

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

Civil Case 776 of 2000

BOOKER KUNGU MUNGAI

DANIEL MUNGAI

MONICA WANJIRU MUNGAI

MUNCON CONSTRUCTION.....PLAINTIFFS

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

R U L I N G

This is an application by the Defendant, firstly under Order 16 rule 5(c) of the Civil Procedure Rules for dismissal of the 3rd and 4th Plaintiffs' suit for want of prosecution. Under that rule, if within three (3) months after the removal of the suit from the hearing list the Plaintiff or the court of its own motion on notice to the parties, does not set down the suit for hearing, the Defendant may either set the suit down for hearing or apply for its dismissal. This particular prayer is brought upon the ground that from 8th December, 2004 the 3rd and 4th Plaintiffs have failed or neglected to set down the suit for hearing and prosecute the same. The second prayer of the application is for an order that the Defendant be awarded costs against the estates of the 1st and 2nd Plaintiffs of defending the suit. That order is sought under Order 23, rule 3 (2) of the Civil Procedure Rules upon the ground that the 1st and 2nd Plaintiffs' suits abated on 8th December, 2004 and 11th March, 2002 respectively. There is an affidavit sworn by one EDWARD M. ONYANGO who describes himself as the credit analyst of the Defendant which gives the factual background of the application.

The Plaintiffs have opposed the entire application upon the grounds set out in the replying affidavit of their advocate, CHARLES NDUNGU GITHUKA.

I have read the supporting and replying affidavits. I have also given due consideration to the submissions of the learned counsels appearing. I will first deal with the application as concerns the 1st and 2nd Plaintiffs' cases. Papers placed before the court show that the 1st Plaintiff died on 1st December, 2003 while the 2nd Plaintiff died on 11th March, 2001. It is common ground that there was no application for substitution of their legal representatives in their places under rule 3 (1) of Order 23 made within one year of their respective deaths. **Under sub-rule (2) of the same rule their suits abated**, and the Defendant was entitled to apply for costs incurred by it in defending the suit from the estates of those two deceased Plaintiffs. It is of no consequence that there is an application for substitution in respect of the 2nd Plaintiff (chamber summons dated 27th November, 2003 filed out of time), or that the court by order of 3rd April, 2003 extended the time for filing that application. The fact of the matter is that the 2nd Plaintiff's suit abated by operation of law for want of an application for substitution within one year of his death. For the application for substitution in respect to his case (chamber summons dated 27th November, 2003) to be sustainable his suit must first of all be revived under rule 8 (2) of Order 23. There is no such application before the court. With regard to the 1st Plaintiff's suit there is not any application for substitution, belated or otherwise. For the above reasons, therefore, I must grant prayer no. 2 of the

application.

Regarding the prayer for dismissal of the 3rd and 4th Plaintiffs' cases for want of prosecution it is the Defendant's case that the suit was last removed from the hearing list on 4th December, 2003, and that since that date those Plaintiffs have not set down the suit for hearing. I have perused the court record. On that date the suit did not come up for hearing, and therefore it could not have been removed from the hearing list. The case was coming up for mention as ordered by Mutungi, J. on 19th November, 2003. The mention was for the purpose of establishing whether there was substitution for the deceased Plaintiff(s). Paragraph (c) of rule 5 of Order 16 is specific: in order for the Defendant to take advantage of it the suit must have been removed from the hearing list of 4th December, 2003. As already seen, the suit was not coming up for hearing on that date, and could thus not have been removed from the hearing list. This is sufficient to dispose of prayer no. 1 of the application, which I must dismiss for the reasons given above. All the other matters argued by both counsels were not germane to the application at hand, and I will not consider them.

In the event, prayer no. 1 of the application is dismissed while prayer no. 2 of the application is allowed. In these circumstances the just order as regards costs is that parties do bear their own costs of the application. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF MARCH, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 24TH DAY OF MARCH, 2006.