



**Ali (Suing as Personal & Legal Representative of the Estate of Habiba Hussein Siko – Deceased) v Safe (Environment and Land Appeal E004 of 2021) [2024] KEELC 3463 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3463 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT AND LAND APPEAL E004 OF 2021**

**PM NJOROGE, J**

**APRIL 29, 2024**

**BETWEEN**

**HADIJA HUSSEIN ALI (SUING AS PERSONAL & LEGAL REPRESENTATIVE OF THE ESTATE OF HABIBA HUSSEIN SIKO – DECEASED) ..... APPELLANT**

**AND**

**ADAN TELE SAFE ..... RESPONDENT**

*(Being an Appeal from the ruling and orders made on the 22nd day of August, 2018 by the Honourable B.M Ombewa, Principal Magistrate in Marsabit PMCC No. 15 of 2018)*

**JUDGMENT**

1. The Amended Memorandum of Appeal in this suit states as follows;

Memorandum Of Appeal

Take Notice that the Appellant herein HAdija Hussein Ali (Suing as personal & legal representative of the estate of Habiba Hussein Siko – deceased) being dissatisfied and aggrieved by the Ruling and Orders made on the 22<sup>nd</sup> day of August, 2018 by the Honourable B.M Ombewa Principal Magistrate appeals to this Honourable Court against the entire Ruling and Orders on the following grounds; -

1. The Learned Trial Magistrate erred in law and fact by failing to hear the Appellant’s interlocutory application for substitution rendering it nugatory.
2. The Learned Trial Magistrate erred in law and fact by failing to hear and determine all interlocutory applications on record.



3. The Learned trial Magistrate erred in law and fact by failing to appreciate fully the probative value of the evidence before it and the conduct of the Appellant and Respondent.
4. The Learned Trial Magistrate erred in law and fact by imposing very high and excessive conditions to the Appellants against the weight of evidence.
5. The Learned Magistrate erred in law and fact by imposing very high and excessive conditions to the Appellant's against the weight of evidence.
6. The Learned Magistrate erred and misdirected himself in law and in fact in failing to act fairly despite appreciating that the Appellant had applied for substitution within five days of the expiry of the period within which the application for substitution is to be filed.
7. The Learned Magistrate erred and misdirected himself in law and in fact in failing to appreciate that the all the pleadings filed in court by the Defendant/Respondent were incompetent. The Defendant/Respondent's Counsel having not filed a Notice of Appointment or a Memorandum of Appearance on behalf of the Defendant/Respondent.
8. That the Ruling and Orders of the Principal Magistrates' Court amounts to a miscarriage of justice.
9. That the Learned Magistrate erred in law and in fact in failing to decide on all issues submitted by the Appellant and making a determination against all the weighty evidence tendered by the Appellant.
10. The Learned Magistrate erred and misdirected himself in law and in fact in failing to appreciate weight of the Appellant's evidence.

Dated At Nairobi This 20<sup>th</sup> Day Of September, 2018

Nelko Misati & Company

Advocate For The Appellant

2. The application was canvassed by way of written submissions.
3. The Appellant's Advocate while canvassing the appeal has raised the following issues;
  - a. The Appellant's mother died on 3/7/2017 and filed an application to be substituted with her mother on 10<sup>th</sup> July, 2018 one year and one week after the deceased original plaintiff died. The appellant urges the court to find that the trial court ought to have extended time for filing of the application for substitution in view of the fact it was filed only 7 days after expiry of the stipulated period of one year.
  - b. The Appellant's Advocate also submits that by dint of Order 50 Rule 4 of the Procedure Rules, time for abatement to accrue had not expired when the application for substitution was filed. He says that the latest time allowed for the appellant to file her application to be substituted with the deceased plaintiff was 26<sup>th</sup> July, 2018. He says that the 24 days provided Under Order 50 Rule 4 of the Civil Procedural Act are expressly excluded in computation of time. Order 50 Rule states as follows; ".....except where otherwise directed by a Judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the 13<sup>th</sup> day of



January in the year next following, both days included, shall be omitted from any computation of time (whether under the Rules of any order of the court) for amending, delivering or filing of any pleading or the doing of any other act.”

- c. The Appellant’s Advocate submits that the hearing of the respondent’s application for abatement on the day intended for mention raises suspicions regarding the whole process.
  - d. The Appellant’s Advocate says that the Learned trial Magistrate refused to hear the appellant’s application to be substituted in the case and only heard the respondent’s application.
  - e. The Appellant’s Advocate reiterates that the Learned trial Magistrate was factually wrong when he stated that; “...the deceased plaintiff having died on 3/7/2017, one year lapsed on 2/7/20218 before the deceased plaintiff could be substituted, it is therefore clear that the suit had abated. The advocate submits that this finding was a violation of Order 24 Rule 3 (2) and Order 50 Rule 4 of the Civil Procedure Rules”.
  - f. Buttressed by the above assertions, the appellant asks this court to set aside the trial court’s ruling which declared that the apposite suit had abated and to allow the appeal.
4. Although it is apparent that the respondent has not filed submissions, I will not simply allow the appeal by saying that the appeal is not opposed. My court being the first appeal court in this matter, I am entitled to consider all the apposite pleadings and proceedings in the lower court and after that come to my independent decision.
  5. I find that by dint of the provisions of Order 50 Rule 4 of the Civil Procedural Rules, the period for accrual for an order of abatement had not been achieved by the time the appellant filed her application to be substituted with her deceased mother. Even allowing that the period of one year had not elapsed to allow for accrual of an order for abatement, I find that the appellant had satisfactorily explained the reason for delay in filing her application to be substituted with her deceased mother and especially the issuance of the necessary grant to represent the plaintiff in the suit. She was late by just a few days. My finding in this matter is buttressed by the fact that Order 24 (3) allows the court, for good reasons on an application to extend time for filing an application for the appellant to be a legal representative of her deceased mother.
  6. Having found that, I am persuaded that the trial court’s ruling delivered on 22/8/2018 should be set aside, I find that it is not necessary to delve into the other issues raised by the appellant.
  7. I have carefully considered the issue of costs. I am inclined to find that the parties should bear their own costs.
  8. The following orders are hereby issued;
    - a. The appeal is upheld and I direct that this suit be revived and consequently, the Appellant’s application dated 15<sup>th</sup> day of June, 2018 is hereby allowed.
    - b. I issue no order as to costs.

**DELIVERED IN OPEN COURT AT ISIOLO THIS 29<sup>TH</sup> DAY OF APRIL, 2024 IN THE PRESENCE OF:**

**HON. JUSTICE P.M NJOROGE**

**JUDGE**

Court assistant: Balozi/Rahma



Miss Nyenyire holding brief for Misati for the Appellant.

Miss Kerubo for the Respondent.

