



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Case 1671 of 1994

KENYA FARMERS CO-OPERATIVE

UNION LIMITED.....PLAINTIFF

VERSUS

CHARLES MURGOR (DECEASED) t/a

KAPTABEI COFFEE ESTATE.....DEFENDANT

R U L I N G

The Plaintiff herein, **KENYA PLANTERS' CO-OPERATIVE UNION LIMITED**, filed suit against the Defendant, **CHARLES MURGOR (t/a KAPTABEI COFFEE ESTATE)**, for Kshs.9,026,337/75 and interest, the same being due on account of a loan advanced. The Defendant died on 23rd April, 1995 before the suit was heard. By chamber summons dated 18th December, 1997 (filed on 19th January, 1998) the Plaintiff applied under Order 23, Rule 4 of the Civil Procedure Rules (the Rules) for substitution of the deceased Defendant's legal representatives in his place. Those legal representatives were named as **JOHN K. MURGOR, HENRY K. MURGOR, AUSTIN K. MURGOR and GEORGE K. MURGOR**. The application was allowed on 5th March, 1998. The record of the court shows that there was appearance only for the Plaintiff/Applicant before the judge.

The suit was subsequently heard. The record shows that one witness testified for the Plaintiff and one of the substituted defendants, **JOHN K. MURGOR**, testified for the Substituted Defendants. John K. Murgor subsequently died on 17th January, 2000 before judgment was delivered on 29th November, 2001. The court found for the Plaintiff and granted it relief as prayed in the plaint.

The surviving Substituted Defendants have now come to court by notice of motion dated 21st November, 2003 seeking orders that there be stay of execution of decree pending hearing and determination of the application (prayer No. 2), that the judgment of 29th November, 2001 and all consequential orders be reviewed and set aside or varied and the suit be re-opened for further defence hearing (prayer No. 3), that the Surviving Defendants be granted leave to substitute John K. Murgor, deceased (prayer No. 4) and that the Plaintiff do amend its plaint dated 20.4.1994 (prayer No. 5). Prayer No. 2 was granted *ex parte* on 27.11.2003. When the rest of the application came up for hearing on 9.5.2005 the Court ordered that prayer No. 3 be heard first and prayers Nos. 4 and 5 do await the outcome of prayer No. 3.

Prayer No. 3 is brought under Order 44, Rules 1, 2 and 4 of the Rules. The judgment of 29.1.2001 sought to be set aside was passed by Onyango Otieno, J. (as he then was). He is now a judge of appeal and no longer available to hear the present application. During arguments an important point of law was canvassed. That point is this. The Defendant died on 23rd April, 1995. Application to substitute his legal

representatives was made after 12 months from the date of his death. The suit as against the deceased Defendant had therefore abated when the application for substitution was made. There was thus no suit subsisting in which substitution could be lawfully made. The proceedings leading to the judgment, the judgment itself and the consequent decree were thus a nullity and must all be set aside. Those were the submissions made on behalf of the surviving Substituted Defendants.

For the Plaintiff/Decree-Holder it was submitted that the issue now raised ought to have been raised at the time of hearing of the application for substitution, or at the latest, at the time of the trial. It is now too late to raise the issue. The judgment (and decree) resulted from *inter partes* hearing of the suit. The case was heard *inter partes* and one of the Substituted Defendants testified for the defence. The Substituted Defendants were represented by counsel during the hearing. The application for substitution had been duly served. By making the order of substitution the Court restored the suit, if it had abated.

I have considered the submissions of the learned counsels. There is no dispute that the original Defendant died on 23rd April, 1995. His death certificate is annexed to the supporting affidavit. There is also no dispute that the application for substitution (by chamber summons dated 18th December, 1997) was filed on 19th January, 1998. The court rubberstamp on the face of the application says so. Clearly, the application for substitution was made more than one year after the Defendant's death, in fact more than two years after the death. Under Order 23, Rule 4(1) of the Rules, where a sole defendant 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 defendant to be made a party and shall proceed with the suit. Subrule (3) of the same Rule is in the following words-

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

In the instant case there was no application for substitution made within one year since the death of the Defendant. Therefore as a matter of law the suit as against him abated. When substitution was subsequently purportedly made on 5th March, 1998 there was no suit subsisting in which substitution could be made. It had abated on or about 23rd April, 1996, that is, one year since the death of the Defendant. The order of substitution was thus made in error. It was unlawful and ought not to have been entered.

It is to be noted that under Rule 8(2) of the same Order 23 the plaintiff can apply for an order to revive a suit which has abated; and if he proves that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit upon such terms as to costs or otherwise as it thinks fit. In the present case there was no application for revival of the suit which had abated by operation of the law.

The suit having abated on or about 23rd April, 1996, as seen above, the order of substitution of 5th March, 1998 was a nullity in law and of no effect. Equally, the subsequent hearing and judgment were null and void in law; the resulting decree was also equally a nullity. It is not a sufficient answer that the application has come too late in the day or that these issues ought to have been raised at the time of hearing the application for substitution or at the latest at the time of hearing of the suit. Ofcourse it would have been best had these issues been raised as early as possible. But it is really a matter that goes to the jurisdiction of the court. Does the court have jurisdiction to order substitution (except in an application to revive the suit) where the suit has already abated by operation of the law? Obviously not. Does the court have jurisdiction to hear and determine a suit that has already abated by operation of the law? Certainly not. If a suit has abated it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time.

In these circumstances I will allow the application in prayer No. 3, but only to the extent that the judgment entered on 29th November, 2001 and the consequent decree and orders are hereby set aside. The surviving Substituted Defendants shall have the costs of this application. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF JULY, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 22ND DAY OF JULY, 2005.