



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 39 OF 2014

MBAYA NZULWA.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

RULING

1. A Notice of Motion dated 31/5/2017, premised upon the provisions of Order 1 Rule 10 and Order 51 Rules 182 of the Rules as well as Section 3A of the Act is presented before me and seeks orders that:

“The applicant herein Mr. Kassim Mzee Mbaya be joined as a legal representative of the plaintiff in the suit”.

2. The same is grounded on the brief facts that the plaintiff died on the 3rd September 2015 and grant of *Letters ad Litem* were issued to the Applicant on 12/5/2017 granting to him the capacity to sue on behalf of the estate and continue with the pending suit. Those are the facts reiterated in the Applicant’s affidavit in support sworn before Mbago A. Omondi on 31/5/2017.

3. That application was opposed by the defendant/Respondent by the grounds of opposition dated 21/7/2017 and filed in court the same day. Essentially the grounds of opposition term the Application as misconceived, bad in law and fatally defective because the provisions cited do not found it and further that the suit has abated hence the application for substitution does not lie.

4. Based on the papers filed, there are two issues I find isolating themselves for resolution by the court:

(i) Whether the Application is incompetent and fatally defective considering the prayers sought and the law cited.

(ii) Whether an order for joinder can be made upon an abated suit.

Analysis and determination

5. I understand the Defendants grounds of opposition (1) & (3) to fault the application for failure to cite the relevant law that govern the substitution of a party on behalf of a deceased party.

6. The law as I understand is that the provisions on the inherent powers of the court under section 3A of Civil Procedure can only be invoked where there is no specific provision of the Act and the rules appurtenant to the matter at hand. It is not a panacea for all ills intended to render otiose all else [\[1\]](#). That provision is only available in a situation where there is no specific provision to anchor the party’s prayers to court.

7. That however, is not to say that an application by an applicant citing the wrong provision the court or totally failing to cite any law would divest the court of the jurisdiction to answer to the calls of its very existence, look at a party’s complaint and determine it according to the law whether that law be cited or misquoted. I think this to me is the natural and irrefutable character of the institution called the court of law. A court expects parties to guide it on the applicable law they seek to rely upon but the dereliction of that duty by the party takes no bit of the courts duty to apply the applicable law. That to me is the justification for the provision Order 51 Rule 10 Civil Procedure Rules which mandates.

“10.(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily

be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule”.

8. Over and above the Rules, the character and duty of the court is that it must find where the law lies and apply it to the letter. It can never be confined to what the parties cite or avail to it. It is deemed and expected to know the law hence the Court of Appeal has clarified the point when it said:-

“A judge in determining a dispute is not restricted only to the provision of the law cited by a party”.^[2]

9. I have said what is foregoing, to underscore the fact that having been confronted with an application to substitute a deceased plaintiff, by a personal representative, I must apply the law that govern such application. Clearly it cannot be Order 1 Rule 10 Civil Procedure Act. It is equally cannot be grounded under the inherent powers of court under Section 3A of the Act but is governed by the provisions of Order 24 Rule 3 of the Rules.

10. The law under that Rule provides:-

“3.(1) Where one of 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 subrule (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.”

11. I understand that law to say that upon death of sole plaintiff or the only surviving plaintiff and on application the court has the discretion to substitute the deceased plaintiff and that even after the suit abates, there is jurisdiction in the court to extend time.

12. In this matter it cannot be denied that the suit has abated. An abated suit is non-existent prior to it being revived. For a suit to be revived an appropriate application must be presented to court and the court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement.

13. I hold the view that under the proviso to Rule 3(2) the court has a discretion to extend time even where the application for substitution is not made within one year but an abated suit need revival under Rule 7(2). The proper way to proceed is to seek in the same application for substitution that the suit which has abated be revived.

14. That to me is what the applicant and counsel ought to have done here but they have not done. I will not seek to punish the Applicant and the beneficiaries to the estate for failure by delay as well as failure to seek revival of the suit. Rather I will adopt the courts duly to sustain claims for purposes of them being heard on the merits.

15. I invite the intrinsic power of the court to administer justice devoid of technicalities as well as the overriding objective of the court and understand the applicant to plead that the suit be heard on the merits. I accede to that plea.

16. Answering to that call, I allow the application to have the Applicant substituted for the deceased plaintiff. Having done so I further order that the suit be revived for purposes of being heard on the merits.

17. Let the plaintiff be amended within 7 days from today to reflect the true plaintiff and the matter be mention in court on 28/2/2018 for directions and further orders.

18. I order that the costs of the application be costs in the cause.

Dated and delivered at Mombasa this 02nd day of February 2018.

P.J.O. OTIENO

JUDGE

[\[1\]](#) Jiwa N. Dhanji vs Jeborah N. Wabwayi & Another [2006] eKLR and Kenya Commercial Bank Ltd vs James Oisebe

[\[2\]](#) Kwanza Estates Ltd vs Dubai Bank of Kenya Ltd [2016] eKLR

