



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**MISCELLANEOUS APPLICATION NO 143 OF 2000 (O.S)**  
**IN THE MATTER OF AN APPLICATION FOR THE DELIVERY OF AN**  
**ADVOCATE/CLIENT STATEMENT OF ACCOUNT**  
**LUCY WANJIRU KAMAU..... PLAINTIFF/APPLICANT**  
**VERSUS**  
**K.H. OSMOND ADVOCATE.....DEFENDANT/RESPONDENT**  
**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated on 19<sup>th</sup> February 2018 and filed on 5<sup>th</sup> April 2018 was filed pursuant to the provisions of Article 159 of the Constitution of Kenya, 2010, Section 1A & 3A of the Civil Procedure Act, Order 24 Rule 4(1) & (3) and Rule 5, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It sought the following orders:-

- 1. THAT this Honourable court be pleased to revive this suit the same having abated under Order 24 of the Civil Procedure Rules, 2010.**
- 2. THAT this Honourable court be pleased to grant leave to the Applicant to file an Application for substitution of the Defendant (deceased) with QUADROS BERNEDETTE MARIA out of time.**
- 3. THAT this Honourable court be pleased to substitute the Defendant herein K.H. OSMOND ADVOCATES with QUADROS BERNEDETTE MARIA the official nominee of the Defendant/Respondent.**
- 4. THAT in the alternative, the Defendant herein be substituted with the legal representative of the estate of the Deceased Defendant so appointed by court.**
- 5. THAT the costs of this Application be awarded to the Applicant.**

2. The Plaintiff's Written Submissions were dated 4<sup>th</sup> May 2015 and filed on 5<sup>th</sup> June 2018. The Written Submissions of S. Musalia Mwenesi Advocates were dated on 19<sup>th</sup> June 2018 and filed on 20<sup>th</sup> June 2018 while those of Quadros Bernedette Maria were dated 11<sup>th</sup> June 2018 and filed on 12<sup>th</sup> June 2018.

3. When the matter came before the court on 21<sup>st</sup> June 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE PLAINTIFF'S CASE**

4. The Plaintiff's application was supported by the Affidavit of the Plaintiff's advocate, Ezekiel Munyua, that was sworn on 19<sup>th</sup> February 2018. His Supplementary Affidavit was sworn on 30<sup>th</sup> May 2018 and filed on 4<sup>th</sup> June 2018.

5. The Plaintiff's case was that the Defendant died before his advocate, Stephen Mwenesi had complied with certain directions that had been given by the court and that since then, she had been unable prosecute her case because Quadros Bernadette Maria who had been appointed by

the Law Society of Kenya (LSK) to manage and conclude the pending work of the deceased Defendant, who was an advocate, had failed to apply to be substituted to stand in place of the deceased Defendant.

6. She therefore urged this court to allow her application in the interests of justice so that she could prosecute her case.

#### **THE DEFENDANT'S CASE**

7. S. Musalia Mwenesi Advocates filed Grounds of Opposition dated 8<sup>th</sup> May 2018 on 10<sup>th</sup> May 2018. The same were as follows:-

- 1. THAT M/s S. Musalia Mwenesi Advocates were not concerned with the estate of K.H. Osmond deceased.**
- 2. THAT the application was frivolous and vexatious.**
- 3. THAT under the law, Order 24 Rule 4(3) the suit herein abated against the Defendant and no provision was made for substitution of any legal representative outside the time limit and after abatement of the suit.**
- 4. THAT no evidence was produced and the applicant admitted, at paragraph 7 of the supporting affidavit, that there was no evidence that a "legal representative" within the meaning of Order 24 Rule 4(1) existed who could have been made a party as defendant to proceed with the suit.**
- 5. THAT the application was contrary to law and against the process of the court.**

8. The said firm of advocates therefore urged this court to dismiss the Plaintiff's said application.

#### **THE CASE OF QUADROS BERNADETTE MARIA**

9. Quadros Bernadette Maria filed a Notice of Preliminary Objection dated 21<sup>st</sup> May 2018 on 22<sup>nd</sup> May 2018. The points of law were as follows:-

- a. THAT this suit abated by virtue of the provisions of Order 24 Rule 4(3) of the Civil Procedure Rules, 2010 and there was no legal provision for substitution of a Defendant upon the abatement of the suit.**
- b. THAT Legal Notice No 279 of 1995 limited the duties of a nominated Advocate in winding up a deceased advocate's firm and does not extend to dealing with funds or accounts.**

10. On the same date of 22<sup>nd</sup> May 2018, she also filed a Replying Affidavit that she swore on 21<sup>st</sup> May 2018. She stated that the suit had abated by virtue of the Defendant having died almost three (3) years ago. She was emphatic that she was not a legal representative of the Estate of the Defendant because her appointment by the Law Society of Kenya (LSK) was limited to conclude pending work of his company.

11. She was categorical that she was under no obligation to give any account to the Plaintiff for the reason that an advocate winding up a law practise of a deceased advocate does not take liabilities or responsibilities of his firm.

#### **LEGAL ANALYSIS**

12. The Plaintiff pointed out that where no application is made to substitute a Defendant who has died within a year of his death, then the suit against such a deceased Defendant abates. The said provision of the law is contained in Order 24 Rule 4 of the Civil Procedure Rule, 2010 that provides as follows:-

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

13. It is also clear from the said Order 24 Rule 7 of the Civil Procedure Rule 5 that a suit, which fact was admitted by the Plaintiff and Quadros Bernadette Maria, that a suit that has abated can be revived. The said provision states as follows:-

- 1. Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.**
- 2. The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.**

14. What appeared to be really in contention was whether or not Quadros Bernadette Maria was the legal representative that was envisaged under the provisions Order 24 Rule 4 of Civil Procedure Rules, 2010. Both Quadros Bernadette Maria and S. Musalia Mwenesi were emphatic that a suit that had abated against a deceased Defendant could not be revived.

15. S. Musalia Mwenesi further submitted that the definition of a "legal representative" is given in Section 2 of the Civil Procedure Act as:-

**“Legal representative” means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.**

16. He went further to add that the procedure of appointing such legal representative fell under the law of Succession Act Cap 160 (Laws of Kenya) that dealt with persons who died testate and intestate.

17. He agreed with Quadros Bernadette Maria that she was not the legal representative of the Estate of the deceased Defendant as she was appointed under the provisions of Law Society of Kenya Act and not, the Law of Succession.

18. He was also categorical that failure by the Plaintiff to have applied to have a legal representative to the Estate of the Defendant appointed within a period of one (1) year was not a technicality that could be overlooked and that the overriding objectives of the Civil Procedure Act did not uproot the established principles or precedent in the exercise of the discretion of the court. He also pointed out that extension could be refused if the effect would be to re-open litigation after so long. He relied on the cases of **Kamani & Another vs Kenya Anti-Corruption Commission & 3 Others [2010] 1 KLR 289** to support his case.

19. Quadros Bernadette Maria agreed in principle with the Plaintiff regarding the abatement of suits but was emphatic that the suit ought not to be revived as the Plaintiff had not shown that she was prevented from continuing with her suit against the Defendant within the stipulated period.

20. She relied on several cases amongst them **Leonard Mutua Muteru vs Benson Katela Ole Kantai & Another [2014] eKLR**, **Phillips, Harrison & Crossfield Ltd vs Kassam [19820] EA**, **Charles Mugunda Gacheru vs The Attorney General & Another [2014] eKLR** where the common thread was that a court can allow an application for revival of an abated suit but that such application could be denied if there had been inordinate delay in bringing the said application or if the application did not show that he had been prevented by sufficient cause not to have applied for substitution of a legal representative within a year because such revival had the potential of unnecessarily prolonging litigation.

21. It was her averment that the Plaintiff was trying to shift the blame to her for her failure to apply for substitution of the legal representative because she had only been appointed by the LSK to manage and conclude all pending work of the Defendant’s firm of advocates.

22. She contended that under Order 24 Rule 4(1) of the Civil Procedure Rules any party could apply for the legal representation of a deceased to be made a party to the suit and that the court shall cause such legal representative to be made a party of the suit and proceed with the suit. Her argument was that since it was in the Plaintiff’s interest to proceed with her case, she ought to have made the aforesaid application.

23. This court carefully considered the submissions by the parties and found itself in agreement with the position that was taken by S. Musalia Mwenesi and Quadros Bernadette Maria that the latter was not the legal representative of the Estate of the Defendant. The mandate given to her by the LSK was to complete the pending work of the Defendant with a view to closing his firm. The Plaintiff therefore misapprehended the role of Quadros Bernadette Maria vis-a-vis provisions of Order 24 Rule 4 (1) of the Civil Procedure Rules.

24. If there had been a question of whether or not a party was a legal representative to a deceased Defendant’s estate, the court had power under the provisions of Order 24 Rule 5 of the Civil Procedure Rules to determine such question. Order 24 Rule 5 of the Civil Procedure Rules provides as follows:-

**“Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such question shall be determined by the court”.**

25. Indeed, as was rightly pointed out by S. Musalia Mwenesi, the procedure for the appointment of a legal representative to a deceased’s estate is to be found in the Law of Succession which deals with both testate and intestate estates of deceased persons. Notably, Order 24 Rule 4(1) of the Civil Procedure Rules is clear that the person to be made a party is **“the”** (emphasis court) legal representative. This presupposes that a legal representative ought to have been appointed to a deceased’s estate.

26. Bearing in mind that the Plaintiff had pursued Quadros Bernadette Maria as the legal representative of the Estate of the Defendant erroneously, she had not demonstrated that she had been prevented by any other sufficient cause to apply to have the legal representative of the Estate of the Defendant made a party to the proceedings herein. Her application would therefore fail on this ground in the first instance.

27. This court also agreed with S. Musalia Mwenesi that whereas a Plaintiff’s suit that had abated could be revived, it was not so in the case of a deceased defendant. It is correct as he stated that under Order 24 Rule 3 of Civil Procedure Rules, the provision for extension of time to make an application for substitution of a legal representative can be made in the case of a deceased plaintiff. Indeed, under Order 7 Rule (2) of Civil Procedure Rules, after sufficient cause has been shown, a suit that has abated as against a plaintiff can be revived.

28. It therefore appeared to this court that from Order 24 Rule 3 (2) of Civil Procedure Rules and Order 24 Rule 7 (2) of the Civil Procedure Rules, firstly, a plaintiff’s representative could be granted **an extension of time to file an application** (emphasis court) to be substituted as a deceased’s plaintiff’s legal representative and secondly, for a plaintiff’s suit that had abated to be revived if it was shown that sufficient cause prevented a deceased’s plaintiff’s representative from applying for revival of an abated suit.

29. On the other hand, the law did not appear to have any such provisions where the deceased was a defendant. If the drafters of the law had intended that both a deceased plaintiff and deceased defendant were to be treated equally as regards extension of time to file an application to be substituted as a legal representative or to have an abated suit revived, nothing would have been easier than for the drafters of the piece of legislation to have said so.

30. It was therefore the finding and holding of this suit that the suit as against the deceased Defendant herein could not be revived under the provisions of Order 24 Rule 4 (1), Rule 4 (3) and Rule 5 of the Civil Procedure Rules as had been sought by the Plaintiff for the simple reason that there was no provision for revival of an abated suit as against a deceased defendant under Order 24 of Civil Procedure Rules.

31. It was also the considered opinion of this court that it could also not make an order for the substitution of the representative of the estate of the Defendant to be made a party of the suit herein because firstly, it would be futile for this court to cause him to be made a party to the suit herein under the provisions of Order 24 Rule 4 (1) of the Civil Procedure Rules because Order 24 Rule 4(3) of the Civil Procedure Rules was clear that where no such application is made within a year, the suit against a defendant shall abate. Secondly, an abated suit against a deceased defendant cannot be revived. Thirdly, the legal representative of the Estate of the Defendant was unknown. As was pointed out hereinabove, Order 24 Rule 4(1) of Civil Procedure Rules was implied that when such legal representative is being substituted in any proceedings, he would be known hence the use of “**the**” (emphasis court) in the provision therein.

32. Accordingly, having considered the affidavit evidence, the Written Submissions and the case law that was relied upon by the parties, this court came to the firm conclusion that the Plaintiff had not demonstrated that she was entitled to the orders that she had sought. Whereas the time from when the Defendant died was about three (3) years having died on 26<sup>th</sup> May 2015, was not too inordinate, this court nonetheless found that the provisions of the law did not provide for revival of an abated suit against a deceased defendant.

### **DISPOSITION**

33. For the reasons foregoing, the upshot of this court’s Ruling was that the Plaintiff’s Notice of Motion application dated 19<sup>th</sup> February 2018 and filed on 5<sup>th</sup> April 2018 was not merited and the same is hereby dismissed with costs to S. Musalia Mwenesi and Quadros Bernadette Maria. On the other hand, the Preliminary Objection of Quadros Bernadette Maria dated 21<sup>st</sup> May 2018 was merited and is hereby upheld.

34. It is so ordered.

**DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of October 2018**

**J. KAMAU**

**JUDGE**