

REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL SUIT NO: 63 OF 1999

BENJAMIN MACHIO LUTOMIA.....APPELLANTS

AGNETA W. MACHIO

AND

JOSEPH ISIMBISHIRA WANDAKARESPONDENT

RULING

On the 9th of February 2012 counsels for both parties herein attended court and recorded consent. The consent is to the effect that the appeal has abated and the matter to be marked as settled. Each party to bear his own costs. The consent was granted by the court.

The 2nd appellant filed an application dated 7/4/2014 seeking orders that the consent order recorded on 9th February 2012 be set aside and the appeal be allowed to proceed. The application is supported by her affidavit sworn on 7th April, 2014 . CHARLES ISIMBISHIRA WANDAKO filed a replying affidavit sworn on 21st May 2014.

Mr. Osango, Counsel for the applicant submitted that there were two appellants. The 1st appellant who was the 2nd appellant's husband died. The 2nd appellant is still alive and was present in court. On 21/2/2006, the court allowed the 2nd appellant to substitute her deceased husband. The order that allowed the suit to be marked as having abated was made in error. Counsel is relying on the authorities of **TROPICAL FOOD PRODUCTS INTERNATIONAL LTD VS THE EASTERN & SOUTHERN AFRICAN TRADE AND DEVELOPMENT BANK, eKLR (2008)** and **FLORA N. WASIKE VS DESTIMO WAMBOKO (1982-88) KLR 625**.

Mr. Ombaye, counsel for the respondent opposed the application. Counsel contends that there was a consent recorded between the parties. There are no good grounds to set aside the consent. There is no mistake that has been pleaded by the applicant. Counsel relies on the case of **BROOKE BOND LIEBIG (T) LTD VS MALLYA (1957) E.A 266** and that of **DIAMOND TRUST BANK OF KENYA LATD -VS PLY & PANELS LTD & ANOTHER – NAKURU Civil Appeal No. 243 of 2002**.

The record of the court shows that on 9/2/2012, Mr. Ibenzi, appearing for the appellants and Mr. Ombaye for the respondent recorded a consent to the effect that this suit has abated. Abatement of cases relates to situations where a party has died and there is no possibility of the family members taking over the suit. The main issue for determination is whether the suit has indeed abated.

The 2nd appellant was present in court when this application was being heard on 17/6/2014. The memorandum of appeal dated 7/7/1999 also had the applicant's name as the second appellant. This is an appeal from the Western Provincial Appeals Committee. The record of the Mumias Land Disputes Tribunal also shows that the applicant herein was a 2nd defendant in those proceedings. It is therefore

clear to me that the applicant has all along been a party to the proceedings in her own right. She is still alive and would like to pursue her appeal. She also successfully applied to substitute her deceased husband after having been issued with a grant on 12th May 2004. On 21/2/2006 the court allowed the applicant herein to substitute her deceased husband.

Since the applicant is a party to the proceedings and she is alive, I do find that the appeal has not abated. The appeal has not abated as against the 1st appellant as the 2nd appellant substituted him. One of the grounds for setting aside a consent judgment is mistake or ignorance of material facts. I do find that there was mistake on the part of Mr. Imbenzi when he recorded that the suit has abated. The mistake was made due to ignorance of material facts. It is a fact that the 2nd appellant is alive. The court cannot tell the applicant that her matter has abated as it was presumed that she was also deceased. The intention of litigation is to hear the dispute between the parties and make a final determination. This suit had not abated as recorded by consent of both counsels. The applicant is alive and I saw her in court. She has a constitutional right to have her dispute determined by the court.

In the end, I do find that the application dated 7/4/2014 is merited and the same is granted as prayed. The consent order made on 9/2/2012 is hereby set aside. The appeal shall process to full hearing. Costs shall follow the outcome of the appeal.

Dated, delivered and signed at Kakamega this 16th day of October 2014

SAID J. CHITEMBWE

JUDGE