



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 215 OF 2008**

**FORD AMENYA ASEKA.....1<sup>ST</sup> PLAINTIFF**

**PETER ROUSSEL AMENYA.....1<sup>ST</sup> APPLICANT**

**THEOPHELOUS OCHOLI OMUTEKU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**MAURICE OTUNGA.....1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. *Ford Amenya Aseka* filed suit against the 1<sup>st</sup> defendant *Maurice Otunga* and the 2<sup>nd</sup> defendant the *Hon. Attorney General*, seeking the following reliefs:

- a. *General damages*
- b. *Punitive and exemplary damages*
- c. *Special damages in the sum of KShs.100,000*
- d. *Costs*
- e. *Interest on both general and special damages at court rates*
- f. *Any other relief or further relief deemed appropriate*

2. The claim arose from alleged false imprisonment and malicious prosecution of the plaintiff by the police at the instigation of the 1<sup>st</sup> defendant which prosecution terminated in the plaintiff's favour.

3. The court record shows that before the suit proceeded for hearing, the plaintiff passed away on 8<sup>th</sup> June 2017. On 25<sup>th</sup> September 2018, his two sons, *Peter Roussel Amenya* and *Theophilus Ocholi Omuseku*, who were his legal representatives filed a Notice of Motion dated 12<sup>th</sup> September 2018 seeking to be substituted in his place on behalf of his estate. The application was heard and allowed by *Hon Serгон, J* on 15<sup>th</sup> October 2018 but to date the plaint has not been amended to reflect this development in the suit.

4. On 12<sup>th</sup> July 2019, the 2<sup>nd</sup> defendant filed a preliminary objection dated 2<sup>nd</sup> July 2019 in which he urged the court to find that the suit had abated as the causes of action being actions in persona did not survive the death of the original plaintiff.

5. By consent of the parties, the preliminary objection was canvassed by way of oral submissions. In his brief submissions, learned counsel for the 2<sup>nd</sup> defendant *Mr. Ngumi* relying on the persuasive authority of *Loice Wanjiru Meru & 3 Others V John Miqui Meru, [2017] eKLR* argued that once the original plaintiff died, the suit automatically abated as his two causes of action being personal in nature did not survive him; that the claim for exemplary damages had also abated pursuant to *Section 2 (2) (a)* of the *Law Reform Act*.

6. In response to the preliminary objection, *Mr. Ombete*, learned counsel for the plaintiffs submitted that whether or not a cause of action survived the death of a party was a question of law whose answer lies in *Section 2 (1)* of the *Law Reform Act* and the proviso thereto.

Counsel submitted that the actions of false imprisonment and malicious prosecution survived the original plaintiff as they are not among the causes of action referred to in the proviso to *Section 2 (1)* of the *Law Reform Act*.

7. In addition, *Mr. Ombete* contended that since the causes of action survived the original plaintiff, the substituted plaintiffs had a right to prosecute the suit on behalf of the deceased. In support of his submissions, he relied on yet another persuasive authority in the case of *Hesbon Onyuro V Gilbert Oduor & Another, [2015] eKLR* where *Hon. Maina, J* held that a claim for pecuniary damages and for damages for malicious prosecution and false imprisonment would under *Section 2 (1)* of the *Law Reform Act* survive for the benefit of the deceased plaintiff's estate. He urged the court to dismiss the preliminary objection and allow the substituted plaintiffs to prosecute the suit.

8. Having considered the preliminary objection and the short rival submissions made on behalf of the plaintiffs and the 2<sup>nd</sup> defendant, I find that it is not disputed that the causes of action on which this suit is premised are the torts of false imprisonment and malicious prosecution.

9. I agree with *Mr. Ombete's* submissions that whether a cause of action survive the death of a party is a question of law. *Section 2 (1)* of the *Law Reform Act* which provides for causes of action which survive the death of a party provides as follows:

***“2. (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:***

***Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.”***

*Section 2 (2)* proceeds to state that:

***“(2) Where a cause of action so survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person —***

***(a) shall not include any exemplary damages;***

***(b) ....”***

10. From the foregoing, it is clear to me and I so find that under *Section 2 (1)* of the *Law Reform Act*, claims for pecuniary damages including claims for malicious prosecution and false imprisonment survive for the benefit of a deceased plaintiff's estate since they are not among the causes of action specified in the proviso to the section. The only claim that does not survive the death of a plaintiff is a claim for exemplary damages.

11. I have read the two persuasive authorities cited by the 2<sup>nd</sup> defendant. I find that the case of *Loice Wanjiru Meru And 3 Others V John Migi Meru, [supra]* is not directly relevant to the issues at hand since the issue for determination in that case was whether a suit instituted by a *donee* of a power of attorney would abate upon the death of the donor of the power of attorney. The case of *Hesbon Onyuro V Gilbert Oduor & Another, [supra]* is on all fours with the issue raised in the preliminary objection. I wholly concur with the decision of my sister *Hon. Maina J* that all claims for pecuniary damages survives for the benefit of a deceased plaintiff's estate.

12. Consequently, I do not find any merit in the preliminary objection dated 2<sup>nd</sup> July 2019 and it is hereby dismissed with no orders as to costs.

13. In order to facilitate expeditious disposal of this suit, I invoke the court's inherent powers under *Section 3A* of the *Civil Procedure Act* and grant the substituted plaintiffs leave to file and serve an amended plaint reflecting their capacity in the suit within the next 21 days after which the suit shall be fixed for hearing on a priority basis given its age.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH ELECTRONIC MAIL WITH THE CONSENT OF THE PARTIES THIS 14TH DAY OF MAY 2020.**

**C. W. GITHUA**

**JUDGE**