



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 421 OF 2014

JOHN KIPKEMBOI KILEL.....PLAINTIFF

VERSUS

UAP PROVINCIAL INSURANCE COMPANY LIMITED.....1ST DEFENDANT

WILFRED RIITHO NJERU AS INTERIM LIQUIDATOR OF LAKESTAR

INSURANCE COMPANY LIMITED (IN LIQUIDATION).....2ND DEFENDANT

RULING

1. This ruling relates to a Chamber Summons Application dated 22nd September 2016, brought under Order 24 Rule 3 of the Civil Procedure Rules 2010. It is based on the grounds thereon, and an Affidavit sworn by Geoffrey Kipkoech.
2. The Applicant is seeking for orders that the Honourable Court be pleased to order for the substitution of the Plaintiff named herein **John Kipkemboi Kilel** now deceased with **Geoffrey Kipkoech**. The costs of the Application be in the cause.
3. The background facts of the case are that, the Plaintiff filed this suit on 28th July 2014. On 23rd April 2016, he demised before the conclusion of the suit. The Applicant avers that he has been appointed as a Personal Representative of the deceased Plaintiff's Estate in relation to the suit herein. That as the cause of action survives the deceased Plaintiff, unless substitution of the deceased Plaintiff is done within one (1) year from the date of the said demise, the suit will automatically abate.
4. The Application was however opposed vide the grounds of opposition dated 13th October 2016 and filed, in which it is stated that:
 - a. *The deceased Plaintiff lacked the locus standi to institute the suit in the first instance.*
 - b. *In any event, the cause of action as urged by the deceased Plaintiff was such that the suit could not succeed him following his demise.*
 - c. *The nature of the suit is such that it has abated pursuant to the provisions of Order 24 of the Civil Procedure Rules.*
 - d. *The Application is bad in law and a gross abuse of the Court process.*

e. The Application is misplaced and ought to be dismissed with costs to the 1st Defendant.

5. The Parties agreed to dispose of the suit by filing written submissions. The Plaintiff's/Applicant's filed its submissions on 4th November 2016. He submitted that, the 1st Defendant's opposition to the Application is misconceived, misplaced and actuated with malice. That the Application has been brought in accordance with provisions of Order 24 of the Civil Procedure Rules, 2010 and Section 82(a) of the Succession Act. The relevant Rules require that, an Application as herein, be made within one (1) year of the demise of a Party to the proceedings. As aforesaid, the deceased Plaintiff demised on 23rd April 2016 and the present Application was filed on 22nd September 2016, barely five (5) months thereafter. Similarly, the issue of *Locus Standi* does not arise at all, as the suit is already heard and is awaiting judgement. It is also one of the issues among other issues to be determined in the judgement and consequently does not deserve any consideration at all at this stage. The nature of deceased Plaintiff's claim is not a personal action. He was seeking to have the suit property revert back to Lakestar Insurance Company Limited (in liquidation) and the beneficiaries include the creditors who are members of the public and who are still waiting to be paid. It's a right to sue devolved on his heirs and legal representative.

6. The Applicant further submitted that the present suit does not fall within the categories of suits which automatically abate on the demise of the Plaintiff or defendant as listed down by the learned authors on Mulla on the Code of Civil Procedure 14th Edition at page 1288, dealing with Order XXII of Indian Civil Procedure which is equivalent to Order 24 of the Civil Procedure rules, 2010, of Kenya, which states that:

“The right to sue for damages for breach of contract, the right to sue on a promising note, the right to sue for a debt, the right to sue on a mortgage, the right to sue for wrong done to the property, are all instances of rights that are not extinguished on the death of the Plaintiff or defendant.....”

7. That the Succession Act is also silent on instances when a suit abates on the demise of the Plaintiff and/or Defendant.

8. The 1st Defendant/1st Respondent, filed its submissions on 16th February 2017 and submitted that, the Application having been made before the expiry of one (1) year since the demise of the deceased, it is well within the limitation enacted in Rule 3(1) of the Rules, however, the sole question for resolution, is therefore, whether the cause of action in this matter survived the demise of the Plaintiff and continued, so as to enable the Court to substitute the Applicant as a Party, to allow him to proceed with the suit. That the Survival, continuation or otherwise causes of action is generally governed by Section 2 of the Law Reform Act (Cap 26) and in so far as it is relevant to this Application provides that:

“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....”

9. The 1st Respondent reiterated that the Applicant has confirmed that the deceased Plaintiff did not bring the suit in his personal capacity, but in his capacity as a Director and Contributory of Lakestar Insurance Company (Limited) (in liquidation), and that the nature of the claim is such that he was not suing in his personal capacity. That, no personal benefit capable of transmission to the deceased's estate is discernible from the prayers sought in the suit. Nor can there be such prayers to his personal benefit. For no cause of action would vest upon him as a person.

10. The 1st Respondent submitted that, in the case of **George M. Muchai Vs Francis Atwoli & 17 others (2016) eKLR** the Court considered the question as to whether a suit instituted by the deceased Petitioner in his capacity as an official of COTU and the General Secretary of Bakery, Confectionary, Food Manufacturing and Allied Workers Union survived him and thereby vested in his personal representative(s) upon his demise and held that:

“In the circumstances, the alleged causes of action as pleaded in the petition subsisted and vested on the petitioner in his official capacity as the Deputy Secretary General of COTU and General Secretary of Bakery, Confectionary, Food Manufacturing and Allied Workers Union which positions were co-terminus with procedural removal or death of the holder. No action or litigation initiated in such capacity can survive the office holder for it to be continued for the benefit of such person’s estate. None of the prayers sought in the petition seeks any compensatory order or damages personal to the deceased petitioner which his estate could continue to pursue for its benefit. The Court therefore finds that the petition as filed is incapable of continuing to be prosecuted as no benefit to the deceased estate would be yielded therefrom”.

11. The Respondent further submitted that, as a condition precedent to continuing such causes of action after the demise of the Plaintiff or Defendant, the right to sue must have accrued to the Plaintiff in the first place. That, in the instant case, the deceased Plaintiff had no *locus standi* to commence the suit against the Defendants in the first place. That, the deceased Plaintiff neither sought nor obtained leave to commence the suit and, in any case, he wrongly sought to commence the suit in his own name. That he violated the well known law on both counts, and therefore the suit has no legs to stand on. Any Application founded on the suit accordingly lacks legal foundation. ***“One cannot construct a house on a foundation of sand and expect it to stand”.***

12. The Respondent continued in submission to state that, a suit instituted by an individual qua shareholder or contributory in a limited liability company is not a personal suit. The remedies, if any, from such suit do not lie as against the individual Plaintiff but as against the Company. Therefore, the submission by the Applicant that the deceased’s estate will be liable as a contributory pursuant to the provisions of Section 216 of the Companies Act (repealed) is not only contradictory but also misdirection in law. Even so, the deceased Plaintiff wrongly brought the suit in his own name as opposed to bringing it in the Company’s name. The totality of these actions on the deceased Plaintiff’s part is that the suit as instituted is incurably defective. That it is on record that the 1st Defendant/1st Respondent filed grounds of opposition dated 12th March 2012; submissions on 11th March 2016 and submissions in Reply on issues of law filed on 15th May 2016, all in pursuance of its objection to the suit, on the grounds *inter alia* that the deceased Plaintiff lacked *locus standi* to institute the suit.

13. The 2nd Respondent also opposed the Application and submitted that the reasons for opposing the instant Application are that it is a common law rule that all suits and actions must be litigated by and against living parties. The Plaintiff herein is deceased and as such the entire suit abates. That Order 24, Rule 1 of the Civil Procedure Rules, 2010 provides that:

“The death of a Plaintiff or defendant shall not cause the suit to *abate if the cause of action survives or continues*”.

14. That the deceased Plaintiff’s case was purely on the ground that the 2nd Defendant/Respondent acted without authority and/or in collusion with the 1st Defendant/Respondent in the events leading to the sale of the suit property. The issue of authority is addressed under *Section 238(5) of the then Companies Act, which provides for the validity of actions by the 2nd Defendant/Respondent even if defects in authority may be later discovered.* That the issue of lack of authority on the part of the 2nd Defendant/Respondent is pegged on the grounds that he was not gazetted and had failed to file his security pursuant to provisions of Section 237(a) of the then Companies Act. Further, the deceased Plaintiff/Applicant alleged that the 2nd Defendant failed to fetch the highest price for the suit property and instead relied on an outdated valuation report and as such the Plaintiff/Applicant implies collusion between the Defendants to defraud the shareholders, contributories and creditors. That these matters are personal to the deceased and cannot be continued to be litigated upon following his demise.

15. That the suit property is vested in the company that is under liquidation and under the management of the 2nd Defendant/ Respondent. Therefore, so long as a right is referable to the individuality of a person, it does not survive at the death of that person. The deceased Plaintiff/Applicant brought the action in his personal capacity and not at the behest of the Company in liquidation. Section 228 of the Companies Act

(now repealed) not having been adhered to; there was never a proper cause of action before Court which can now be continued.

16. I have considered the Application in totality alongside the averments and/or submissions of the Parties. I find that the Applicant was a director/shareholder in Lakestar Insurance Company Limited (in liquidation) (herein “the Company”). The Company was placed under liquidation vide a Court Order of 30th June 2003 through a winding cause No. 21 of 2003. After filing of this case, the hearing thereof commenced on 27th January 2015, and concluded in February 2016. The matter is pending the highlighting of submissions filed by the Parties after the conclusion of the hearing. Unfortunately, the Plaintiff died on 23rd April 2016. The Deceased Plaintiff’s son, was granted Limited Grant of Letters of Administration vide Succession Cause No. 1020 of 2016, on 12th July 2016.

17. The issues for determination are basically based on the grounds raised in opposition to the Application and summarized as follows:

a. Did the Deceased Plaintiff have the capacity or locus standi to institute this suit in the first instant?

b. Did the Deceased Plaintiff institute this suit in his personal capacity or as a Director and Shareholder of the Company?

c. Depending on the answer to question (b) above, the next question is whether, the cause of action herein can survive his demise.

d. Depending on the answer to (c) above, whether the prayer sought for herein for substitution can be granted.

18. The survival of causes of Action is provided for under Section 2 of Law Reform Act which states:

“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....”.

19. The 1st Respondent submitted that, the case could only survive the demise of the Plaintiff or continue after such an event if the cause of action “vested in him” prior to his death. The 1st Respondent referred the Court to various meaning of the word “vested” and cited Lexicon definition to mean *inter alia* “clothed, robed, dressed” or short oxford English Dictionary to mean, “established, secured or settled in the hands of, or definitely assigned to a certain possessor”.

20. The other issue raised is whether the Plaintiff brought the suit in his personal capacity or in his capacity as a director and contributory of the Company. The 1st Respondent argued that no cause of action vests in him as a person and submitted that the Applicant concedes and states:

“As aforesaid the Plaintiff sued the Defendants jointly and severally for exercise of the powers by the 2nd Defendant and wrong done to the suit property. It is apparent that the suit did not abate with his demise”.

21. In my considered opinion, the issue as to whether the Plaintiff sued in his personal capacity or as the Director/shareholder of the Company goes to the root of the matter. It is closely linked with the issue as to whether the deceased Plaintiff had the *Locus Standi* in the first instance to institute this suit. This issue is alleged to have been raised by the 1st Respondent but does not seem to have been determined. To answer this question, the Court will definitely have to delve into the merit of the entire suit and that may pre-empt the pending judgment herein depending on the outcome of the Court’s finding on issue (a) above.

22. To the contrary, even if the Court were to allow the substitution sought, all the issues raised herein,

can still be considered by the Court in the main judgment.

23. A right to be heard is provided for under Article 48 of the Constitution of Kenya. It is supported by the general principles of Natural Justice, that a person should not be condemned unheard. Therefore, and in accordance with the principles of upholding substantive justice under Article 159 of the Constitution of Kenya, I shall allow the Application in the terms of Prayer 1, save for an order of costs to the Respondents. All the other issues raised herein for determination shall be banked for consideration in the main judgement. The submissions in relation to the same shall also be banked for the same use. I shall treat the submissions made in respect to this Application as part of the final submissions by the Parties. And now I direct that, the Parties should proceed and take a date to highlight the submissions filed.

24. Orders Accordingly.

Dated, delivered and signed on 6th June 2017 at Nairobi

G. L. NZIOKA

JUDGE

In open Court in the presence of:

Mr. Manyara for Oyugi for the Plaintiff

Mr. Jelle for the 1st Defendant

Mr. Jelle for Ms. Latif for the 2nd Defendant

Teresia – Court Assistant