



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Suit 117 of 2001**

**1. WALTER KUNDERT**  
**2. DORIS KUNDERT .....** **PLAINTIFFS**

**- Versus -**

**WARDA MOHAMED SHALI .....**  
**DEFENDANT**

**Coram:        Before Hon. Justice Mwera**

**Khatib for applicant**

**Lijodi for respondent**

**Court clerk – Mitoto**

**RULING**

By a Chamber Summons dated 24<sup>th</sup> March 2005 the defendant invoked O23 r. 3(2) Civil Procedure Rules and Section 3A Civil Procedure Act praying that the suit herein be marked as having abated because the 2 plaintiffs have since died. He also sought judgement on the counter claim.

Mr. Khatib submitted and Mr. Lijodi appeared to agree that the 1<sup>st</sup> plaintiff died in 1999. The 2<sup>nd</sup> plaintiff who then became the legal representative of the 1<sup>st</sup> plaintiff, also she died on 5<sup>th</sup> November 2003. That there had been no substitution (by her legal representative) since and so the suit has abated. Yes. From the time of death to the time this application was filed a year had gone by without substituting the dead plaintiff (s) and so under O23 r. 3(2) Civil Procedure Rules the suit has abated and it is thus so marked. Costs to the defendant in terms of that provision of law.

As for the counter – claim the defendant will not automatically get judgement following the above ruling. In essence a counter – claim is and can be treated as a separate suit. The defendant will take due course as regards further proceedings in it.

Orders delivered on 29<sup>th</sup> December 2005.

**J.W. MWERA**

**JUDGE**