



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 408 OF 2015

**STANLEY ALUKONYA NDIBIRE [Suing through Guardian and next
friend SELINA NDIBIRE.....PLAINTIFF**

VERSUS

**JOHN LUKOYE [Suing as the Legal Representative of the Estate of
ATANAS MUKOBERO.....DEFENDANT**

RULING

1. **John Lukoye [Suing as the Legal Representative of the Estate of Atanas Mukobero (Defendant)]**, Applicant, moved the Court vide the Motion dated 16th January, 2020 seeking for the following:

- (a) Leave to be substituted for and on behalf of the Estate of the late Atanas Mukobero, Defendant.
- (b) That the draft statement of defence be amended in the manner proposed in the draft amended statement of defence.
- (c) Costs be in the cause.

2. The application is based on the six (6) grounds marked (i) to (vi) on its face, and supported by the affidavit of **John Lukoye** sworn on the 16th January, 2020 summarized as follows:

- (i) That the Defendant passed on the 14th December, 2018 and that this Cause survived his death.
- (ii) That the Applicant filed ***Eldoret Chief Magistrate's Cause No. 239 of 2019***, and was granted Limited Grant of Letters of Administration Ad Litem on the 28th November, 2019.
- (iii) That it is only fair that he ***"be substituted as the Plaintiff in place of the deceased ATANAS MUKOBERO"*** and he be allowed to amend the pleadings.

3. The application is opposed by Selina Ndbire through her replying affidavit sworn on the 13th February, 2020 summarized as follows:

- (a) That she has sued as the guardian and next friend of the late Stanley Alakonya Ndbire who passed on the 11th October, 2018. That the suit against the Plaintiff has since abated and unless revived through an application, no proceedings subsists against the deceased's estate.
- (b) That from the date the Plaintiff passed on, a period of about 1½years has since lapsed.
- (c) That a judgment had been delivered before the Plaintiff passed on, and the application is hence a non-starter as there is no prayer to set aside the proceedings and judgment, and consequential orders arising therefrom.
- (d) That a defence at this stage will serve no purpose as there is a judgment against the Defendant.

(e) The application be dismissed with costs.

4. The application came up for hearing on the 18th February, 2020 when **Mr. Ngetich** and **Mwinamo**, learned Counsel for the Applicant, and Respondent respectively made their oral submissions for and against the application.

5. The following are the issues for the Court's determinations:

(a) Whether the suit has abated on the death of the Plaintiff and or the Defendant and if so, when?

(b) Whether the Applicant has made a reasonable case for substitution for the Defendant and amendment of the draft defence.

(c) Who pays the costs?

6. The Court has carefully considered the grounds on the application, the affidavit evidence, oral submissions by both Counsel, the record and come to the following conclusions:

(a) That this suit was commenced by **Stanley Alukonya Ndibire** through the Plaintiff dated and filed on the 9th November, 2015 against **Atanas Mukobero**. That subsequently, an amended plaintiff dated the 29th September, 2017 was filed on the 2nd October, 2017 through which Selina Ndibire was added as the guardian and next friend, through whom the Plaintiff was suing.

(b) That the Plaintiff passed on the 11th October, 2018 as confirmed by the Certificate of death No. 0514660, issued on the 5th December, 2018 that is attached to the replying affidavit deponed by **Selina Idaya Alakonya**.

(c) That Atanas Mukobero, the Defendant, subsequently passed on the 14th December, 2018 as can be seen in the Limited Grant of Letters of Administration Ad Litem issued in Eldoret Chief Magistrate's Cause No. 239 of 2019 on the 28th November 2019, and attached to the supporting affidavit sworn by John Lukoye on the 16th January, 2020.

(d) That the provisions of **Order 24 Rule 3(1) and 4(1) of the Civil Procedure Rules** allows the substitution of a deceased Plaintiff and Defendant respectively, upon application being made by the legal representative of the party. That **Rules 3(2) and 4(3)** thereof provides that where such a substitution application is not made within one year of the party's death, the suit "**shall abate**" so far as the deceased, Plaintiff and Defendant, is concerned respectively.

(e) That one year from 11th October, 2018 when the Plaintiff passed on, lapsed on or about 11th October, 2019. That further, one year from the 14th December, 2018 when the Defendant passed on lapsed on or about 14th December, 2019. That the record confirms that there was no application filed to replace the Plaintiff and the Defendant within the period of one year of their respective deaths. That by operation of the law, the Plaintiff's suit against the Defendant abated on or about 11th October, 2019 while the suit against the Defendant lapsed on or about 14th December, 2019. That accordingly, there is no suit in existence in which the Court could consider allowing John Lukoye to be substituted for the Defendant, and prayer (a) of the Motion cannot be granted. That prayer (b) of amending draft defence cannot also be allowed for the same reason, and further there exists a judgment dated 10th October, 2017 following the ex parte proceedings. That there is no application to set aside or vacate the ex parte proceedings and the judgment thereof, or to reinstate the abated suit, that was included in the Motion dated 16th January, 2020 or any other Motion.

(f) That as it is apparent that the Applicant has failed in his application, he will pay costs of the application to the Respondent in accordance with **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

7. The foregoing shows that the Motion dated the 16th January, 2020 has no merit and is dismissed with costs to the Respondent. Orders accordingly.

Dated and signed at Eldoret this 7th day of May, 2020.

S. M. KIBUNJA

JUDGE

Ruling read in the absence of all the Parties/Counsel and is to be transmitted digitally by the Deputy Registrar through the online media given by Counsel/Parties.

Court Assistant: Christine