



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

**Civil Case 68 of 2000**

**EMKAY BUILDERS LTDS ..... PLAINTIFF**

**VERSUS**

**ZAVERCHAND RAMJI SHAH**

**WHITE MEG CO. LTD.**

**KANCHANBEN FULCHAND RAMJI SHAH .....DEFENDANTS**

**RULING**

Chambers summons dated 15/11/07 seeks orders under **Order 1 rule 10 (2)** of **Civil Procedure Code, Order VI A rule 3(1) (3) (4)** and all other enabling laws namely:

1. to strike out the name of the third defendant, Fulchand Ramji Shah from the plaint and be substituted with the name of Kanchaben Fulchand Ramji Shah as the personal representative of the estate of the said Fulchand Ramji Shah.
2. that the plaintiff be granted leave to amend the plaint in terms of draft annexed to the application.

The supporting affidavit shows that the 3<sup>rd</sup> defendant died and exhibited certificate of death and shows date of death as 19/4/1994 and an application to substitute him was made upon which on 15/4/2002 the court granted an order to substitute him.

It is also shown that the deceased was the registered owner of the land. L.R. 209/4/10 (original number L.R. No.209/4/4/3) since 31.12.1976 and that he has been sued because he owned that piece of land. It is alleged that there was an agreement between plaintiff and the first and second defendants for construction of some maisonette situated on the said plot whereupon the first and second defendants agreed to pay Shs.20,000,000/= and other charges to the plaintiff.

The agreement which is pleaded was made on or about 28/3/1996 which was after the death of the 3<sup>rd</sup> defendant. This suit was filed on 19/1/2000, several years after death. The order which grants leave to the plaintiff to substitute the widow and legal representative of deceased, 3<sup>rd</sup> defendant, was made on 15/4/2002 by Hon.Mr. Justice Ombija, J. That order was made under **Section 3A Civil Procedure Act**

and **Order XXIII rule 4 (1)** and **12 Civil Procedure Code rules**.

**Rule 4 (1)** thereof provides that in case of death of a defendant the court shall on application cause the legal representation of the deceased defendant to be made a party and shall proceed with the suit. However, **sub-section 3** provides that where within one year no such application is made under **sub-rule (1)** the suit shall abate against the deceased defendant. The right to revive suit which has abated appears to belong only to plaintiff or if he has died to his legal representative as provided under **Rule 8 (2)**. The respondent, the widow of deceased, is opposing the application on the grounds that she was never a party to the transaction giving rise to the suit and that her deceased husband died in the year 1994 and was never a party to the said transaction and the agreement relied upon by the plaintiff was made after his death.

She also states that the application to substitute was not brought within one year as required by the Order and that never has been other applications heard and determined in same subject matter and this matter is now **res judicata**. Also the plot mentioned by the plaintiff being L.R. 209/4/10 has been sold and transferred to third parties. She has annexed copy of transfer registered on 21/9/2007.

Upon considering the above provisions and upon hearing submissions of Counsel. It is my finding that the agreement giving rise to dispute was entered into after the 3<sup>rd</sup> defendant had died. It is not clear how the plot No.L.R. 209/4/10 was involved. There is no evidence that the deceased was a party to the construction agreement. Therefore there is no cause of action against him. It is further my finding that the suit against the third defendant was not in existence at the time of his demise. If there was a cause action surrounding him it should have been filed against his legal representative then and the provisions of **Order 23 Civil Procedure Code** are not applicable.

Furthermore the plaintiff is guilty of inordinate delay in prosecuting this suit. I therefore do not see any reason to drag in the legal representative of the deceased into litigation that does not concern her or her deceased husband. I find no merit in the application and the same is dismissed with costs to the respondent.

It is so ordered.

**DATED** and **DELIVERED** at Nairobi this 16<sup>th</sup> day of July 2008.

**JOYCE N. KHAMINWA**

**JUDGE**