



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO.319 OF 2009**

**KENNETH KIMARI KAHURO .....PLAINTIFF**

**VERSUS**

**JAMES MAINA.....1ST DEFENDANT**

**JEDIDA KAGAI.....2ND DEFENDANT**

**AND**

**HANNAH NGINA KENNETH KIMARI.....1ST APPLICANT**

**BENJAMIN GITERE KIMARI.....2ND APPLICANT**

**RULING**

1. The application is brought by way of Notice of Motion under the provisions of **Order 24 Rule 8(1)** of the **Civil Procedure Rules**.
2. The applicants rely on the grounds on the face of the application and on the supporting affidavit made by **BENJAMIN GITERE KIMARI**.
3. The orders sought by the applicants are *inter alias*:

a) That the applicants, Hannah Ngina Kenneth Kimari and Benjamin Gitere Kimari be granted leave by this court to continue as plaintiffs in this suit for purposes of executing the decree herein.

b) The costs of the application be provided for.

4. Counsel for the applicants submitted that the plaintiff who is the decree holder died on the 21st March, 2011 and that the applicants are the administrators of the Estate and a copy of the grant is annexed to application and is marked.
5. Counsel further submitted that judgment was entered in favour of the plaintiff on the 16th February, 2010 and a decree was issued thereafter on the 17th February, 2010. The applicants now wish to continue with the suit and wish to proceed to execute the decree.
6. Counsel argued that abatement of the suit was not applicable at the stage of execution and prayed that the applicants be allowed to continue with the suit and proceed to execute the decree.

**ISSUES FOR DETERMINATION**

7. Whether the applicants ought to be enjoined in the suit.

8. Whether abatement applies to a suit that has reached the stage of execution.
9. Whether to grant the applicants the order sought.

## **ANALYSIS**

10. Counsel for the applicants argued that the suit had been heard and determined and the only aspect that remained relates to execution and at that stage the suit cannot abate and that the applicants are desirous to continue with the plaintiff's suit.
11. This court makes reference to **Order 24 Rule 1** and **Rule 3(2)** which read as follows:

**“Order 24 (1) The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.**

**(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 party and shall proceed with the suit.**

**3(2) Where within one year no application is made under sub-rule (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.”**

12. This court also makes reference to **Section 37** of the **Civil Procedure Act** which provides *inter alia*:

**“37(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.**

**(2) Where the decree is executed against such legal representative, or against any person as aforesaid, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability the court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.”**

13. The above section provides that a decree holder may directly pursue the legal representative of the deceased judgment debtor or a person who has intermeddled with the estate of the deceased without proceedings to enjoin these aforementioned parties to the proceedings. In essence, there is no need for substitution in cases where the judgment debtor dies.
14. This court is of the opinion that the law differs where the plaintiff dies irrespective of whatever stage the suit may have reached, the law requires that an application to court be made requesting that the legal representative of the deceased plaintiff be made a party to enable such a party to proceed further with the suit.
15. The applicants are not parties to the suit and must therefore apply for substitution as provided for under **Order 24 Rule 3(1)** and not seek for continuance.
16. This court notes that the plaintiff/decree holder died on the 21st March, 2011 and that the application herein is dated 24th May, 2013 and was filed on the 24th May, 2013.
17. From the date of death of the plaintiff/decree-holder, (21/3/2011) to the date this instant application was filed (24/5/2013) this period translates to two (2) years and two (2) months.
18. The court reiterates that, a period of two (2) years and two (2) months had lapsed and this court

finds that the provisions of **Order 24 Rule 3(2)** on abatement of suit are applicable herein.

**FINDINGS:**

- 19.This court finds that there is need for the Applicants to be enjoined to the suit by way of substitution.
- 20.This court finds that abatement applies to the suit regardless of the fact that it had reached the stage of execution of the decree.
- 21.This court finds that the suit has abated and this court is unable to grant the applicants the orders sought.

**CONCLUSION**

- 22.The application is hereby dismissed with no order as to costs.

**Dated, Signed and Delivered at Nakuru this 12th day of May, 2014**

**A. MSHILA**

**JUDGE**