

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 14 of 2006

CENTUARY OIL TRADING CO. LTD.....PLAINTIFF

VERSUS

GERALD M. MWANIKI.....1ST DEFENDANT

GEORGE WAINAINA

T/A INTERNATIONAL RELIEF SERVICES.....2ND DEFENDANT

RULING

Before me is an application made on behalf of the 1st defendant purportedly under the provisions of **Order XXIII Rules 3 and 9** and **Order VI Rule 13 (b) and (d)** of the **Civil Procedure Rules** seeking the orders of the court to declare the suit as against the 1st defendant to have abated. In the alternative, the applicant prays that the suit against the 1st defendant be struck out with costs. The grounds in support to the application are stated on the face of the application. The application is supported by the annexed affidavit of Eunice Mbogo. The application is opposed. The plaintiff filed a notice of preliminary objection in opposition to the application.

At the hearing of the application, I heard rival submissions made by Mrs. Karanu for the 1st defendant and Mr. Nyakundi for the plaintiff. I have carefully considered the said submissions. I have also read the pleadings filed by the parties in support of their respective opposing positions. Mrs. Karanu concedes that the application should have been predicated upon the provisions of **Order XXIII Rule 4** of the **Civil Procedure Rule** instead of **Order XXIII Rule 3** of the said rules. **Rule 3** deals with applications in regard to plaintiffs who have died while **Rule 4** deals with substitution of deceased defendants. Under the said **Rule 4**, a legal representative of a deceased defendant is required to make an application to be substituted as a party in the suit before the expiry of one year from the time of death of the deceased defendant. **Rule 4(3)** provides that if no such application is made within a year from the time of death of such defendant, the suit shall abate against such defendant.

In the present application, it is not disputed that the 1st defendant died on 9th February 2008. The applicant, Eunice Mbogo is the widow of the deceased defendant. By her own admission, she states that the legal representatives of the 1st defendant have not applied to be substituted as parties to these proceedings. There is no evidence on record that the said Eunice Mbogo has obtained letters of administration to administer the estate of her deceased husband. It is therefore clear that the objection of the plaintiff to the application has merit. The said Eunice Mbogo lacks legal capacity to agitate any proceedings on behalf of the estate of the 1st defendant in the absence of proof that she is the administrator of the estate of the said deceased. She lacks capacity to bring any proceedings before this court on behalf of the estate of the deceased because she is not recognized in law as the person who has legal authority to administer the estate of the deceased.

The application has been made by a stranger to these proceedings and supported by an incompetent affidavit. It is therefore unmeritorious. It is dismissed with costs to the plaintiff.

DATED AT NAIROBI THIS 1ST DAY OF JULY 2009

L. KIMARU

JUDGE