REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

REFERENCE TO JUDGE IN CHAMBERS

HIGH COURT CASE NUMBER 1661 OF 1985

TITUS KIRAGU. ..... PLAINTIFF/RESPONDENT

VERSUS

JACKSON MUGO MATHAI. ..... DEFENDANT (DECEASED)

MARY WANJIKU MUGO. ..... LEGAL REPRESENTATIVE OF DECEASED

(APPEAL FROM THE DEPUTY REGISTRAR TO JUDGE IN CHAMBERS UNDER ORDER 49 Rule 2 and 3)

J U D G M E N T

This appeal arises from a ruling of the Deputy Registrar exercising power under the present Order 23 rule 3 (formerly order XXIII rule 3).

The Appellant, Mary Wanjiku Mugo, filed an application under the former order XXIII, Rule 3 and Order L, Rule 1 and 2 of the Civil Procedure Rules seeking the orders that: -

a. **Mary Wanjiku Mugo the legal representative of the plaintiff (deceased) be granted leave to make the application on behalf of the deceased.**

b. **The suit against the defendant Jackson Mugo Mathai (Deceased) be declared as abated.**

c. **Costs.**

The Deputy Registrar having considered the effect of the then Order 23(3), now Order 24 Rule 4(3), of the Civil Procedure Rules stated in her ruling: -

> **"The provisions of Order 23 are clear but the overriding objectives of the Act and the Rules need to be upheld in cases that are unique as this one where parties cannot solely be blamed on the length of time that matter has taken in court or and circumstances that have arisen which were unforeseen."**

The Deputy Registrar accordingly, refused to declare the suit to be abated although she stated that the said application seeking such declaration was proper and rightly brought. It is that failure to declare the suit as abated that led to this appeal to the judge in Chambers.

The relevant facts of the case are as follows: - the plaintiff (respondent) had sued the Defendant/Appellant

in 1985 and the case proceedings took a long time to be completed after several judges had presided over it. Finally Mugo, J who heard the last part of the case, reserved judgment for 1st December, 2006. However the judgment had yet to be delivered by October, 2010 when the Plaintiff sought a mention of the case by a letter dated 13th October, 2010 to seek a fresh judgment date. By then Mugo, J had disqualified herself from the case and was clearly not going to deliver the expected judgment. That meant that the next Judge who would handle the case might be the one to write the pending judgment using the evidence already adduced on record or the judge might as well, order a retrial.

As things happened however, the Defendant/Appellant's Legal Representative, on being served with the notice to mention the aforestated case, went ahead and on 15th October, 2010 filed the application now before the court. She stated that the Plaintiff's husband having died on 24th March, 2008 and since the Respondent had failed to substitute the dead plaintiff with a legal representative of his estate as party, the suit had, by operation of statute, abated. In the circumstances, she had argued before the Deputy Registrar, there was no valid suit to be fixed, mentioned or pursued. Hence she requested for a declaration that the suit had abated exactly one year after the death of the Plaintiff.

It is on the record that the Respondent/Plaintiff, had opposed the application to abate the suit, stating that she had on 5th February, 2009 forestalled the situation by filing an application to substitute the deceased plaintiff as required under the former Order XXIII. The Respondent had argued that the court could not declare that the suit had abated so long as the said application of 5th February, 2009 still pended. The Respondent had also urged the Deputy Registrar to take refuge under the provisions of Sections 1A and 1B of the Civil Procedure Act, to salvage the situation especially since the delay in completing the suit was clearly caused by court's failure to deliver the pending judgment.

The Deputy Registrar's decision not to declare the suit as abated and/her failure on the other hand to clearly come out to declare that suit was still alive, aggrieved the Appellant who then as earlier pointed out, filed this appeal.

I have examined the grounds of this appeal to the judge in Chambers. They can be summarized into one main ground: that the trial Deputy Registrar erred in law in failing to declare the suit as abated in accordance with Order XXIII, rule 3 (2) of the Civil Procedure Rules (Now Order 24 Rule 4(3)).

I have also perused the written submissions filed by either party's counsel. The main and single issue to be resolved by this court is whether or not this suit abated one year after the defendant had died? That calls for a clear interpretation of former Order 23 rule 4(1-2) which states as follows: -

> ***"3(1) where....sole plaintiff or surviving plaintiff dies and the cause of action survives or continues, the court, on application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.***
>
> ***(2) Where within one year no application is made under sub-rule (i), 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."***

In this case there is no dispute that the Plaintiff, Jackson Mugo Mathai, died on 24th March, 2008. There is no doubt either, that a year thereafter say, on 24th March, 2009, no legal representative of the deceased Plaintiff had by an application by the Plaintiff's representative, been brought on board of this case. There was an arguable fact before the trial court as to whether or not an application to that end and dated 5th February, 2009, had been filed although not heard and determined. The court will consider both options.

The trial court of its part on this point, however, noted that the alleged application for substitution was not in the court file although a photocopy held by the Respondent bore a court-received stamp. The court however deliberately decided not to make any finding as to whether the alleged application for substitution had indeed been filed or not or whether it had been merely sneaked into the court file or not.

Again, this court will if necessary, examine and make its conclusion as whether the presence of the application for substitution in the court file could have made any difference to position anticipated by Order 23 rule 4(2).

The rule has been interpreted in many courts in many cases. In **Kenya Farmers Co-operative Union Limited Versus Charles Murgor (Deceased) t/a Kaptabei Coffee Estate eKLR**, the facts were that an application for substitution of the deceased Defendant, was filed on 19th January, 1998, which was more than two years after the Defendant had died. That was clearly not within one year since the said death. Waweru, J, stated: -

> ***"Therefore, as a matter of law, the suit (had) abated. When substitution was subsequently purportedly made on 5th March, 1998, there was no suit subsisting in which substitution could be made. It had abated..... one year since the death of the Defendant. The order for substitution was thus made in error. It was unlawful and ought not have been entered."***

In **M'Mboroki M'arangacha Vs Land Adjudication Officer Nyambene & 2 others [2005] eKLR**, I had opportunity to consider a similar issue. In referring to an application for substitution of a party by a Legal Representative, I stated as follows: -

> ***"But it is clear that such an application seeking that a legal representative be made party in the place of the deceased Plaintiff, must be made within one year. In default of bringing the said application as I understand the rule, the surviving suit shall abate so far as the deceased Plaintiff is concerned. The language used by the legislature is mandatory as the words used are "the suit shall abate." It is my understanding and view therefore the abatement of the suit is automatic and does not... need an order of the court to abate the suit."***

In this case before me, no substitution was made within one year of the death of the Plaintiff. The suit by operation of a statute was mandatorily to abate on expiration of one year after the death of the plaintiff Jackson Mugo Mathai. That abatement mandatorily took place on or about 24th March, 2009 a year after his death. It took place automatically as a matter of law and because the law say so. It did not require a declaratory order by court to abate. And every day thereafter until the appellant herein filed the application dated 14th October, 2010, the suit did not exist because it had abated. The fact of filing the application dated 5th February, 2009 for substitution by the Respondent was in the right direction and had it been prosecuted and substitution made before 24th March, 2009, the suit could have been saved. However the act of filing the application without more, was not enough and could not fulfill or satisfy the requirement of Order XXIII Rule 4(2) aforestated.

The Respondent argued before the trial Deputy Registrar that the suit was an old one, had been heard by many judges and that only judgment remained to be delivered by court, which judgment's delay was squarely placed at the door of the judges. The court sincerely sympathises with the situation in this case which may have been conducted at a great cost and may have many unscored issues still pending. However the law is the law. The court's duty is to interpret the law as it was promulgated by parliament. The court does make the law, except in those very few circumstances where the written law is not clear or is absurd and the court has to find or establish the intention of the legislature.

Reverting to this case, it is my view and finding that the trial Deputy Registrar should have taken a firm stand found in and in conformity with the provision of order 23 Rule 4(2) whose clarity she did not doubt. That is to say, she should have declared a clear decision on the abatement of this suit. In the court's further finding, her, such failure to declare the abatement of the suit, did not in any way survive or revive the suit which had already abated. The only act of the Plaintiff's legal representative which would revived the suit would be an application for such revival under the present Order 24 rule 7(2) of the Civil procedure Rules, which states as follows: -

> ***"The Plaintiff or the person claiming to be the legal Representative of the 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 set aside an order or 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."

I find no reasonable ground on this record as to why the Respondent herein has never filed a relevant application to revive the abated suit except the comfort drawn by her from the failure by trial Deputy Registrar to declare the suit as abated. To that extent the failure by the Deputy Registrar to take the rightful and proper course, may have misled the respondent that the suit is still alive.

Finally, an issue arose during the arguments before me as to whether or not it was necessary for the Appellant to file the application for the declaration of abatement of the suit if the suit had indeed abated. My view, as already expressed above, is that the suit, by operation of Order 23 Rule 4(2), automatically and mandatorily abated at the beginning of the first day after the expiration of one year after the death of the deceased. Thereafter, the suit was as dead as a dodo. Any act on the suit thereafter, apart from an act confirming the abatement or on the other hand, reviving it under and as specified by the law, would be void and a nullity. Even the act or non-action by the Deputy Registrar in this case, would come to nought as it would not revive an abated suit. As aptly put in **Macfoy Vs United Africa Co. Ltd [1961] 3 All ER, 1169** and in **Omega Enterprises (Kenya) Ltd. Vs Kenya Tourist Development Corporation & 2 Others CA 59 of 1993**: -

"If an act is void then it is nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".

It follows, therefore, that the application made by the Appellant to declare the suit abated was, for its purpose, proper and necessary to enable all the parties concerned know that the suit was no longer alive. Indeed the trial Deputy Registrar arrived at that conclusion and in some cases or circumstances, such declarations as the one sought before the Deputy Registrar are necessary. However, as noted, the actions add nothing to the then existing legal position and are only good for clarity and convenience.

The end result is that this appeal has merit. It is allowed to the extent that it has clarified that this suit with or without a judgment, abated on or about the 23rd March, 2009 and any judgment written or based on it in its abated status, shall be null and void. Costs of the appeal and the application below are to the Appellant. Orders accordingly.

Dated and delivered at Nairobi this 6th day of November, 2013.

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D A ONYANCHA

JUDGE