



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Civil Appeal 61 of 2005

ZIPPORAH K. MBAYA ..... APPELLANT

V E R S U S

M'MWONGERA MIRURI ..... RESPONDENT

(Being an appeal from the ruling and orders made in Meru CMMCC No.807 of 1995 by M. S. G. Khadambi, SRM on 3<sup>rd</sup> August, 2005).

J U D G M E N T

In a very short ruling the court below (M. S. Gidali, SRM) appointed the appellant herein the legal representative of Ayub Mbaya Mwongera, (the deceased) the defendant in Civil Suit No. 807 of 1995 who died on 27<sup>th</sup> January, 2001. The appellant is the widow of the deceased. Arguing this appeal learned counsel for the appellant submitted that the lower court erred by failing to find out if indeed the appellant was the deceased's legal representative. That the fact that the appellant is a widow of the deceased does not automatically make her a legal representative. It was also argued that the suit had abated.

On his part learned counsel for the respondent argued that the lower court properly exercised its discretion in making the orders under reference.

I have duly considered these arguments and hold the following view of the matter. There are basically two issues to be determined in this appeal, namely, whether the appointment of the appellant as the legal representative of the deceased was proper and whether the suit had abated.

Order 23 rule 4 of the Civil Procedure Rules provides that where one of two or more defendants die and the cause of action does not survive or continue against the surviving defendant(s) alone or a sole defendant dies and the cause of action survives, the court, on application, shall cause the legal representative of the deceased defendant to be made a party to the suit. The phrase "legal representative" is a term of art which derives its meaning from Section 2 of the Civil Procedure Act. It means;

***"..... a person who in law represents the estate of a deceased person, and where a party sues or, is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued".***

Only a person to whom a grant of representation has been made in respect of the estate of a deceased person can represent the deceased's estate. In the present appeal, it was mandatory for the court below to satisfy itself that a grant of representation had been made to the appellant before making the order in question. Appointment of a legal representative can only be made under the Law of Succession Act and not the Civil Procedure Rules. Regarding the second issue, as a general rule the death of a plaintiff or defendant in any suit does not cause a suit to abate if the cause of action survives or continues.

An application, however, must be made within one year following the death of the plaintiff or defendant failing which the suit abates. See order 23 rule 4(3) of the Civil Procedure Rules. I have observed clearly that the deceased died on 27<sup>th</sup> January 2001. So far it can be said that no proper application to appoint a legal representative has been made in view of my holding above. Nearly six years have elapsed since the death of the deceased. The suit, therefore, has abated.

In the result this appeal is allowed with costs to the appellant.

Dated and delivered at Meru this 21<sup>st</sup> day of September, 2007.

**WILLIAM OUKO**

**J U D G E**