



REPUBLIC OF KENYA



**Manyange (Deceased) v TG (Minor suing through her mother and next friend WMG)
(Civil Appeal E005 of 2022) [2024] KEHC 1083 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1083 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E005 OF 2022
DKN MAGARE, J
FEBRUARY 7, 2024**

BETWEEN

ANNE MOOCHI MANYANGE (DECEASED) APPELLANT

AND

**TG (MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND
WMG) RESPONDENT**

RULING

1. This Appeal arises from the Ruling and Order of Honourable G. N Barasa, RM, delivered in Ogembo PMCC No. 57 of 2020 on 7th December 2021.
2. By an application dated 12th May 2021, the Deceased prayed that the Respondent's suit be struck out for being a nullity. The Application was materially premised on the Ground that the suit was instituted against a person who was deceased and as such was untenable and an abuse of the court process.
3. After considering the Application, the Trial Court established that at the time of filing the suit, the Plaintiff was not aware of the death of the Defendant and it would be unfair to strike out the suit since the Plaintiff had suffered injuries.
4. The Trial Court thus struck out the Defendant from the suit and directed that the Plaintiff was at liberty to substitute the Defendant.
5. The Deceased being aggrieved by the finding filed the Memorandum of Appeal dated 25th January 2022.
6. The Ground of Appeal was materially that the Learned Magistrate erred in law and fact in failing to find that the suit was null and void and there was nothing to substitute.
7. The Deceased therefore sought the following reliefs:



- a. An Order that the suit in the lower court be struck out
- b. costs

Submissions

8. The Deceased submitted that this first Appellate court is mandated to reevaluate the evidence and arrive at its own conclusion. Reliance was placed on the case of *Selle & Another v Associated Motor Boat Co. & Others*.
9. It was further submitted that the trial court erred in failing to struck out the suit when it was proved that the Deceased was Deceased.
10. Counsel further submitted that there was no letters of administration to justify the legality of the suit and relied on the case of *Viktor Maina Ngunjiri & 4 Others v A.G & 6 Other* (2018) eKLR.
11. It was further submitted that the Trial Court had no jurisdiction to proceed with a suit in which the Defendant had died prior to its filing. Reliance was placed on the case of *Geeta Bharani Shah & 4 Others v. Omar Said Mwatayari & Another* (2009) eKLR where the Court of Appeal held that the trial court was plainly wrong in refusing to allow an Application in favour of Deceased person against whom the suit was filed after his demise. The deceased urged the court to dismiss the Appeal.
12. It is clear by now that the Appeal is tautological. The Deceased Appealed that since she was deceased, the court should have not struck out her name and order that she be substituted. She prayed for costs. These are the same grounds that the court used to strike out the name of the deceased.
13. The Respondent on her part filed submissions dated 9th February 2023. It was the submission of the Respondent that the Application was raised late and nothing to object to the suit against the Defendant was raised in the Defence.
14. It was further submitted that before striking out a suit under Order 2 Rule 15 of the *Civil Procedure Rules*, the court had to exercise caution and the lower court consequently acted in the interest of justice in not striking out the entire suit.
15. To buttress the point that the suit would not be summarily dismissed, counsel relied on the case of *Salesion Maribu v Meru County Council*, Civil Appeal No. 183 of 2002.
16. The Respondent prayed that the Appeal be dismissed with costs to her.

Analysis

17. This Court has considered the Record of Appeal filed in Court, submissions and authorities relied on by the parties in support and opposition to the Appeal.
18. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy.
19. In the case of *Selle & Another v. Associated Motor Board Company Ltd.* [1968] EA 123, the Court stated as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence,



evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

20. Further, in the case of *Mbogo and Another v. Shab* [1968] EA 93 where the Court stated:
- "... that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."
21. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
22. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows: -
- "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."
23. The issue in this case is whether the court erred by not striking out the entire suit having established that the Defendant was Deceased at the time the suit was filed against her.
24. It is not in dispute that the suit was filed against the Defendant who was Deceased. It also appears to be the common position of the parties as was established by the Trial Court that the Plaintiff, at the time of filing the suit, was not aware of the fact that the Defendant was deceased.
25. In the case of *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others* [2018] eKLR, the court stated as doth: -
- "The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to court. In the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity.
- In the Indian case of *C. Muttu v. Bharath Match Works* AIR 1964 Kant 293 the court observed,
- "If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of



the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

In yet another Indian Case of *Pratap Chand Mehta v Chrisna Devi Mehta* AIR 1988 Delhi 267 the court citing another decision observed as follows,

“ ... if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

It is common ground that the 7th defendant was not alive when the suit was filed against him. It is also inconceivable how a party who is deceased can instruct counsel and that counsel takes over instructions from a non-existent person. It follows therefore any action including the filing of the plaint, the extraction of the summons; the entering of appearance and filing of the defence were a nullity. The cases cited by counsel for the plaintiffs include, *Benjamin Leonard Mc foy v. United Africa Company Limited* [1961] All ER 1169. In that case the court stated as follows,

“ If an Act is void, then it is in Law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

This is exactly what the instructing party to the counsel now on record for the deceased person and or his estate is attempting to do. In the words of the cited case above this is an attempt to place something on nothing and expect it to retain ground. This cannot happen.”

26. Further, in *Geeta Bharant Shah & 4 Others -v- Omar Said Mwatayari & Another* (2009) eKLR, the Court of Appeal while considering an Appeal over a matter in which the suit was filed against a Defendant who was dead at the time of filing suit stated as follows:

“ We have anxiously considered the appeal. This is a first appeal. We have no doubt whatsoever that the learned judge, in refusing to allow the application as in favour of the deceased against whom a suit was filed after his demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased’s estate to urge the court to do so for once the respondent also admitted he sued a dead person, the court was duly bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed. In any event, because the person cited in the plaint as the first defendant was already dead by the time the suit was filed meant that the plaintiff (now first respondent) did not tell the truth when he said in his verifying affidavit that he had read the



plaint and verified the facts therein for how could he say that against undisputed fact later discovered that by the time he was saying so, the first defendant was long dead....”

27. In this case, the court was aware that the suit was filed against the Defendant who was deceased at the time of the filing. I note that it was also the common position of the parties and therefore there was no dispute that by the time the Respondent instituted the suit as against the Deceased, the Deceased was a deceased person.
28. Therefore, the suit was fatally instated against a non-existent person and remained so. Ipso facto, the suit was nullity ab initio. It could not be resuscitated by amendment. It could not survive to be substituted. It was dead on filing because something could be placed on nothing and be expected to remain there.
29. As was re-stated by the Supreme Court in Petition No. 5 of 2015 - *Republic v Karisa Chengo and 2 Others*, where the court quoted Lord Denning M.R in *Benjamin Leonard Mcfoy v United African Company Limited* (UK) [1962] AC 152 in the Privy Council as opining:

“If an act is void, then it is in law a nullity. It is not only bad ...and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”
30. Therefore, the submission by the Respondent to the effect the court employed Order 2 Rule 15 of the *Civil Procedure Rules* is misplaced. I do not agree that Order 2 Rule 15 of the *Civil Procedure* would apply to this case for the reason that there was no suit in existence, in the first place.
31. The Trial Court was thus wrong in ordering that the Deceased Defendant would be substituted to breathe life into the suit. Equally, the court was wrong in striking out the name of the Deceased person who was the sole Defendant.
32. The next aspect was whether this Appeal was properly filed. The Deceased was deceased by the time the Appeal was filed. A deceased person cannot file an appeal. The deceased was already deceased when he was sued. He cannot be alive to file an appeal. The proceedings in this court and the court below are both a nullity.
33. The suit in the lower court and this Appeal are both a nullity. There is no Appeal before me. The same as there was no suit before the court. A deceased who was already dead, during the lower court, resurrected, well enough to file this Appeal.
34. We do not know who filed the Appeal. I noted that the deceased was aggrieved by the court decision striking her out of the suit. Wonders will never cease. Given the foregoing I have nothing useful to say other than to strike out the Appeal. I need not say that though there was no Appeal, equally there is no suit. I cannot understand how the deceased entered appearance, while dead and filed defence. I will not say more.

Determination

35. In the upshot, I make the following Orders.
 - a. There is no Appeal herein as the Deceased was already deceased by the time of filing Appeal.
 - b. There was also no suit for which the court was proceeding on.
 - c. The matters both in this court and the court below are thus closed with no order as to costs.



DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS DAY OF 7TH DAY OF FEBRUARY, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Oremo for the Respondent

No appearance for the Appellant

Court Assistant - Brian

