



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC MISC. APPL. NO. 9 OF 2018**

**STEPHEN THATHI LOLO & 177 OTHERS.....PLAINTIFF/APPLICANTS**

**VERSUS**

**ZIWANI MOSQUE SCHOOL ASSOCIATION & ANOTHER ..... DEFENDANT/RESPONDENTS**

**RULING**

1. What is before this court for ruling is the Applicants Notice of Motion application dated 08/08/2018 and filed in court on 10/08/2018 and the 2<sup>nd</sup> Defendant's/Respondent's notice of preliminary objection dated 21<sup>st</sup> September, 2018 and filed in court on 25<sup>th</sup> September, 2018. The application seeks the following orders: -

- a. THAT this Honourable court be pleased to transfer CMC ELC 627 of 2006 from Chief Magistrate's court at Machakos to the itself (sic) for determination.**
- b. That there be stay of further proceedings in CMC No.627 of 2006, Machakos until the hearing and determination of this application.**
- c. THAT costs of this application be provided for.**

The preliminary objection is based on the grounds that: -

- 1. THAT, the suit intended to be transferred to this court against the 2<sup>nd</sup> Respondent (referred to as "another" in this application) abated long time ago thus there is no suit for transfer (sic) to this court thus the application should be dismissed with costs.**
- 2. THAT the High court does not have jurisdiction to hear and determine the application thus the application should be struck out with costs.**
- 3. THAT the court cannot transfer a suit where no pleading has been annexed to prove its existence.**
- 4. THAT the suit has never been revived thus dead by operation of law.**

2. On the 16<sup>th</sup> October, 2018 the court directed that the application and Preliminary Objection be disposed off by way of written submissions.

3. The facts as presented by the 2<sup>nd</sup> Defendant/Respondent as well as the Plaintiff/Applicant are as follows: -

4. That on 21<sup>st</sup> July, 1993 the Plaintiffs herein filed a suit against the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants/Respondents vide a plaint dated 21<sup>st</sup> July, 1993. The Defendants filed their defence on 05<sup>th</sup> August, 1993. The 2<sup>nd</sup> Defendant herein passed on. On 10<sup>th</sup> August, 2018 the Plaintiffs/Applicants filed the application seeking to transfer Machakos Chief Magistrate's Court case No.627 of 2006 to this court.

5. What is in contention is whether or not Machakos Chief Magistrate's Court Case No.627 of 2006 abated by operation of the law. None of the parties indicated when the 2<sup>nd</sup> Defendant passed on.

6. The Plaintiff/Applicant's Counsel cited **Order 24 Rule 2 of the Civil Procedure Rules 2010** which provides: -

“Where there are more Plaintiffs or Defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving Plaintiff or Plaintiffs alone or against the Defendant or Defendant alone, the court shall cause an entry to that effect to be made on the record and the suit shall proceed at the instance of the surviving Plaintiff or Plaintiffs, or against the surviving Defendant or Defendants.”

7. On the other hand, the Counsel for the Defendants/Respondents cited Order 24 Rule 4(1) and (3) of the Civil Procedure Rules 2010.

**Rule 4(1) of Order 24** provides as follows: -

“Where one of two Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant 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 Defendant to be made party and shall proceed with the suit.”

**Rule 4(3) of the same Order 24** provides: -

“Where within one year no application is made under subrule (1) the suit shall abate as against the deceased Defendant.”

8. The Counsel further cited **Order 24 Rule 7(2)** of the same Civil Procedure Rules. It provides 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 of dismissal; and, if it is proved that he was prevented by 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.”

9. The Applicant’s Counsel submitted that the suit in Machakos CMCC 627/2006 survived the death of Maalim Musa Kioko the other Defendant as was held by Justice Kariuki in the ruling delivered on 22/06/17 in Succession Cause No.196 of 2017. That the question of whether or not the suit has abated was long determined in the aforementioned Succession Cause No.196 of 2017.

10. The Counsel urged the court to dismiss the preliminary objection dated 20/09/18 and allow the application to transfer CMCC 627/2006 to this court.

11. On the other hand, the Respondent’s Counsel cited the case of **Football Kenya Federation vs. Kenya Premier League Ltd & 4 others [2015] eKLR** which adopted with approval the definition of a preliminary objection in the landmark case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** where **Law JA** stated thus: -

“A Preliminary objection consists of a point of law which has been pleaded or by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

In the same case, **Sir Charles Newbold P** held thus: -

“a preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The Counsel went on to cite the case of **Oraro vs. Mbaja [2005] eKLR** where **J. B. Ojwang J** (as he then was) put it thus: -

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement.. that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”

The Counsel further cited the case of **Kishor Kumar Dhanji Varsani vs. Amalok Singh & 4 others [2016] eKLR** where the Court of Appeal adopted with approval the ruling in **Titus Kiragu vs. Jackson Mugo Mathai & Another [2013] eKLR** and had this to say with regard to abatement of suits: -

“..... it was contended that the suit abated automatically as a matter of law; that there was therefore no suit in regard to which an application for substitution could be made; and that the court could not act in vain by making an order in favour of the deceased’s wife in the absence of any suit...”

12. Arising from the above, the Counsel was of the view that the suit herein abated after the lapse of the mandatory period of one year in line with the provisions of Order 24 Rule 4 of the Civil Procedure Rules. That the Plaintiffs have never made an application for review of the abated suit against the 2<sup>nd</sup> Respondent and as such there is no suit against the 2<sup>nd</sup> Respondent. That there is nothing to transfer. The Counsel cited the case of **Said Sweilem Gheitham Saanum vs. Commissioner of Lands (Being sued through the Attorney General) and 5 others**

**[2015] eKLR** where the Court of Appeal adopted with approval the words of **Lords Dennings** who had this to say in the case of **Macfoy vs. United Africa Company Ltd. [1961] 3 All ER 1169** with regard to abated suits: -

“If an act is void, then it is in law a 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....”

13. I have read the submissions that were filed by Counsel on record for the parties herein. Whereas I agree with the Respondents Counsel that a suit abates after the lapse of the mandatory one year in line with the provisions of Order 24 Rule 4 of the Civil Procedure Rules, no evidence was placed before me to show when the 2<sup>nd</sup> Respondent died. In the absence of such evidence, the enquiry as to when the 2<sup>nd</sup> Respondent died and whether or not one year has lapsed since his death will have to be made in Machakos CMCC 627/2006. In my view therefore, this preliminary objection does meet the threshold set out in the case of Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696. The preliminary objection must fail. I, therefore, dismiss it and proceed to allow prayers 1 and 2 of the Applicant’s application dated 19<sup>th</sup> December, 2018 and filed in court on 15<sup>th</sup> January, 2019.

**Signed, dated and delivered at Makueni this 12<sup>th</sup> day of July, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of: -**

Mr. Mutia holding brief for Mr. Muumbi for the Respondent

No appearance for the Applicant

Ms. Nzioka – Court Assistant

**MBOGO C. G. (JUDGE),**

**12/07/2019.**