



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
MISC CIVIL CASE 502 OF 2005

ISSA TIMAMY PLAINTIFF

V E R S U S

REPUBLICDEFENDANT

R U L I N G

This Ruling relates to a Preliminary Objection raised by the Applicant herein, orally, in court when this matter came up for hearing on 1-12-2005. The issue raised orally by Mr. Nyandieka learned Counsel for the Applicant was whether the complainant in the lower court having died, without prosecuting the private prosecution the complaint abates or survives him.

Mr. Mugambi, learned Counsel for the deceased Complainant objected to the issue being raised on the ground that he had no notice of it before it was raised. I overruled the objection, and allowed parties to urge the application for and against it.

Perhaps before, I consider the objection itself, it is necessary to give a short brief of what the complaint is about, the reference to the Constitutional Court and the subsequent raising of the Preliminary Objection. The complainant was a land owner in Malindi Sub-District. He sought to sell all or some of his land to a Client (*the purchaser*) represented by the Applicant or the Applicant's firm. The matter was brought before the appropriate Land Control Board in Malindi and the application for approval of the transaction was deferred by that Board. The Complainant alleged that despite the deferment of the consideration of the application for consent to transfer the land, the Applicant or the Applicant's firm's managed to secure a consent of the Land Control Board, and had the Complainant's land transferred to the Applicant's client, the Purchaser, called Sum Parm Limited.

The complainant alleges that the alleged letter of consent to transfer his land to the said company was a forgery and when the Republic through the Attorney-General declined to prosecute the Applicant, the complainant instituted a private prosecution in the Chief Magistrate's Court Nairobi, Criminal Case No. 2 of 2005 in which the complainant had the applicant and three others summoned to court to answer four charges, namely conspiracy to defraud contrary to Section 317 of the Penal Code, Forgery Contrary to Section 350 of the Penal Code, uttering a false document contrary to section 353 of the Penal Code, making a false statement contrary to Section 21 of the Land Control Act, and entering and remaining in the possession of land in furtherance of voided transaction contrary to Section 22 of the Land Control Act as read with Section 6 thereof.

The Applicant together with others was to appear in answer to the summons on 14-04-2005. However

due to good intelligence, and quick action by the Applicant's Counsel, the Applicant received a reprieve in terms of the temporary orders issued by my brother Hon. Mr. Justice Ibrahim on 13-04-2005. In the meantime, the complainant one Mohammed Siaka Ali died on a date presumably before the 14-04-2005 when the applicant and three others were to appear in court, to answer the summons in the private prosecution instituted by the Complaint, hence the issue raised by the Applicant's Counsel, whether or not the complaint abates upon the death of a complainant in criminal matters unlike on an appeal which abates upon the death of the appellant.

Learned Counsel for the Applicant (**Mr. Nyandieka**) and Mr. Mugambi for the Interested Party and Mrs Murungi a friend of court acknowledged that there was no precedent on the matter, and the matter may be determined on analogy and construction of some near relevant provisions of the Criminal Procedure Code (**Cap 75**), Laws of Kenya (the Criminal Procedure Code”).

The position on the ground is that there is pending before the Chief Magistrate's Court an application for leave to prosecute the Applicant and three others. The summons to do so had not been served by the time the Applicant had filed and obtained temporary orders staying the proceedings in the Lower Court. Leave to prosecute had also not been granted, and what is therefore pending, before the Chief Magistrate's court is an application to prosecute. In Mr Nyandieka's submission, it would be futile for the applicant to argue the Originating Summons and obtain orders in vain when the complainant in the Lower Court is deceased. In his view therefore, and a considered view at that, is that once a complainant in the lower court is deceased, the criminal proceedings abate, and that once proceedings abate, there would be no need for the hearing and determining of the Originating Summons (***i.e the Constitution Reference***).

Mr. Nyandieka had no direct authority for this proposition, but referred to different areas of law for the guidance of the Court in reaching a decision.

Firstly, the proceedings in the Chief Magistrate's Court are criminal in nature, and this is not disputed. There is a draft charge sheet attached to the Complaint on Oath by the deceased setting out the proposed charges which are themselves criminal in nature. The intended offences are cited under the Penal Code and the application is brought pursuant to the provisions of Section 89 of the Criminal Procedure Code.

Secondly, Counsel submitted that criminal proceedings are different, from civil proceedings. There is no provision in the Criminal Procedure Code which addresses the issue of death of a complainant. Section 360 of the Criminal Procedure Code on abatement of appeals, only addresses the issue of the death of an appellant, the person who appeal is the person who has the right of appeal, and where that person dies, the appeal abates. The courts apply this provision, that where an appellant dies before the determination of his appeal, the appeal abates.

Thirdly, there is a difference in Civil Proceedings. Under Order XX III, Rule 1 of the Civil Procedure Rules, the death of a defendant or a Plaintiff does not cause a suit to abate if the cause of action survives, or continues. Order XXIII, rule 4 (3) of the Civil Procedure Rules provides that where within one year, no application is made under rule 1 of the said order, the suit shall abate against the Defendant. Under the said Order XXIII, rule 8 where a suit abates, no fresh suit shall be brought on the same cause of action. This is the position so far as civil actions, and civil rights are concerned. In those civil rights, citizens or litigants have, or could have a cause of action, and where a cause of action survives, the rules provide for a course to follow. If the action does not survive, then of course, the action automatically abates.

In criminal jurisprudence, it is the Attorney-General who is under Section 26 of the Constitution, vested with the power to institute, take over and terminate any prosecution. Any other person who can institute a prosecution of a criminal matter is either a person appointed by the Attorney-General under the relevant provisions of the Criminal Procedure Rules (**Sections 82 – 85 of Civil Procedure Code**), to whom the Attorney-General has delegated prosecution powers under Section 26 (5) of the Constitution, or in the case of a private prosecution, leave of court has been granted to such other person under Section 89 of the Criminal Procedure Code, and then only can such private person prosecute another person.

In Private Prosecution Criminal Case No. 2 of 2005, the Complainant, Mohammed Siaka Ali had filed a complaint seeking leave of Court to prosecute the Applicant and three other persons. The application was not determined. In granting or refusing to grant leave to institute a private prosecution, Mr Nyandieka referred the Court to the decision of Simpson and Sachdeva JJ, in the case of **KIMANI –VS-KIHARA [1985] K.L.R. 79** to which I shall presently address myself once I have considered the contrary arguments by Mr. Mugambi learned Counsel for the Interested Party, and Mrs Murungi, as an *amicus curiae*.

Mr. Mugambi, invited the court to look at the prayers sought in the Originating Summons, a Constitutional Reference that the Applicants Constitutional rights are being violated by virtue of the application for private prosecution of the Applicant and three others, that such prosecution is against the public interest, that it is oppressive, that is brought *mala fides*, and for other ulterior and illegal motives.

In Criminal law, other than in the case of appeals, where an appeal abates upon the death of an appellant, there are no provisions as to what happens when a complainant dies. Under Section 202 of the Criminal Procedure Code, where a complainant fails to attend court, then the case shall be dismissed. It is the only provision, Mr. Mugambi submitted, which refers to actions of a complainant.

In contrast in civil jurisprudence, for instance in cases of assault or defamation, where the party who claims to have been injured by reason of the assault, or defamation dies, the action abates automatically. Counsel therefore submitted that for the court to determine whether the case abates or survives the death of the complainant, the court must look at the history of the case, the issue in the case, that is a dispute/complained about land which, the complaint alleges to have been illegally transferred without the consent of the Land Control Board. Counsel informed the Court that he, was in the process of filing an application for Letters of Administration with a view to appointing the deceased complainant's representative to take up the complaint.

For these reasons Mr. Mugambi urged the court to disallow the preliminary objection and direct that the matter be referred to the subordinate Court so as to allow him to file the private prosecution.

The Court's "*friend*" Mrs Murungi confirmed the views expressed by both Mr. Nyandieka, and Mr. Mugambi that there is no provision in the Criminal, Procedure Code, as to what happens to a complaint where the complainant dies. Counsel referred to Sections 202 and Section 206 of the Criminal Procedure Code which provide what happens where the complainant does not appear. The Court may acquit the accused (Section 202 – where the complainant does not appear), or dismiss the charge with or without costs (**Section 206**). These Sections however apply to a living complainant who does not attend court, during the hearing of the case. There is no question regarding the reasons for non-attendance.

Counsel submitted that the matter be referred to the trial magistrate for determination presumably under Section 202 or 206 of the Criminal Procedure Code as clearly this not being an appeal, the provisions of Section 306 of the Criminal Procedure Code do not apply.

The above is what the three-counsel told me regarding the Applicant's Preliminary Objection, that the complainant having died, the complaint died with him, or as they say, in case of a dead appellant, the appeal abates, as it was personal to him. So what happens to an applicant/complainant who dies before he/she can prosecute his/her complaint?

Clearly, the matter cannot as suggested by learned counsel for the Interested Party and the *amicus curiae* be referred to the lower court. The case of **KiMANI –VS- KAHARA** (*supra*) laid down the principles upon which the court will decide whether or not to grant permission to conduct a private prosecution as follows:-

“4 (a) it ought to be ascertained whether or not the

Attorney-General or Police have been informed. The Court may adjourn the matter to enable a report to be made. However in simple cases such as trespass and assault this may not be necessary;

- (b) where the Attorney-General has or had previously declined to institute the proceedings, the magistrate should grant the permission to conduct a private prosecution in default of the Attorney-General doing so;
- (c) the *locus standi* of the applicant should be considered;
- (d) the fact of whether or not the applicant has suffered any personal injury, damage or whether it is being done for political consideration, should be taken into account.

5. Even though it be true every citizen has sufficient interest in seeing the law being enforced it does not follow that every citizen has a sufficient interest in conducting the prosecution of another citizen for an offence which has caused him no damage or injury;

6. A right of any other person to institute or undertake criminal proceedings can be inferred from Section 26 (1) and (2) of the Constitution which provide that the Attorney-General can take over and continue criminal proceedings (other than those of a court martial) instituted or undertaken by any other person or authority and he also has power to discontinue any such proceedings at any stage before judgment.

7. Section 89 of the Criminal Procedure Code expressly confers the right to institute criminal proceedings to any person by means of a complaint to a magistrate and section 88 confers the right to any person to conduct the prosecution subject to the permission of “***any magistrate trying the case.***”

In the present matter, although the Applicant and his co-accused were duly summoned before the lower court, no prosecution or “***trial of the case***” could be said to have commenced until the applicant and his co-accused are before court. Any purported grant of permission before the deceased person are before court is but null and void. There are however proceedings pending in the lower court subject in this instance to the determination not of the Originating Summons, but of the Preliminary Objection raised herein.

For the purposes of determining that objection, the grounds in the Originating Summons are not in issue, nor would the merits of the complaint.

There is no question but that Section 89 of the Criminal Procedure Code, expressly confers the right to institute criminal proceedings on any person (***including the complainant***) by means of a complaint to a magistrate and Section 88 thereof confers the right to any person to conduct the prosecution “**subject to the permission of any magistrate trying the case.**”

The Criminal Procedure Code, (***Sections 202, and 206***) assume however that the complainant or complainants will attend court. If they do not attend court, certain consequences flow from their non-attendance. The case against the accused may be dismissed, with or without costs. The court does not concern itself with reasons why they did not attend court. In appeal situations, the appeal abates automatically by operation of law under Section 360 of the Criminal Procedure Code once the appellant dies.

For whatever reasons historical or otherwise, the Attorney-General was vested with power to institute, take over or terminate prosecutions. No one questioned this awesome power of the Attorney-General. Conventional wisdom and indeed the Constitution and the law required, and requires him/her to exercise those powers with diligence, and without the direction of anybody else or authority and I believe he does so. Occasionally however, the citizenry is not satisfied with either the bona fides or diligence or this exercise of such authority, and go a notch higher by seeking the intervention of the other arm of government, namely the judiciary. The Judiciary too is guided by law, and where it is called upon to exercise a discretion, it must do so judicially in the sense that it must do so without favour or fear in accordance with its Oath of Office.

In the matter at hand, the complainant if he were alive would be required to prosecute his complaint by personal attendance before the magistrate. If he failed to do so, the magistrate is required to dismiss the

charge or complaint, and has the discretion to award costs to the accused such as the Applicant in this case.

Where the complainant is, as in this case dead, he will only attend the **Last Judgment**, upon the Resurrection Day. (*for those who confess that faith*). In the mean time, being a Criminal Complaint, and not a Civil matter (which might have survived him, and his estate takes appropriate action under Order XXIII of the Civil Procedure Rules), his complaint cannot survive him. It is as it were, an applicant who upon conviction appeals against both the conviction and the sentence passed against him. If he dies pending the appeal, the appeal dies with him or as they say under Section 360 of the Criminal Procedure Code, it abates upon his death.

Logic and common sense dictates this conclusion. It is the deceased who made the complaint. It was his right. The subject matter of the complaint does not of course die with him. That remains. He cannot however prosecute it. If a member of his family duly empowered in law, (hardly his Counsel - he will be subjecting himself to appearance on the witness stand or box and be subject to cross-examination,) is in addition, sufficiently enabled, he must lay a fresh complaint before the magistrate, and not otherwise.

Being of this mind in the matter, I must uphold the Applicant's Preliminary Objection on a point of law that notwithstanding the absence of any provision in law, where a complainant, pursuant to the provisions of Section 88 and 89 of the Criminal Procedure Code dies, his complaint "**dies**" **with him or it abates if he were a dead appellant**" under Section 360 of the said Criminal Procedure Code. I consequently direct that the Applicant and his co-accused be discharged of the charges under Nairobi Chief Magistrate's Criminal Case No. 2 of 2005. There shall be Orders accordingly. Each party bear its own costs herein.

Dated and delivered at Nairobi this 2nd day of March, 2006,

ANYARA EMUKULE

JUDGE.