



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO. 101 OF 2006

JOHN KIPTOLE BII.....PLAINTIFF

VERSUS

MOGOGOSIEK TEA FACTORY CO. LTD. DEFENDANT

RULING

(Suit dismissed for want of prosecution and defendant filing bill of costs for taxation; emerging later that at the time the application to dismiss was argued and ruling delivered, the plaintiff had died more than one year earlier; suit therefore had abated and it was an error to proceed with the application to dismiss suit; order of dismissal reviewed; in place thereof suit marked as abated; defendant at liberty to apply for costs; no taxation until the defendant applies for costs and application allowed; if no application is filed suit to be marked as abated with no orders as to costs)

This suit was commenced by way of plaint filed on **24 November 2006**. In the suit, the plaintiff claimed that on **23 December 2005**, the defendant fraudulently became proprietor of the **land parcel Kericho/Sotik East S.S /593** which was hitherto registered in the name of the plaintiff. The defendant filed defence through which the claims of the plaintiff were refuted. The defendant averred that the plaintiff sold to it the property vide an agreement voluntarily entered into on **12 May 2005**. The plaintiff did not move the court to hear the suit and an application to have the suit dismissed for want of prosecution was filed on **8 March 2012**.

I heard the application on **26 May 2015** which I allowed through a ruling delivered on **29 May 2015**. I ordered the plaintiff's suit dismissed for want of prosecution with costs to the defendant.

The defendant thereafter filed its bill of costs for taxation. In the course of the taxation proceedings, Mr. Siele Sigira for the plaintiff, filed an application to cease acting. He later filed an affidavit to oppose taxation and further proceedings. Inter alia he averred that it had come to his attention that the plaintiff had died and the suit has abated.

I directed that the matter be mentioned before me and the parties duly appeared on **7 April 2016**. Mr. Siele pointed me to a Certificate of Death which shows that the plaintiff died on **27 March 2014**. He submitted that the suit should be marked as abated. This was conceded by Mr. Koech for the defendant. I have considered the submissions of counsel. Technically there is no suit as the same was dismissed for want of prosecution.

However, I do note that at the time the application was argued, that is on **26 May 2015**, the plaintiff had already died. None of the counsels appear to have been privy to this information and the application

proceeded on that basis. The plaintiff died on **27 March 2014** which means that the suit abated on **27 March 2015**. It follows that at the time the application to have the suit dismissed for want of prosecution was heard and decided, the suit had already abated. It was therefore irregular to have the application argued when the suit had already abated.

That being the case, I think the best I can do is to review the order dismissing the suit for want of prosecution. Instead, I do order that this suit be marked as having abated. In other words, I do substitute the order that this suit has been dismissed for want of prosecution, with an order that this suit has abated owing to the death of the plaintiff.

The only issue left is costs. The applicable provision is Order 24 rule 3. It is drawn as follows :-

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff

[Order 24, rule 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 plaintiffs 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 the court may, for good reason on application, extend the time.

It will be seen from the above, that where a suit abates owing to the death of the plaintiff, the defendant, on application, may be awarded costs to be recovered from the estate of the deceased. It is now upon the defendant to consider whether or not to apply for costs. If the defendant wishes to have costs, may it file the requisite application under **Order 24 Rule 3(2)** for consideration. Given the reversal of the order of dismissal for want of prosecution, there can be no taxation of the defendant's bill of costs on the basis of the said order. So that there is finality, I direct that the defendant if minded to apply for costs, does file the application seeking costs within 30 days from today.

If no application is filed, then the suit will be marked as abated with no order as to costs.

It is so ordered.

Dated, Signed and delivered on this 8th day of April, 2016

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT

Mr. Siele Sigira for the Plaintiff.

Mr. Caleb Koech for the defendant.