



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 663 of 2005

MOHAMED SIAKA ALI PLAINTIFF

VERSUS

SUN PALM LIMITED AND 3 OTHERS DEFENDANTS

RULING

After death of the plaintiff on the 5th August, 2005 a Chamber Summons dated 7th August 2006 was filed under Order XXIII Rules 1 and 3(2) and 12 of the Civil Procedure Rules.

The said application was withdrawn by consent with direction to file a fresh application, which was done by filing a Chamber Summons dated 28th September 2007. It is premised under the same provisions as specified hereinbefore.

It seeks for the order that:-

“Mohamed Shaibu Shosi be appointed legal representative of the plaintiff Siaka Ali the deceased plaintiff herein.”

It is agreed by all the counsel that 5th August, 2006 fell on Saturday which is not a working day. But learned counsel for the Defendants have argued that under the provisions of Order XXIII Rule 3(2) the suit has abated on 5th August, 2006, and thus there is no suit.

Rule 3(2) provides:

“Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff”.

I shall like to note also the provisions of Rule 4(3) of Order XXIII which Rule provides for the abatement of the suit on account of the death of one or more defendants:

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

Relying on Rule 3(2) aforesaid, the counsel for the Defendants/Respondents urged that the suit abated

on 5th August, 2006 and thus there is no suit. I do not think that the said argument can stand in view of the provisions of Order XLIX Rule 3 of the Civil Procedure Rule and the agreement on the fact that 5th August, 2006 fell on a Saturday when the courts are closed. The said Rule stipulates:

“3. Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open”

The Application was filed on 7th August, 2006 which was the immediate next working day. I shall thus reject that contention by the Respondents, and find that the application filed on 7th June 2006 was made within the period allowed by the law.

Second issue raised in opposition was that as the affidavit in support was sworn by the counsel of the applicant, the application is fatally defective having no basis to support it.

The case of **Kisya Investments Ltd. and another –Vs- Kenya Finance Corporation Ltd. and Others (H.C.C.C.S. No. 3504/93)** and **Triton Petroleum Co. Ltd. –Vs- Kirinyaga Constructor Kenya Ltd. (H.C.C.S. No.830 of 2003)** were relied upon.

I do agree with due deference to the findings made in both the cases to the effect that the counsel for a litigant cannot swear an affidavit containing evidentiary facts which could be questioned and the counsel may have to relegate to the witness box.

I shall quote pertinent portion of the Kisya’s case (*supra*) from the bottom of page 2 thereof, namely:

“The applicant’s counsel has deponed to contested matters of fact and said that the same are true and within his knowledge, information and belief. It is not competent for a party’s advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters the advocate courts an adversarial invitation to step down from his privileged position at the bar into the witness box..... He cannot be both counsel and witness in the same case”.

Same was the sentiment of the court in the second case of Triton (*supra*).

Supporting affidavit before me which is sworn by the counsel for the applicant only avers to the facts which are supported by official documents from the Registrar of Births and Deaths as well as from the court record. There is no contested fact which can be questioned.

It is undeniable that the Advocates on record may swear and file an affidavit sparingly and definitely not wherein adversarial facts are deponed as if they are from his knowledge.

I shall only determine the issue on the affidavit before me and considering its contents I do not see any objection as to its propriety within law.

The second objection also is thus rejected.

Lastly Mr. Odera the Learned Counsel for the 2nd Defendant/Respondent raised an interesting issue to the effect that this court has not jurisdiction to grant prayer in the form in which it is stipulated.

I have already specified the prayer in the earlier part of this ruling. What is contended is that this court cannot appoint a legal representative of the deceased plaintiff and that is what it is prayed.

The relevant part of rule 3(1) of Order XXIII provides:

“3(1) Where one, two or more plaintiffs or sole surviving plaintiff dies and the cause of action

survives or continues, the court on application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.”

I do note that the application does not seek any further or other order deemed fit and is limited to the only prayer which unfortunately cannot be granted by the court under the provisions.

It is unfortunate that the wordings of the prayer are not appropriate and I have no option but to uphold the objection raised.

I thus dismiss the application with leave to file a fresh one within seven days from the date of this ruling.

Costs in the cause.

Dated, Delivered and Signed at Nairobi this 30th day of October, 2007.

K.H. RAWAL

JUDGE

30.10.07