



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. 81 OF 2006

NICODEMUS KEBASO.....PLAINTIFF

VERSUS

CHAIRMAN BOARD OF GOVERNORS,

MATONGO LUTHERAN THEOLOGICAL COLLEGE.....DEFENDANT

RULING

1. The plaintiff died on 15th May 2015. Doubt is removed by the death certificate issued on 24th August 2015. His widow, *Berita Nyakerario Kebaso*, now prays to be substituted as the plaintiff in this suit. The grounds are set forth in the notice of motion dated 22nd January 2016; and, in a deposition of even date.
2. In a synopsis, the applicant avers that this suit is partly heard; that she is the legal representative of the estate of the plaintiff by dint of a grant of letters of administration *ad litem* issued on 16th November 2015; and, that the cause of action has survived the death of the deceased.
3. The motion is contested. There are grounds of opposition dated 11th March 2016. The pith of the objection is that the claims in the suit were *in persona* and did not survive. Since the deceased was the sole plaintiff, the defendant contends that the suit has abated; and, that the applicant is ill-suited to substitute the deceased. Accordingly, the defendant submitted that the motion is incompetent; and, an abuse of court process.
4. On 16th March 2016, I heard oral arguments from learned counsels for all the parties. I have considered the notice of motion, the deposition, grounds of opposition and the rival submissions.
5. Before his demise, the plaintiff had concluded his testimony. The prayers in the plaint are for general damages for *breach of contract*; general damages for malicious falsehood; *loss of earnings* for 26 years; aggravated and special damages; interest; and, costs. The case is thus *not* entirely based on *tort*. I must say that the grounds of opposition are not idle. Some of the prayers may as well have been overtaken by the cruel hand of death. The question whether the *entire* cause of action has survived is *live*. But those matters can only be *fairly* decided in a formal motion to strike out the pending suit. To do so, it is imperative that the estate be heard. The estate cannot be heard unless substitution takes place.
6. Order 24 of the Civil Procedure Rules 2010 provides that a cause of action shall *not* be defeated merely by the death of the plaintiff or defendant. If the cause of action *survives* the deceased, a substitution must be undertaken within a *year* of the death; in default, the cause of action *abates* by operation of the law.
7. Kenya has a new Constitution. The Court must now pay heed to the overriding objective to do justice to the parties. See Article 159 of the Constitution; and, sections 1A, 1B and 3A and 63 of

- the Civil Procedure Act. See also Harit Sheth T/a Harit Sheth Advocate v Shamas Charania, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.
8. The application has been brought with *expedition* and *before* the expiry of one year. If substitution is not allowed, the estate is likely to be left holding the short end of the stick. The court must strive to ensure equality of arms of the parties. The applicant is the legal representative of the estate of the plaintiff by dint of a grant of letters of administration *ad litem* issued on 16th November 2015. To prevent the ends of justice from being defeated, I will allow her to step into the shoes of the deceased in this action.
 9. The upshot is that *Berita Nyakerario Kebaso* is hereby substituted in place of the *plaintiff*. I grant general leave to amend the pleadings to reflect the new party. Costs shall be in the cause.

It is so ordered.

DATED and DELIVERED at ELDORET this 12th day of April 2016

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

Ms. Kesei for the plaintiff instructed by Onyinkwa & Company Advocates.

No appearance for the defendant.

Mr. J. Kemboi, Court Clerk.