

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1671 of 1994

KENYA FARMERS CO-OP. UNION LTD. PLAINTIFF

VERSUS

CHARLES MURGOR DEFENDANT

R U L I N G

Application dated 11/10/05 seeks orders to revive the abated suit as against the administrators of the estate of Charles Murgor, deceased, the defendant. The application is brought under Order XXIII rule 4 (3), 8 (2) and 12 of Civil Procedure Code.

The application is based on grounds set out in the application that by a Ruling of court made on 22/7/2005 the Court held that the suit had abated and there was no application to revive the same. The claim amounted 9,026,337.75 with interest as at 1/12/1993. Further the administrators obtained a grant of administration in the estate of the deceased in Succesion Cause No.199 of 1995. And that the death occurred on 23/4/1995.

To this application there are several preliminary objections filed, that the application is fatally defective, the supporting affidavit offends Order 18, Civil Procedure Code, and that this application has been overtaken by events and does not comply with Order 50 rule 15, Civil Procedure Code. These objections were argued first. That the suit is abated is not disputed. It was found to be so by this court in its ruling made on 22/7/2005 aforesaid.

The death occurred on 23/4/1995 and judgment was entered on 29/11/2001 after hearing some witness by Hon. Onyango Otieno, J. (as he then was). The respondent's argument is that the suit having already abated there is no suit to revive and the supporting affidavit being sworn by an advocate is not competent. It should have been made by the plaintiff who is making the application. Furthermore, the application offends Order 50 rule 15. The advocate did not disclose which limb of that Order 50 rule 15 is breached but from a perusal of the application it appears as if it was Rule 15 (2) which was breached. Mr. Ruto relied on the ruling in Milimani HCC No.89 of 2000 where the court stated that an advocate should not swear an affidavit in contentious matters on behalf of the client. An advocate should not enter into the arena. In this matter I do not think that the issue of reviving an abated suit is a contentious matter. The death of a party cannot be contentious and the issue of delay is for explanation to court at the hearing of application.

I therefore do not find that the act of swearing the affidavit by advocate renders the application incompetent. The right for a plaintiff to revive a suit is granted under Section 8 (2) of Order 23, Civil Procedure Code and it is not limited in time. I do not find the submission of the counsel merited. On the whole the preliminary objection has no merit and the same are over-ruled with costs.

DATED at NAIROBI this 8th day of July 2008.

JOYCE N. KHAMINWA

JUDGE