

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAKURU
CAUSE NUMBER 180 OF 2018**

BETWEEN

JOHN NGOCHI KENNETH KAMAU
CLAIMANT

VERSUS

JOHN NGOCHI KENNETH KAMAU
[acting as the administrator of the estate
of Wainaina Kuria Ngachui t/a Mwenda
Andu Driving School]RESPONDENT

JUDGMENT

1. This is an unusual Claim. It was filed by the Claimant on 19th July 2018.
2. He avers that he was employed by the Respondent as a Driving School Instructor, in 1989.
3. He was dismissed by the Respondent sometime in 2017, after he became sick. He avers that he worked for 28 years.
4. He urges the Court to find that termination was unfair, and grant to him 12 months' salary in compensation for unfair termination at Kshs.

278,301.60; terminal benefits at Kshs. 895,664; certificate of service; and costs.

5. The original Respondent, Wainaina Kuria Ngachui t/a Mwenda Andu Driving School, filed his Statement of Response on 14th September 2018.
6. He denied that he employed the Claimant in 1989. The Claimant started working as a Casual Employee, in 1999. He left in 2001, and returned in 2010. He obtained instructor's license in 2012. He was sickly from the year 2014, and did no significant work. The Respondent continued to pay him *ex gratia*, on humanitarian basis. He left to seek medical attention in July 2016, returning in May 2017, requesting to be reinstated.
7. The Respondent denies owing the Claimant any of the sums claimed.
8. The Claim was scheduled for hearing way back on 20th April 2021.
9. The Court was informed that the Parties were not ready to proceed, because unfortunately, the Respondent passed away on 3rd January 2021.
10. From then until 26th September 2024, there was no letters of administration granted in the estate of the Respondent, to facilitate his substitution and prosecution of the Claim.
11. The Claimant spent the prolonged period from the date of the Respondent's demise, communicating to the Court that the family of the

Respondent had not filed succession proceedings in the estate of their kin, and in the absence of an administrator, he was stuck in having the Respondent substituted.

12. In a bizarre turn of events, the Claimant himself filed a succession cause concerning the estate of the Respondent, at Naivasha Chief Magistrate's Court, Succession Cause Number E076 of 2024. He was issued letters of administration of all the estate of the Respondent.
13. Armed with the letters of administration, the Claimant filed an application dated 13th November 2024 for substitution.
14. Subsequently the Advocates who had been acting for the deceased Respondent, successfully applied to be discharged from the proceedings. It is not clear when or if, the application for substitution was heard and granted, but the record indicates that the Advocates for the Claimant, scheduled the Claim for hearing on 2nd July 2025.
15. Hearing was scheduled for 19th September 2025.
16. The Claimant appeared and confirmed to the Court that he is the administrator to the estate of the Respondent. He then went on to give sworn evidence for himself as the Claimant, and against himself as the administrator of the deceased Respondent. He restated the averments contained in his Statement of Claim.

The Court Finds: -

17. The Respondent passed away on 3rd January 2021. The Court has not been able to trace in its record, orders of his substitution.
18. There is an application filed by the Claimant dated 13th November 2024, over 3 years after the Respondent died, where he sought to substitute the Respondent with his very self, as the Respondent's administrator.
19. The record shows that he prosecuted the Claim on 19th September 2025, in his capacity as both the Claimant and the administrator of the estate of the deceased Respondent.
20. There are various legal reasons, why the Claim as prosecuted by the Claimant, is not sustainable.
21. It appears to have abated under Order 24 Rule 4 of the Civil Procedure Rules. Although there is no specific Rule on abatement of suits under the E&LRC [Procedure] Rules, 2024, the E&LRC has adopted Order 24 Rule 3, on abatement of employment claims, as a default Rule.
22. In **Julius Maina Kabiru v. Kabiru Kanga'ara & Thomas Irungu Kigoi [2022] e-KLR**, the E&LRC applied Order 24 Rule 3 of the Civil Procedure Rules, in finding an employment claim to have abated. Order 24 Rule 3 applies where a Claimant [Plaintiff] dies, while Order 24 Rule 4 applies where a Respondent [Defendant] dies. The principles under both Rules are similar.

23. In a Court of Appeal decision, **Said Sweilem Gheithan Saanum v. Commissioner of Lands [being sued through the Attorney-General] & 5 Others [2015] e-KLR**, the law on abatement of suits was elaborated as follows: -

- a. Generally, the death of a party does not cause the suit to abate, if the cause of action survives. But within 1 year of the death of a party, or within such time as the Court may in its discretion, for good reason determine, an application must be made for the legal representative to be made a party.
- b. If no application is made within 1 year, or within the extended period allowed by the Court, the suit shall abate.
- c. The legal representative of a deceased party may apply for revival of the suit, by satisfying the Court that he/she was prevented from continuing with the suit, by sufficient cause as held by the Court of Appeal in **Gachuhi Muthanji v. Mary Wambui Njuguna [2014] e-KLR**. Abatement takes place on its own force, once no steps have been made for substitution in accordance with Order 24 Rules 3 and 4, of the Civil Procedure Rules.

24. Over 1 year had lapsed from the time the Respondent passed away to the time substitution was sought; there was no time extended by the Court for his substitution; and even when the Claimant approached the Court seeking to represent the Respondent, he could not do so legally.

25. The role of an administrator to the estate of a deceased person, under the Law of Succession Act, Cap 160 the Laws of Kenya is to act in the interest of the estate, not against its interest.
26. The Claimant was appointed by the Court in Naivasha Chief Magistrate's Succession Cause E076 of 2024, as an administrator of the Respondent, to faithfully administer the estate, in accordance with the law, and to render a just and true account thereof, whenever required by law to do so. How will the Claimant discharge his duty faithfully, while seeking compensation and terminal benefits from the very estate he represents?
27. The E&LRC [Procedure] Rules, 2024 contemplate that employment disputes are adversarial, with a Claimant and a Respondent, each acting as a polar opposite of the other, and coming to Court for adjudication of diametrically opposed factual and legal standpoints. There is no room for a Claimant to act as, or for, a Respondent, or a Respondent to act as, or for, a Claimant.
28. The Employment Act regulates the death of an Employee under Section 24, and the death of an Employer, under Part VIII on insolvency. An Employer is insolvent if adjudged bankrupt or has made a composition or arrangement with his creditors; or has died. Section 67 [a] [ii] states that where an Employer has died, his estate is to be administered in accordance with the Law of Succession Act. Once the Claimant learnt about the death of his Employer, the Employment Act required him to move under the insolvency law, prescribed under Part VIII of the Act.

29. Section 66 of the Act states that where, on an application made by an Employee, or his representative, the Cabinet Secretary is satisfied that: [a], the Employer has become insolvent; [b], the employment of the Employee has been terminated; and on the appropriate date the Employee was entitled to be paid the whole or part of any debt, to which this part applies, the Cabinet Secretary shall subject to Section 69, pay the Employee out of the National Social Security Fund, the amount to which, in the opinion of the Cabinet Secretary, the Employee is entitled, in respect of the debt.
30. The prayers in the Claim, fall within debts contemplated under Section 68 of the Employment Act. It would have been for the Minister to hear the Claimant's representations, upon being moved by the Claimant, and determine the veracity of the debts.
31. In the view of the Court the most appropriate route for the Claimant would have been insolvency, under Part VIII of the Employment Act, instead of the route the Claimant took.
32. Another approach would be, if the beneficiaries of the Respondent declined representation of the Respondent's estate, the Claimant could seek the aid of the Public Trustee, under the Public Trustee Act, Cap 168 the Laws of Kenya, rather than take it upon himself to administer an estate in which he harbours an adversarial interest. The Public Trustee is authorised to represent estates of deceased persons, where there are no executors or beneficiaries, who have offered themselves for

representation. Section 6 of the Public Trustee Act, allows any person appearing to have a legitimate interest in the succession to, or administration of an estate, to request the Public Trustee to take such action in furtherance of such a person's legitimate interest.

33. The Employment Act exempts its application, under Section 2[d], to an Employer and an Employer's dependants, where the dependants are the only Employees in a family undertaking.
34. The Act endeavours to keep the demarcation between employment and family relationships, clear.
35. The Claimant appears to have been part of the Respondent's family, for him to be appointed as his administrator. It was not made clear to the Court, if he was a dependant of the Respondent, or whether the driving school was a family undertaking, where dependants were the only Employees. What familial link did he have with the Respondent, to be appointed his administrator? The Court would however, avoid this speculation, and consider the Employment Act applicable to the Claim.
36. The Court is persuaded that there is no valid Respondent left, to the Claim; the Claimant cannot legally represent the deceased Respondent in this Claim; the Claim has abated; there was no leave granted to the Claimant to substitute the Respondent; the Claimant's representation of the Respondent is against the adversarial procedural architecture, articulated by the E&LRC [Procedure] Rules, 2024; it is in violation of an administrator's obligation to the estate subject matter of administration;

and the most appropriate procedure, would have been the insolvency procedure, under Part VIII of the Employment Act, which governs the death of an Employer.

IT IS ORDERED: -

- a. The Claim is declined.***
- b. No order on the costs.***
- c. The file is closed.***

Dated, signed and delivered electronically at Nakuru, pursuant to Rule 68 [5] of the E&LRC [Procedure] Rules, 2024, this 30th day of October 2025.

James Rika

Judge

