



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 137 of 2002

AGNES WANJIKU WANG'ONDU APPELLANT

VERSUS

UCHUMI SUPERMARKET LTD RESPONDENT

(An Appeal from the Ruling of Hon. G. N. Ngari, SRM in

Nairobi Milimani Commercial Civil Suit No. 8662 of 1994

delivered on 6th December, 2001)

JUDGMENT

This appeal raises an important issue of law and procedure. Does a suit, that has been concluded, and where Judgment has been delivered, “abate” as against the deceased litigant? Does the deceased Plaintiff’s personal representative need to be enjoined in the suit in order to execute the Judgment?

The facts in the case before me are not in dispute. The Appellant (Plaintiff in the lower court) filed a suit in the lower court on 25th February, 1993 for recovery of Kshs.187,625.70. The suit was heard, and Judgment delivered in his favour, on 9th February, 1999. The Judgment was executed in part. However, before realizing the entire decretal sum, the Appellant passed away on 12th July, 1999.

On 29th August, 2001, some two years later, the deceased Appellant’s personal representatives made an application for substitution under Order 23 Rule 3 of the Civil Procedure Rules. The Respondent raised a Preliminary Objection that the application had been made one year after death (contrary to Order 23 Rule 4); and that accordingly, the suit had “abated”. In a brief 10-line Ruling the lower court upheld the Preliminary Objection and held that the suit had indeed abated, and proceeded to dismiss the application. This appeal is against that Ruling.

In his submissions before this Court, Mr Ndege, Counsel for the Appellant, argued very ably, that a suit that had been concluded could not “abate”; that there was no limitation provided in the Civil Procedure Rules for “substitution” where the suit had been “determined”; that the only “limitation” that applied was in the Limitations of Actions Act, Section 4 (4) which required that action based on Judgment be filed within 12 years; and he relied on the case of *Dhulla Harichand vs Gulam Mohu-Udin and Aziz Din s/o Gulam Mohu-Udin*, (1940) KLR Vol. XIX at page 6.

Mr Mwaura, Counsel for the Respondent, while conceding that the suit had not abated, argued that the procedure adopted by the Appellant in the lower court was wrong; that an application for “substitution” was unnecessary when execution proceedings were already in place.

I would uphold Mr Ndege’s submission that the lower court was wrong in holding that the “suit” had “abated”, because the application for substitution had not been made within one year as required under Order 23 Rule 4 (3). There was no suit pending before the lower court, and therefore, it could not have possibly “abated”. The suit in the lower court had been determined, and, in fact, the Judgment partly satisfied. There was nothing to “abate”. In any event, Rule 11 of Order 23 states that:

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

So, clearly, the requirement for substitution in Order 23 Rule 4 (3) does not apply to proceedings in execution of an order as was the case before the lower court.

Secondly, was the application to “substitute” the personal representatives indeed necessary? In other words, was it necessary to enjoin the personal representatives to the suit? Order 30 Rule 1 would seem to say “NO”. This is what it states:

“Order 30 Rule 1: In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the court may, if it thinks fit, order them or any of them to be made parties.”

While the above rule states that it shall not ordinarily be necessary to make them parties to the suit, it does not say that they cannot be made parties to the suit. So, in appropriate circumstances, the personal representative can and should be allowed to be enjoined in the suit. In the case of *Dhulla Harichand (supra)*, the Court said:

“In Shailendranath Ghosh vs Surendranath De (930, I.L.R. 57 Cal. p. 1137 at p. 1140) the learned Judges in appeal say: “O. XXII, Rule 12, Civil Procedure Code, lays down that the provisions as to abatement of a suit or appeal, in consequence of death or insolvency of a party, do not apply to execution proceedings. It follows, therefore, that the provision is for the benefit of a decree holder or his heirs and that the heirs need not take steps for substitution. This is clear from the decision of the Judicial Committee in the case of Kedarnath Goenka vs Anant Prasad Singh (L. R. 52 I. A. 188). There are two courses, either of which may be availed of by the heirs, that is to say, that they may apply immediately for carrying on the proceedings in execution of the decree or they may apply for fresh execution under O. XXI., r. 16, Civil Procedure Code (our O. XIX. R. 13) Akhoy Kumar Talukdar v. Surendra Lal Pal (1926, C. W. N. 735)”

In (1934) I.L.R. 13 Pat. P. 777 Khaja Mohamed Noor J. says at p. 780: “No doubt, there is no express provision for substitution of the name of a representative of the deceased decree holder during the pendency of the execution proceedings but, as is apparent from a number of cases, such applications are filed and allowed, and the Courts have almost invariably treated such applications to be applications for continuation of the pending execution proceedings. It has been held more than once that the Code is not exhaustive. It is clear from O. XXII r. 12 read with rules 3 and 4 that an execution proceeding does not abate on the death of the decree holder. If so, there is no bar to the execution continuing at the instance of his representative”

In my view, therefore, it was perfectly legitimate for the Appellant to seek “substitution” in the lower court, and the lower court erred not only in dismissing the application, but also in holding that the suit had “abated”.

I will therefore allow this appeal in its entirety; allow the application dated 16th August, 2001 made before the lower court, and declare that the suit herein did not abate. The Appellant shall also have the

costs, both here and in the lower court.

Dated and delivered at Nairobi this 24th day of July, 2008.

ALNASHIR VISRAM

JUDGE