REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CIVIL APPLICATION NO OF 2011

LEONARD MUTUA MUTEVU.....PLAINTIFF

Versus

BENSON KATELA OLE KANTAI.....1ST DEFENDANT

MINA SAMNAKAY T/A

MOHAMMED SAMNAKAAY ADVOCATES.....2ND DEFENDANT

RULING

Abatement of suit

[1] I am considering the application dated 16.12.2013. The Applicant in that application is the personal representative of the 1st defendant, deceased, and has applied to be made a party in place of the 1st defendant. He has also applied for injunction against the Respondents. On 16.12.2013, the court granted the order for substitution. Mr Gacie, counsel for the 1st Respondent filed grounds of objection on 19.12.2013 raising an objection that the application dated 16.12.2013 is void as there was no suit in existence. The suit abated way back in 2011 and was declared so by Kimondo J on 1.2.2012. He, therefore, was of the view that arguing the application will be engaging in a mere academic exercise. The court considered the question of abatement of the suit to bear preliminary significance in the proceeding and allowed it to be canvassed straight away. The court also noted that arguments by counsels were characterized by interesting accusations and counter-accusation; each accused the other for non-disclosure of material facts on the question. Mr Gacie threw the first salvo; that during the *ex parte* hearing of the application herein, Mr Kuloba did not make full disclosures to the court especially on the existence of the order by Kimondo J, which he believes would have affected the decision of the court on the application for substitution. To him, had that information been brought forward, the court could not have allowed substitution of the 1st defendant, and so the order of substitution issued on 16.12.2013 was made in error. On that basis, the order should be discharged. He supported his said position and relied on Order 24 rule 7; that, since no application for substitution was made within one year of the death of the 1st defendant, the suit abated. A suit that has abated is no suit for all purposes; it is non-existent in law. He found support in the case of **ELIAKIM SAKA ODIPO v DISMUS KWEYU MALALASO [2009] eKLR** and **JOHN CHEGE MWANGI & 3 OTHERS v OBADIAH KIRITU METHU [2012] eKLR.** In the circumstances; it was not legally possible for the court to have issued any orders of

substitution after one year. The suit was essentially against the 1st defendant as the 2nd defendant was sued merely as the custodian of the title document. The only legal path in the matter was to apply for the revival of the abated suit, and the court may order the personal representative of the deceased to be made a party where it is shown the party had been prevented by a sufficient cause to apply for substitution. He asked the court to vacate its order made on 16.12.2013 and also dismiss the application for substitution in toto.

[2] M/S Mina, the 2nd defendant fully associated herself with the submissions by Mr Gacie but emphasized that she had been joined in the proceedings merely because she was the advocate in the transaction and at some time held the original title documents of the suit land. She is not a principal party in the suit. In any event, she is no longer in the custody of the title documents and the parties are aware of that fact. She applied for the application for substitution to be dismissed.

Mr Kuloba; suit has not abated

[3] Mr Kuloba opposed the objection. He submitted that the suit has not abated especially because the court has already ordered a substitution of the 1st defendant. He made more substantive submissions; that this is a peculiar case involving land which should be given an opportunity to be heard on merits by substituting the deceased 1st defendant. After all, there is another party, living; the 2nd defendant who was sued in her capacity as the advocate for the sale transaction and as one who held the custodian of the original title documents of the suit property. The suit survives and should be continued with. He also levelled accusations against Mr Gacie; that he did not disclose to the court that they had made an application dated 16.6.22010 for substitution of the 1st defendant.

COURT'S RENDITION

Issues

[4] I see two issues which I should determine:

1) Whether this suit has abated; and

2) Whether the orders issued on 17.12.2013 were made in error.

In determining these issues, I will, at the same time determine; the appropriate procedure in applying for substitution of a deceased defendant and or revival of a suit that has abated; and the consequences of default to follow the laid down procedure.

Relevant procedural law

[5] Order 24 of CPR is the procedural linchpin of the objection herein. I, therefore, reproduce the relevant parts thereof below;

Order 24 of the CPR

1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

2. Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

> ***4(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.***
>
> ***(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.***
>
> ***(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.***
>
> ***7(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.***

Substitution of deceased defendant: Law of Succession Act

[5] Now, the 1st defendant died on 2.1.2010. From the facts of and pleadings in this case, the 1st defendant is the principal party; the suit cannot be effectively proceeded with against the 2nd defendant alone. Accordingly, the personal representative of the 1st defendant ought to be made a party. That process is governed by rule 4 of Order 24 of the CPR. There are two important aspects of rule 4(1) of Order 24 of the CPR; 1) under rule 4(1) any party may apply; and 2) on such application being made, it is the court which *shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.* The party applying just needs to establish the personal representative of the deceased defendant and the rest is left to the court's administrative mechanisms of case management. For purposes of rule 24 of the CPR, the personal representative of the deceased defendant is the one appointed in accordance with the Law of Succession Act. Rule 4(3) of Order 24 of the CPR, however, places a limitation period and consequences of failure to apply within the prescribed time.

[6] Mr Kuloba introduced an interesting turn in the matter: first, he accused Mr Gacie for not disclosing that he had applied through an application dated 16.6.2010 for substitution of the 1st defendant. Then he seemed to suggest that, by that application, there was an application for substitution which was made within one year. Although Mr Gacie did not mention, nonetheless in his reply, confirmed that he filed the application dated 16.6.2013. I hesitate to conclude his guilt for non-disclosure. Does that application satisfy the requirements of Order 24 rule 4 of the CPR? There is an application on record by the plaintiff under Order XXII rules 4 & 5, and Order XXXIV rule 12 of the repealed Civil Procedure Rules dated 16.6.2010 for

> 1) A determination as to who between **ESTHER WOMULABIRA** and **PARSELELO KANTAI** is the legal representative of the 1st defendant; and
>
> 2) On determination of that issue, the court to order that the legal representative be made a party to the suit in substitution for the 1st defendant.

[7] That application is not really an application in the sense of the previous Order XXIII of the repealed CPR (which is similar to Order 24 of the CPR) or Order 24 of the CPR, for it was

speculative in nature and no personal representative had been duly appointed by the court under the Law of Succession Act. It was an incompetent application with no legal effect. Its presence is unnecessary bother which merely creates a false impression of compliance with the law. I treat it as such and hold it does not change the state of things in this matter.

Suit abates: no fresh suit

[8] There was, therefore, no application for substitution of the 1st defendant in terms of the previous rules or under rule 4 of Order 24 which was made within one year of the death of the 1st defendant and the suit abated. Unless revived, the effects of abatement of suit are dire as provided under Rule 7(1) that:

> ***Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.***

Revival of abated suit: application and by whom?

[9] The suit having abated, the only remedy in law, was to apply for revival of the abated suit under rule 7(2) of Order 24 of the CPR but on condition that the court; 1) is satisfied by the party applying that he was *that he was prevented by any sufficient cause from continuing the suit;* and 2) *revival of the suit shall be upon such terms as to costs or otherwise as it thinks fit***.** The law did not want to foreclose on rights of parties to have substantive disposal of cases by providing the possibility of an abated suit from being legally resurrected. But I find Mr Gacie submission to be curious; that it is only the plaintiff who should apply for revival of suit under Order 24 rule 7(2) of the CPR. Mr Kuloba did not make any specific reply to that submission but the general tenor of the submissions in this matter leaves that issue for determination by the court. That argument seems quite attractive but on a second thought I should say something about it. My own view on the matter is that the rule uses the term *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,* however, it must be understood that a defendant who has filed a defence and counter-claim is the plaintiff in the counter-claim. I would, therefore, be guided by the broad constitutional principles of justice to serve substantive justice, and lean towards an interpretation which is not unreasonably restricted in order to avoid injustice on other parties who are entitled to apply for revival of the abated suit. The claim herein was initiated by way of an Originating Summons where the Applicant sought several declarations, including that the sale contract for sale of L.R. NO 209/2951 between himself and the 1st defendant is rescinded, the Respondent to return the deposit which had been paid pursuant to the said agreement, and that he be declared to be the lawful allottee of the suit property. The reply by the 1st defendant makes claims against the Plaintiff on the agreement for sale of the suit property for the balance thereof and also pleads fraud. Under the procedural law in Kenya, an Originating Summons could be turned into a plaint and be determined as such. Accordingly, the personal representative of the 1st defendant in this case would still apply for revival of the suit. Further, and without making a decision, I should think that, in the new constitutional dispensation where *locus standi* has been substantially enlarged, a personal representative of any party in the suit who can show legitimate interest in the revival of the case may apply for the suit to be revived especially in public-interest litigation or where it can be shown that the plaintiff is taking improper or illegal advantage of the abatement of the suit to the detriment of the party applying.

Application dated 16.12.2013

[10] But has the Applicant complied with the law in applying for substitution through their application dated 16.12.2013? In law, this suit abated on 1.1.2011, which is one year after the death of the 1st defendant. This application herein was made on 16.12.2013, almost four years from the death of the 1st defendant. I am not persuaded by Mr Kuloba's argument that these are mere technicalities which are depreciated by Article 159 of the Constitution. They are substantive

matters of law undergirded by sound legal considerations of placing one year as reasonable time within which to apply for substitution; one is to allow sufficient time for the personal representative to apply under the Law of Succession Act for grant of representation; and yet, bring litigation to closure- see rule 7(1). The law is careful not to foreclose the right of parties to receive substantive justice and has provided re-awakening of the abated suit- apply to court to revive the abated suit. The two steps are distinct and serve different purposes; should be adhered to as provided and parties do not have any legal justification not to. It should be understood that once the suit has abated, there is no suit, there is nothing and out of nothing you can derive nothing, hence the requirement to apply to resuscitate the suit to life first, albeit the order for substitution will ordinarily saddle upon the one for revival of suit. But in so applying the applicant must prove to the court that he had been prevented by a sufficient cause from applying within the one year provided in the rules. That, of course, is in accord with the principle of lashes, and the abhorrence by law for indolent suitors. The application by the Applicant dated 16.12.2013 was not filed within one year and is not the application envisaged under Order 24 rule 4 of the CPR. If for a moment the said application pretends to be made under rule 4, it has contravened all procedural rectitude provided under Order 24 of the CPR; it is founded on nothing and will elicit nothing; it has no foot on which to stand for the suit has abated. On the other hand, if it masquerades as an application for revival of the abated suit, likewise it falls short off the requirement of the law; it neither bears a prayer for revival of suit nor the reasons why it has been made out of time. Whichever way you look at the said application, it is difficult to assign to it the vitality of an application to revive the suit contemplated in Order 24 rule 7(2) of CPR. Nonetheless, nothing prevents the Applicant from applying for the revival of the suit. Meanwhile, let me determine other relevant matters which were raised by counsels.

Setting aside irregular orders

[12] Before I close, I note that in the course of the arguments by counsels, Mr Kuloba introduced yet another interesting twist; that the order of the court for substitution of the 1st defendant on 16.12.2013 completely changed the state of affairs in the suit. I think not. Those orders were issued in error which was occasioned by failure of counsel for the Applicant to disclose all material facts. Orders which are so obtained are irregular and are to be set aside *ex debito justitiae*. I am guided by the opinion of Green MR in the case of **CRAIG V KANSEE [1943] 1 All ER 108 at 113,** which has been adopted and applied with a peremptory connotation in many jurisdiction including Kenya-see the cases of **COURT OF APPEAL OF KENYA AT KISUMU CIVIL APPEAL NO. 179 OF 1995, PROVINCIAL INSURANCE CO. OF EAST AFRICA V MORDECAI NANDWA (unreported),** and **COURT OF APPEAL OF KENYA AT NAIROBI CIVIL APPEAL NO. 59 OF 1993 OMEGA ENTERPRISES (K) LIMITED V KTDA & OTHERS (unreported).** See also the explanation in **ISAACS V ROBERTSON [1984] 3 All ER 140** that;

> ***...if [an order] is irregular it can be set aside by the court that made it on application...to that court either under the rules of court dealing expressly with setting aside orders for irregularity or ex debito justitiae...[Addition mine]***

See also the case of **OWNERS OF LILIAN 'S' v CALTEX (KENYA) LIMITED [1989] KLR** on the fate of orders which have been obtained on the basis of non-disclosure of material facts**.** I need not repeat that suitors of justice are always under a duty, and must make full disclosures of all material facts including those which are adverse to them before they can enjoy orders from the court; lest the orders they obtain should be rendered irregular for non-disclosure, and therefore, open to be set aside forthwith by the court- *ex debito justitiae.* A party cannot be allowed to enjoy orders obtained through non-disclosure of material facts. The order issued on 16.12.2013 falls in this unfortunate category and is hereby set aside.

<u>CONCLUSIONS: FINDINGS AND ORDERS</u>

[13] As I have already stated, I do find that this suit has abated. The orders issued on 16.12.2013

were made in error, and are hereby set aside. An application for revival of the suit is absolutely necessary and there is none before the court. The application dated 16.12.2013 is devoid of the vitality of an application for revival of a suit that has abated; for, it does not bear a prayer for revival of suit as contemplated in Order 24 rule 7(2) of CPR; it does not give any reasons why substitution was not applied for in good time; and it has contravened all procedural rectitude provided under Order 24 of the CPR. However, nothing prevents the Applicant from applying for revival of the suit as long as he proves to the court that he was prevented from applying on time by a sufficient cause.

Dated, signed and delivered in open court at Nairobi this 4th day of March, 2014

F. GIKONYO

JUDGE