



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

Civil Case 54 of 2006

METRA INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

GAKWELI MOHAMED WARRAKAH.....DEFENDANT

R U L I N G

The application under consideration is brought by the Advocate for the Defendant under **Order XXIII rule 4(3) of Civil Procedure Rules**. The application seeks to have the suit dismissed on grounds that the defendant died and that no application for joinder of his legal representative was made within one year. The grounds for the application are that the Defendant died on 25th September 2006 and that since his death, no application has been made for joinder of his legal representative and that in the circumstances the suit had abated.

The application was supported by an affidavit sworn by Mildred Warrakah, the wife of the Defendant. The deponent has annexed a marriage certificate to show her marriage to the Defendant. The deponent also annexes a certificate of entry of death from Britain as proof that the Defendant passed on in London on the 25th September, 2006.

The Plaintiff did not file any documents. One day before the hearing of the application, the Plaintiff changed its Advocates and instructed WAMUYU OMUNG'ALA & Company Advocates to represent them. An application to have matter adjourned by the new advocate was rejected by the court for lack of merit as the Plaintiff's previous Advocate had been served with the Application on 25th April, 2008, two months before the application was heard.

The application was argued by Mr. Mburu, on behalf of the Defendant. All counsel relied upon was **Order XXIII rule 4(3) of Civil Procedure Rules** for the proposition that the suit had abated automatically when one year after the Defendant had died, no application had been made to substitute the deceased. The Advocate was applying that the suit be dismissed.

Mr. Omung'ala for the Plaintiff did not make any submissions in the matter since the Plaintiff had not filed a replying affidavit and the application to adjourn the matter was rejected by the court.

I have considered the application and the submissions by counsel together with the law that is relied

upon. The application was incompetent for two reasons. The first reason is that the application has been made by the Advocate for the Defendant whom we have been told is now deceased. So the first question which begs an answer is who instructed this advocate to make the application? Could a deceased person instruct him? The law is very clear instructions can only be received from living persons and since there is no way that the Defendant being deceased could have instructed the Advocate, the application has absolutely no legal basis and the Advocate had no instructions to file it.

The normal course of continuing a suit after the death of a sole Defendant is provided for under **Order XXIII rule 4(1)** of the **Civil Procedure Rules**. On the other hand, there is no provision on the Advocate of the deceased Defendant to file an application of this nature to have the suit dismissed in the ground that the Defendant is dead. The logical reason for this is that suits do not necessary abate upon the death of a Defendant or a Plaintiff as provided under rule 1 of the same order.

The second issue is a technical point which is that where a Defendant has not been substituted one year after he has died, the suit automatically abets and is therefore no need for an application to be made to declare the suit as having abated.

For the foregoing reasons, I find the application incompetent and strike it out with no orders as to costs.

These are the orders of the court.

Dated at Nairobi this 4th day of July, 2008.

LESIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Omung'ala for the Plaintiff

Mr. Mburu for the Defendant

LESIT, J.

JUDGE

-