REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

Misc Civ Appli 211 of 2006

CHEGE WAINAINA T/A CHEGE WAINAINA & COMPANY ADVOCATES……APPLICANT

Versus

JORAM THUO WAIREGI…….....…….RESPONDENT

(Being Advocates-Client Bill of Costs from Nyeri HCCC NO. 39 of 2002)

BETWEEN

JORAM THUO WAIREGI…….....……..……1ST PLAINTIFF

SAMUEL MBUGUA MUTAHI…….…….....……..2ND PLAINTIFF

Versus

KAYLIFT SERVICE LIMITED…….....DEFENDANT

RULING

This action was started when an advocate client's bill of costs was filed by the firm of **Chege Wainaina T/A Chege Wainaina** against their former client **Joram Thuo Wairegi**. The bill was taxed on 8th February 2007 for Khs.151,455. On the advocate filing a Notice of Motion under *Section 51 (2)* of the Advocates Act for judgment and for substitution of the deceased client, there was a preliminary objection raised on behalf of the Respondent. The objection raised is in the following terms:

1. ***The cause of action against the deceased has abated.***

2. ***The application is incompetent and fatal in law.***

3. ***This court lacks jurisdiction to give the orders sought against Michael Mwangi Thuo.***

In submissions Learned Counsel for the Respondent stated that the prayer for substitution of Michael Mwangi Thuo for the deceased client was incompetent because the action had abated. Counsel referred to annexed Limited Grant issued to Michael Mwangi Thuo. The said grant indicated that the client passed away two years ago and that according to *Order XXIII Rule 4* of the Civil Procedure Rules, the action had abated. For that reason counsel argued that the suit cannot be maintained against the client's Estate. Counsel further submitted that the advocate's firm had failed to invoke the enabling law for substitution.

In response the Learned counsel for the advocate stated that the advocate did not know of the death of their client due to the failure of the firm representing the Respondent to inform them. That in any case that the court had jurisdiction to entertain the application by virtue of *Order 50 Rule 12* of the Civil Procedure Rules. That rule provides:

"***Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."***

I have considered arguments of both Learned Counsels. *Order XXIII Rule 4 (1)* provides:

"***(1) Where one of two or more defendants dies and the***

cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or a sole surviving defendant dies and the cause of action survives or continues, 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.

(2) ……

(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant."

According to the Limited grant annexed to the advocate's application the client passed away on 12th March 2005. That is indeed two years ago. The advocate did not make the application for substitution until 15th March 2007. What then is the fate of the application in the light of *Order XXIII Rule 4 (3)* of the Civil Procedure Rules? I would respond that the Advocates Act is a complete Act in itself and the provisions of the Civil Procedure Rules do apply. That indeed was the finding in the case **S. MUTHEE V BANK OF BARODA HCCC NO. 91 of 2004 MILIMANI**. The finding of the court was:

"***The Civil Procedure Act does not apply to the Advocate Act……"***

That being my finding therefore, the restrictions under the Civil Procedure Rules of the period within which an application for substitution can be made do not apply in an action under the Advocate Act. Accordingly the objection under that Rule fails. The other objection raised by the Respondent also fails for the Respondent ought to have shown, that the failure of the advocate to state the law upon which he relied upon, in respect of the prayer for substitution, caused prejudice to the Respondent and the Respondent accordingly was unaware of the type of application he was facing. The end result is that the Respondent's preliminary objection fails and the same is hereby dismissed with costs to the advocate with the bill.

Dated and delivered at Nyeri this 29th day of June 2007.

MARY KASANGO

JUDGE