



REPUBLIC OF KENYA

HIGH COURT OF AT NAIROBI (MILIMANI LAW COURTS)

Civil Case 2222 of 1986

DAVID MBURU GATHAIYAPLAINTIFF

V E R S U S

MUNICIPAL COUNCIL OF NAKURUDEFENDANT

R U L I N G

There are two applications under consideration in this ruling. Both may be said to be by the Plaintiff/Decree-Holder. The first one is chamber summons dated 28th February 2007 brought under Order 42, rule 1(2) of the Civil Procedure Rules (the Rules). It seeks leave to appeal against the order of the court of 13th December 2006. That order dismissed the Plaintiff's application by chamber summons dated 13th July 2006 (brought under Order 22, rules 1A and 10 of the Rules and also under Section 3A of the Civil Procedure Act, Cap. 21 (the Act)). The application sought a garnishee order to attach a debt due to the Defendant/Judgment-Debtor by the Garnishee, NATIONAL BANK OF KENYA LIMITED. The said order of 13th December 2006 also allowed the Defendant/Judgment-Debtor's application by chamber summons dated 23rd October 2006 which had sought to set aside the garnishee order *nisi* issued pursuant to the Plaintiff's application for garnishee orders.

The second application under consideration herein is the chamber summons dated 4th May 2007. It seeks substitution of one DAVID MBURU KAMAU (hereinafter called the Applicant) in place of the Plaintiff/Decree-Holder, DAVID MBURU GATHAIYA, who is said to have died on 2nd January 1993. The application is made under Order 23, rules 3(1) and 12 of the Rules.

The application dated 28th February 2007 is brought upon the grounds that the applicant therein, who was the same David Mburu Kamau who seeks to be substituted in place of the deceased Plaintiff/Decree-Holder, was dissatisfied with the order of 13th December 2006 and intends to appeal to the Court of Appeal; that he has already lodged a notice of appeal and applied for proceedings; and that the leave sought will not prejudice the Defendant/Judgment-Debtor. The application is supported by an affidavit sworn by the Applicant's advocate, ELIJAH BITANGE MAGETO. It is not clear why the Applicant could not himself swear the affidavit.

The Defendant/Judgment-Debtor has opposed the application upon the grounds set out in the replying affidavit sworn by one ALBERT LEINA, its Town Clerk, and filed on 20th March 2007. Those grounds are, in effect:-

1. That the applicant had no *locus standi* to bring the application for garnishee orders that was dismissed on 13th December 2006, and that by the same token he has no capacity to appeal against the said order.

2. That the general power of attorney which the Applicant had relied upon in the garnishee application was suspect, the same having been donated **after** the Plaintiff/Decree-Holder had died.

The application dated 4th May 2007 is brought upon the grounds that the Plaintiff/Decree-Holder died on 2nd January 1993; that the cause of action survived him, that the Applicant has already been appointed the legal representative of the estate of the deceased Plaintiff/Decree-Holder; that the Defendant/Judgment-Debtor will not be prejudiced in any way by the order sought; and that it is fair and just that the order be granted. The application is supported by the Applicants' affidavit to which are annexed the death certificate of the Plaintiff/Decree-Holder, a limited grant **ad litem** under section 54 of the Law of Succession Act, Cap. 160 and an affidavit said to have been sworn on 17th August 1992 by the deceased Plaintiff/Decree-Holder to explain the variance in his names. He also deponed in the affidavit that the suit was determined on 1st March 1988 and was now at the execution stage. There is a supplementary affidavit sworn by the Applicant in response to the replying affidavit filed by the Defendant/Judgment-Debtor. I shall refer to it later.

The relying affidavit is sworn by one FELIX GITARI MBIUKI, the Defendant/Judgment-Debtor's Treasurer. The grounds of objection to the application taken in the replying affidavit are, in effect:-

1. That the Applicant's intentions in this matter are **male fides** and he has not been forthright and candid.
2. That he has on two previous occasions made false depositions as shown in paragraph 4 of the replying affidavit.
3. That he is abusing the process of the court.
4. That the application has been made too late or otherwise after inordinate and unexplained delay.
5. That the Applicant has not properly established that he is a beneficiary of the estate of the deceased Plaintiff/Decree-Holder and therefore entitled to the proceeds of the decree herein.
6. That even the papers filed in the succession court by the Applicant are suspect as shown in paragraph 8 of the replying affidavit.
7. That in any event the suit has abated.
8. That it is not true that the Applicant is the closest surviving relative of the deceased Plaintiff/Judgment-Debtor.

In his response contained in the supplementary affidavit already mentioned, the Applicant has pointed out that issues that ought to have been placed before the succession court cannot be properly raised in this court. He has also denied the allegations of impropriety made against him. He also deponed that the Defendant/Judgment-Debtor paid part of the decretal sum as late as 27th May 2006. It is however not disclosed to whom such payment was made; nor is it clear from the bank statement exhibited in the supplementary affidavit that the payment was towards the decretal sum herein. The Applicant has also deponed that the Defendant/Judgment-Debtor passed a resolution on 31st January 2000 to pay the decretal sum. There is annexed what is said to be the relevant minute of the municipal council.

I have considered the submissions of the learned counsels appearing which were in accordance with the parties' pleadings. I will first deal with the application dated 4th May 2007 (for substitution). Under Order 23, rule 3 (1) of the Rules this application ought to have brought within one year of the death of the Plaintiff/Decree-Holder. The Plaintiff/Decree-Holder is said to have died on 2nd January 1993. The application was filed on 4th May, 2007, that is about 14 years since the Plaintiff/Decree-Holder died.

There is no explanation at all why the applicant did not file the application within the stipulated time. Under sub-rule 2 of rule 3 aforesaid, the Plaintiff's suit abated after expiry of one year since his death as there was no application made within that one year for substitution. It has been argued by the Applicant that a suit that has been heard and determined cannot abate. I beg to differ; whatever remained of the suit did indeed abate. What remained of the suit? Execution of the decree remained. It will be noted that there is no provision in the Civil Procedure Act or the Rules for the legal representative of a deceased decree-holder to execute the decree without the necessity of being made a party in the proceedings by way of substitution. This is unlike in the case of a deceased judgment-debtor: under section 37 of the Act, where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased, without the necessity of being made a party in the proceedings by way of substitution.

The outstanding portion of the Plaintiff/Decree-Holder's suit can, however, be revived under rule 8 (2) of the same Order 23 upon application by the person claiming to be his legal representative. But there is a burden that such person must discharge under that sub-rule; he must prove that he was prevented by any sufficient cause from continuing the suit. The Applicant herein has not even attempted to show what prevented him for fourteen (14) years from seeking substitution.

In the result therefore the application by chamber summons dated 4th May, 2007 is without merit. It is hereby dismissed with costs.

With regard to the chamber summons dated 28th February, 2007 (for leave to appeal against the order of 13th December, 2006), the Applicant obviously had no *locus standi* to bring the chamber summons dated 13th July, 2006 that was dismissed by that order. He had no capacity because he had not been substituted in place of the Plaintiff/Decree-Holder. Furthermore, the application of 28th February, 2007 was dismissed upon the ground that no execution process can issue against a local authority, even by attachment of a debt, because the same is prohibited by section 263A of the Local Government Act, Cap 465. That section is not amenable to any other interpretation. That being the case, any appeal the Applicant might lodge against the order of 13th December, 2006 would be futile. I should not permit such an appeal to vex the Judgment-Debtor. I must therefore refuse the application. It is hereby dismissed with costs.

Both applications under consideration in this ruling are therefore dismissed with costs. Orders accordingly.

DATED AT NAIROBI THIS 12TH DAY OF JULY 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 13TH DAY OF JULY 2007