



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 2068 OF 1984

YUSUF JAMA NOORPLAINTIFF

VERSUS

KENYA MEAT COMMISSION.....DEFENDANT

R U L I N G

1. It is common ground in this matter that the **Plaintiff died on 21st August 2009**. It is also common ground that no application was made by a legal representative to be substituted in place of the deceased Plaintiff, and there has not been such substitution.

2. There is also not before the court any application for substitution.

3. The Defendant has applied by **notice of motion dated 18th January 2011** for an order that the Plaintiff's suit has abated on account of the facts referred to above. There is an alternative prayer for dismissal of the Plaintiff's suit for want of prosecution on account of a period of more than one year having passed without the Plaintiff taking any step to prosecute the suit. The application is supported by an affidavit sworn by the Defendant's advocate and is made under **Order 24, rule 3(2)** and **Order 17, rule 2(1) & (3)** of the **Civil Procedure Rules (the Rules)**.

4. A person called MAHAMED YUSUF has opposed the application by his replying affidavit filed on 7th December 2011. He depones that he is a son of the deceased Plaintiff and that he and his mother (one FATHUMO NUH HUSSEIN) are the legal representatives of his estate by virtue of a grant of letters of administration intestate issued on 19th November 2010 in **Kitale HC Succession Cause No. 72 of 2010**. All the other matters deponed to in the replying affidavit would be germane to any late application for substitution, but not to the present application.

5. The application was canvassed by way of written submissions to which I have given due consideration.

6. Though under **Order 24, rule 1** of the Rules the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues, the provisions following in the Order make it quite clear that it is not intended that a suit shall remain alive indefinitely where action is not taken within a prescribed period to substitute the legal representative of the deceased party.

7. With regard to a deceased plaintiff or plaintiffs, Order 24, rule 3 provides as follows:-

“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 plaintiff 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 a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (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 that the court may, for good reason on application, extend the time.”

8. Abatement of suit in these circumstances is thus not a mere technicality. It is a consequence of inaction by interested parties for over a year following the death of a party.

9. The Plaintiff in this suit having died on 21st August 2009, and there having been no application made within one year or at all for substitution of the deceased Plaintiff’s legal representative in his place, this suit abated on or about 20th August 2010 by operation of the law. It is so ordered.

10. With regard to dismissal for want of prosecution, if the Plaintiff has been dead since August 2009, he could not prosecute his suit, could he? This prayer is misconceived and is struck out.

11. The Defendant shall have costs of the suit (including the application) to be recovered from the estate of the deceased Plaintiff.

DATED AT NAIROBI THIS 1st DAY OF MARCH 2012

**H.P.G. WAWERU
JUDGE**

DELIVERED AT NAIROBI THIS 2ND DAY OF MARCH 2012