



**Ndiangui v Kenyatta University (Cause 424 of 2017)
[2024] KEELRC 450 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 450 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 424 OF 2017
DKN MARETE, J
FEBRUARY 21, 2024**

BETWEEN

ROBERT MAMBO NDIANGUI CLAIMANT

AND

KENYATTA UNIVERSITY RESPONDENT

RULING

1. This is an application dated 29th May, 2023 and seeks the following orders of court;
 1. That the Honourable Court be pleased to substitute the name of the Claimant herein Robert mambo Ndiangui (now deceased) with Rahab Mambo who is the legal representative/ administrator of the estate of the aforesaid deceased.
 2. That the Claimant be granted leave to amend the statement of claim in consonance with the substitution and the same be deemed as duly filed upon payment of the requisite fees.
 3. That the Costs of this application be in the cause.
2. The applicant, the claimant’s widow as obtained letters of administration ad litem and now prays for substitution as claimant; on behalf of the estate of the deceased.
3. The Respondent in opposition to the application filed Grounds of Opposition dated 30th June, 2023 which come out thus;
 1. The Notice of Motion seeks for the substitution of the Claimant with his legal representative, Rahab Mambo, following the death of the Claimant on 5th September, 2021.
 2. The relationship between the Claimant and the Respondent was a contract of personal service, the performance and enforceability of which was strictly and exclusively between them.



3. The Claimant's claim against the Respondent relates to unfair and unlawful termination of employment. The reliefs sought by the Claimant are in persona. Consequently, the maxim action personalis moritor cum persona is applicable.
 4. The Claimant's Notice of Motion dated 29th day of May 2023 is therefore ill-conceived, and ought to be dismissed with costs.
4. The applicant buttresses a case and addresses this court on her following submissions;
5. Section 2(1) of the Law Reforms Act provides that; "Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be for the benefit of his estate; Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.
 6. From the above provision it is our submission that it is clear that employment matters are not excluded from application hence are deemed to survive the claimant as was observed by the court in *Oyole (Legal Representative of the Estate of Rispa Awinja Oyole) v Farline East Africa Limited (Cause 1930 of 2015) [2022] KEELRC 1257 (KLR) (8 July 2022) (Ruling)*. We pray that this honourable court is persuaded by this decision.
5. She further seeks to rely on authority of *Kevina Akinyi Wpukhulu v Kenya Power and Lighting Company Limited [2021] eKLR* the court held thus;
- "....my view the claim before the court is an employment claim seeking declaration of rights, damages and terminal dues which essentially should survive an employee under section 2(1) of the *Law Reform Act* for reason that under section 24 (2) of the *Employment Act* a legal representative is entitled to be paid wages and any remuneration owed to the deceased employee. In addition, the Memorandum of Claim filed by the deceased Claimant partly seeks payment of her dues under the Human Resources Manual. Since the dues accrue to the deceased's estate, the claim can be rightfully be pursued by the legal presentative under section 24(2) of the employment Act. In my view, the issues raised herein are not within the category of causes of action that are personal to the deceased claimant as contemplated under section 2 of the *Law Reform Act*. Causes of action are personal in nature if the only damage involved is personal suffering without any injury to a deceased estate such as an action against a promise to marry among others, where only the deceased would personally pursue..."
6. The Respondent on the other hand opposes the application by relying on authority of *James Mwangi Kamau versus Barclays Bank of Kenya Limited [2022] eKLR* in a similar and related matter held as follows;
- ...the claim in issue relates to unfair and unlawful termination. As such, it revolves around employment relationship that existed between the Claimant and the Respondent. It is therefore apparent that the said employment relationship constituted a contract of personal service, which was very personal to the Claimant. Indeed, the enforceability of such a contract of personal service was strictly and exclusively between the Claimant and the Respondent. As can be discerned from the Claim, the reliefs sought are in persona hence the maxim "action personalis moritor cum personal" (a personal right of action dies with the person") is applicable in this case. As a matter of fact, the issues in the main claim are hotly contested, to the extent that the Respondent proffered a counterclaim against the



Claimant in the sum of Kshs.744,272.11. Further, it is instructive to note that the Claimant was dismissed following allegations that he had committed acts which were deemed to be in breach of his employment contract. Logically, this is a fact that can only be proved or disproved by him personally when the evidence placed before Court is tested through viva voce evidence. In his absence, the same cannot be achieved. It is therefore follows that the Claim can only be prosecuted and defended by parties privy to the employment contract. In the circumstances, I arrive at the conclusion that the claim did not service the death of the deceased claimant. This finding is buttressed by the determination of the Court of Appeal where it was held as follows in the case of *KarL Wehner Claasen vs Commissioner of Lands & 4 others* [2019] eKLR:- “causes of action of a personal nature do not survive for the benefit of a deceased’s estate. The legal maxim *action personalis moritur cum persona* (a personal action dies with the person) applies to such causes of action. The excluded causes of action in the proviso to section 2 (1) of the *Law Reform Act* are an illustration of the application of the legal maxim”. I hasten to add that this position may be different if a determination had been rendered by the Court in favour of the deceased Claimant and an award made to that effect. In that case, his claim would have crystallized hence his rights to the award would have been rightly enforceable by his Estate against the Respondent. In absence thereof, there is no claim that can be taken over by this estate and enforced.

7. The legal maxim providing that a personal action dies with the person may not be all applicable in the present day and age. Letters of administration ad litem and pendente lite are provisions of the Law Succession Act, chapter 160, Laws of Kenya intended to facilitate take-overs of the litigation in the event of the demise of a litigant. This is a universal standard that result with Section 2(1) on Law Reforms Act above cited.
8. It would be an absurdity that in this era of fundamental rights and freedoms, one would employ later day maxims like we here to deny audience to a deserving claimant or litigants.
9. I am therefore inclined to allow the application with orders that each bears their costs of the same.

DELIVERED, DATED AND SIGNED THIS 21ST DAY OF FEBRUARY 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:

1. Ms Mutuku instructed by Cecilia Milinu Advocates for the Claimant/Applicant.
2. Mr. Mungai instructed by MM Chambers for the Respondent.

