



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC APPLICATION NO.15 OF 2017

JOSPHAT MUNYUA KARIUKI P/A JM KARIUKI & CO ADVOCATE.....APPLICANT

VERSUS

MARGARET NJERI MBURU (suing as the legal administratrix of the estate of

SILAS MBURU GICHUA.....1ST RESPONDENT

MUTATI TRANSPORTERS LIMITED.....2ND RESPONDENT

RULING

1. The applicant filed a notice of motion application dated **29th September 2020** seeking for orders;

a. That the certificate of costs dated 13th March 2020 be adopted as a judgement of this court.

b. Costs of this application be provided for.

2. The application is premised on the grounds that parties herein recorded and signed a consent of **Kshs. 1,800,000** towards the full settlement of the applicant's bill of costs dated **25th January 2017**. However, the respondents have failed to honor the terms of the signed consent as per the terms therein.

3. The applicant is likely to suffer irreparable loss if this application is not allowed, hence it is in the interest of justice that this application be allowed.

4. The respondent filed a replying affidavit dated **10th November 2020** and averred that Margaret Njeri Mburu who was the administrator of the estate passed on and her son Perminas Ngugi Mburu took out letters of administration *ad litem*. Thereafter upon substituting Perminas Ngugi Mburu to be the administrator of the estate of Silas Mburu Gichua, he also passed on abruptly.

5. The respondent averred that since the demise of the said Perminas Ngugi Mburu, signatures from the two siblings who are out of the country for consent to substitute him has been a toll order.

6. The respondent averred that during the period when Perminas Ngugi was still alive, some substantive payment of the agreed sum herein had been paid upon the Respondent even prior to the substitution. The respondent moved the court in July to have a substitution, hence it is imperative that the substitution be done to enable them move as at the moment there is no client to grant instructions.

7. The respondent averred that this application should be stayed to await the substitution of the proper party.

8. Parties were directed to file written submissions.

Applicant's submissions

9. The Applicant filed a bill of costs dated **25 January 2017** against the Respondent originating from the judgment in **Nakuru HCCC No. 264 of 2005 Margaret Njeri Mburu Vs National Bank of Kenya Limited**. On 25th October 2019 the Parties herein entered into a consent towards the full settlement of the Bill of Costs at Kshs. 1.800.000. Thereafter the applicant filed and served the respondent with a certificate of costs dated **13th March 2020** duly signed by the Deputy Registrar, High Court, Nakuru.

10. The applicant submitted that substitution of parties is not necessary at this stage because taxation and certificate of costs is a process in execution as underscored in the case of **Governors Baloon Safari Ltd v Skyship Company Ltd & Another [2020] eKLR** and in **Order 24 Rule 10 of the Civil Procedure Rules**.

11. **Order 24 Rule 10** clearly stipulates that substitution proceedings will not apply as provided for **under Order 24 Rule 3**. Therefore, the respondent's replying affidavit as no merit as there is no need of substitution at this stage.

12. The applicant placed reliance in the authorities of **Agnes Wanjiku Wangonde Vs. Uchumi Supermarket Ltd Nairobi Civil Appeal No.187 of 2002** cited in **Eunice Kirunda Kinyua v Josephat Mwathi Kibiri [2018] eKLR**, Visram J (as he then was) held that **Order 23 Rule 11 (now Order 24 rule 10)** did not require substitution in proceedings in execution of an order.

13. In **Isaak Kariuki Kamwitha & another v Joseph Muriithi Ndegwa [2019] eKLR**, it was underscored that: The applicable law is found in **Order 24 Rule 10 of the Civil Procedure Rules 2010** which provides that suits that have reached execution stage cannot abate; It reads as follows; **"Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order"**.

14. In the case of **Mueni Kiamba v Mbithi Kimeu Kimolo [2017] eKLR** it was held that;

"The provisions of Order 23 Rule 11 of the old Civil Procedure Rules and now Order 24 rule 10 of the new rules provide expressly that substitution and abatement of suits shall not apply to execution of orders. In the case of Agnes Wanjiku Wangonde Vs Uchumi Supermarket Ltd- NBI HCCA No.137 Of 2002, It was held that a suit could not abate at execution stage but that it was optional for a party to seek to substitute."

15. The applicant submitted that there is a consent on record between the parties that the respondent is to pay 1.8 Million to the applicant. There is as well a certificate of costs on record showing that the matter is at the execution stage therefore there is no need of substitution as espoused in the above authorities and the Civil Procedure Rules.

16. The applicant pray that their application be allowed and they also seek for the adoption of the said certificate of costs as judgement of this honorable court.

17. There were no submissions from the respondent.

18. The only issue for determination is whether it is necessary to allow for substitution at this stage of the proceedings.

19. I agree with the applicant that taxation and certificate of costs is a process in execution as envisaged in the **Governors Baloon Safari Ltd v Skyship Company Ltd & Another (supra)**. The matter for determination is an application seeking substitution. **Order 24 rule 3 of the Civil Procedure Rules provides as follows:**

3." (1) Where one or two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under sub rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time."

20. **Order 24 Rule4(1)** provides that:

"4(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an 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.

2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant."

21. However, **Order 24 Rule 10 of the Civil Procedure Rules, 2010** provides that:-

"Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order."

22. Therefore, in execution proceedings, it is not necessary that there be substitution of a deceased party. This was the position in **Dhola vs. Gulam Mohudin (1940) 19 LRK 6** where it was held that execution proceedings may continue without the appointment of the personal representative of the deceased decree holder. Accordingly, the application for substitution by the respondent was unnecessary in so far as the

applicant's bill of costs were concerned and the consented amount could still be paid notwithstanding the death of the respondent.

23. In **Mueni Kiamba v Mbithi Kimeu Kimolo [2017] eKLR** the court while referring to Order 24 rule 10 of the CPR held as follows:

“I find there is wisdom in the above provision in that matters that have reached execution stage should be allowed to proceed without the need for substitution of deceased parties. This goes a long way in ensuring the overriding objective of the Civil Procedure Act and Rules namely the timely and expeditious determination of disputes between parties. Hence, it is my considered view that it was not mandatory to substitute the deceased decree holder at the execution stage and therefore the learned trial magistrate misapprehended the law when he ruled that the non-substitution of the decree holder was fatal to the suit....”

24. In **Isaac Olang Solongo v Gladys Nanjekho Makokha (Being the administrator of the Estate Antonina Makokha (Deceased) & another [2021] eKLR** it was held that;

“In this court's view Order 24 Rule 10 is purely calculated to expedite the progression of execution without mandatory substitution to get rid of suits that have been concluded, in which there is no substantive dispute remaining to be determined. The exclusion of mandatory substitution means that parties would not be needlessly held up in court corridors and take up time meant for hearing of other cases on the merits.”

25. In view of the foregoing authorities and the facts herein, **I hold that the applicant's application has merit and the same is hereby allowed as prayed with costs to the applicant. Should there be any payment already made by the respondent as indicated in the replying affidavit then the same ought to be taken into consideration.**

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 18TH DAY OF NOVEMBER, 2021

H K CHEMITEI

JUDGE