution was made outside the limitation period. In that case, the substituted party died before the suit was heard, but the court found that the effect of allowing such an application would have been to defeat a prima facie defence of limitation as was the case in **Mabro v Eagle, Star British Insurance Co. [1932]1 KB 485**.

9. The two authorities cited by counsels on either side of the divide deal with slightly different issues from the issue in hand. In the instant case, the real issue is whether in this case where judgment had been passed, the suit can be said to have abated upon the death of the defendant whose substitution is sought. I heard Mr. Makau for the respondent argue that the suit has indeed abated by virtue of Rule 4 of order 23 of the Civil Procedure Rules, but while that may be so if the instant suit was still at the stages before judgment, the present application should be considered from the point of view of section 4 and in particular section 4(4) of the Limitation of Actions which reads:?

***“An action may not be brought against a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of recovery or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due”***

10. In the instant case, I do not think that the time for executing the judgment is past because, as Mrs. Nzei rightly pointed out, the 12 year limitation period has not expired. Secondly, there was no suit pending as at 8/06/2005 when the defendant died because judgment had long been passed on 14/11/2002. A reading of Rule 11 of Order 23 also tells me that because the issue in this case is not one of deciding whether or not the suit has abated, the provisions requiring the applicants herein to have complied with Order 23 Rule 4(4) of the CPR are not applicable.

11. Mr. Makau raised the point that the applicant’s application should not be allowed because the deceased’s estate has already been distributed and that there is nothing left to be distributed to the applicant. Section 83 of the Law of Succession Act sets out the duties of personal representatives and under subparagraph (d) thereof, personal representatives have the duty to ascertain and pay, out of the estate of the deceased, all his debts; while under sub-paragraph (e) they are under a duty within six months to provide to the court a full inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account. It is not disputed in the instant case that the two respondents are the legal representatives of the deceased, Rueben Chambi Muithya. It is also not disputed that judgment in this case was given against the deceased on 14/11/2002 for Kshs.522,520/= plus costs and interest. It is also not disputed that part of the decretal amount was paid by the defendants insurer, and that there was a balance still outstanding. In my view, the respondents are guilty of breach of duty for failing to ascertain and pay out of the estate of the deceased his debts. Having not paid the debt due to the applicant herein, the respondents are still obligated to make good the same.

12. I have also not been shown evidence by the respondents that they produced to the court an accurate inventory of the assets and liabilities of the estate of the deceased defendant. It is therefore not possible for the court to say for certain that ALL of the deceased's estate has been distributed and that all liabilities have been paid. The respondents did not annex to the Replying Affidavit a copy of the petition for Grant of Letters of Administration as proof to this court that an inventory of the deceased's liabilities was made, nor does the Certificate of Confirmation of Grant show what liabilities there were to the estate and how such debts were going to be paid.

13. In the result, this application must succeed. Accordingly, I allow the application dated 26/09/2006 and order that:?

- i. ***The defendant herein RUEBEN CHAMBI MUIITHYA who died on 8/06/2005 be and is hereby substituted with his legal representatives DORCAS MWIKALI CHAMBI and FRANCISCA SYOMBUA CHAMBI.***
- ii. ***Costs of this application shall be in the cause.***

Orders accordingly.

**Dated and delivered at Machakos this 29<sup>th</sup> day of May 2008.**

**R.N. SITATI**

**JUDGE**

Delivered by Lenaola J in the presence of :?

Mrs. Nzei for Plaintiff/Applicant

Mr. Makau Jnr for Defendant/Respondent

**I. LENAOLA**

**JUDGE**