



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 3164 OF 1995**

**ROBERT NELSON NG'ETHE.....PLAINTIFF**

**Versus**

**KOINANGE INVESTMENT & DEVELOPMENT LTD.....DEFENDANT**

**RULING**

**Death of plaintiff**

[1] This suit is pending ruling of three applications. The first one is dated 9<sup>th</sup> June 2014; the second 7<sup>th</sup> July 2014; and the third 8<sup>th</sup> July 2014. But while the rulings are pending, the Plaintiff passed away on 8<sup>th</sup> October, 2014. The said information was brought to the attention of the court by counsel for the Defendant through their letter dated 10<sup>th</sup> October, 2014. The death of the Plaintiff is not in dispute, except counsel for the deceased plaintiff Mr. Murugara was of the view that the cause of action survives the death of the Plaintiff and the court should deliver the pending rulings. Mr. Mbabu for the Defendant was of the contrary view and insisted that the death of the Plaintiff affects the suit under order 24 of the Civil Procedure Rules. He stated that the applications which are pending rulings relate to transfer of land to the deceased person which by his death becomes null and void. Mr. Mbabu said the deceased died with the judgment and for the suit to continue including delivery of the pending rulings, the status of the Plaintiff has to be regularized first. He beseeched court to stay any further proceeding until appropriate steps have been taken to regularize the status of the Plaintiff.

[2] The relevant law here is Order 24 rule 1, 2 and 3 of the Civil Procedure Rules. The suit survives the Plaintiff but he is the sole plaintiff-a fact calling for further interrogation. In the circumstances, therefore, two things must happen. The first one; the court shall, under rule 1, cause an entry in the file to the effect that the suit survives the Plaintiff. This is an administrative act by the court and I hereby make an entry through this ruling to that effect. The second thing is; under rule 3(1), on an application made in that behalf, the court shall cause the legal representative of the deceased plaintiff to be made a party and shall then proceed with the suit. The second action is premised on the application by the legal representative of the deceased plaintiff and unlike the first one in rule 2, the court cannot make any entry to that effect or proceed with the case until and unless the personal representative applies in that behalf. There is good reason why that is the case and particularly in this case where the deceased plaintiff is the sole plaintiff. The suit cannot proceed without proper parties. The personal representative of the deceased plaintiff is the proper party and has not been substituted as required in law. The court will, therefore, not have jurisdiction to do anything substantial including delivering the rulings herein until the personal representative of the deceased plaintiff is enjoined in the suit. To appreciate the importance of having proper parties before the court before the suit can proceed or the court makes any determination, including delivery of the pending rulings, see what Emukhule J said in the case of **Apex International Limited & Anglo-Leasing and Finance International Limited vs. Kenya Anti-Corruption Commission [2012] eKLR** where he quoted the decision of the Supreme Court of Nigeria in the case of **Goodwill and Trust Investment Ltd And Another vs. Will And Bush Ltd** that;

*‘It is trite law that to be competent and have jurisdiction over a matter, proper parties must be*

*identified before the action can succeed, the parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and, "where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned".*

[3] Accordingly, the status of this case requires the personal representative of the plaintiff to be enjoined so that the suit can proceed and the rulings herein delivered. The personal representative has timelines provided under order 24 rule 3 within which to apply lest he should be caught up by abatement of suit. Therefore, I hereby arrest the rulings herein until the personal representative has been joined in the suit. I need not remind that in law any legal action or step in this matter especially on the deceased person can only be by his personal representative appointed in accordance with the relevant law thereto.

**Dated, signed and delivered in court at Nairobi this 12<sup>th</sup> day of November 2014**

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**F. GIKONYO**

**JUDGE**