



**Alila v Teachers Service Commission (Judicial Review 3 of 2020)
[2024] KEELRC 13360 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13360 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW 3 OF 2020
MN NDUMA, J
DECEMBER 5, 2024**

BETWEEN

CHRISTINE SAE ALILA APPLICANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. By a notice of motion dated 20/5/2024, the applicant Christine Sae Alila seeks the following orders:
 1. That the order of dismissal of the suit for want of prosecution that was made on 30th September, 2022 by Honourable Justice James Rika be set aside.
 2. That the suit be reinstated to its former status prior to the said dismissal order and be set for hearing.
 3. That this honourable court be pleased to substitute the deceased Applicant, Christine Sae Alila with the administrators of the deceased Applicant's estate, Alfayo Alila Mangira and James Ouma Alila.
 4. That costs of the application be in the cause.
2. The application is founded on grounds set out on the face of the application to wit, that the applicant during the pendency of the suit, suffered a long period of illness and was bed ridden until she passed on sometime on the 11/5/2020. That the suit was filed while the applicant was sick and she could not prosecute it due to her condition.
3. That the applicant never recovered from the accident which led to her incapacitation and hindered the progress of the suit.



4. That owing to this, a court order dated 30/9/2022 was made by Hon. Rika J. dismissing the instant suit for want of prosecution. That the suit was yet to be heard and determined.
5. That the family has since obtained letters of administration of the deceased applicant's estate and Alfayo Alila Mangira and Joseph Ouma Alila were issued with grants of the letters of administration on 29/4/2024 and now want to prosecute the matter and pursue the estate benefits.
6. That the application has been brought in good faith and without undue delay. That it is in the interest of justice that it be granted.

Replying Affidavit

7. The application is opposed vide a replying affidavit of Evaleen Mitei acting Director in charge of Human Resources Management and Development (HRM&D) of the Respondent.
8. That she has understood the legal issues arising from the application as explained to her by Mr. Cavin Anyuor, counsel on record for the respondent.
9. That the application is bad in law, incurably defective and ought to be struck out on grounds that, there is no competent suit before court since the suit predicated on an employment contract between the deceased and the respondent which is personal in nature, abated on the death of the deceased. That the cause of action did not survive the death of the Plaintiff.
10. That the Plaintiff's suit having been dismissed for want of prosecution, there is no competent application before court.
11. That the application is statute barred pursuant to the provisions of Order 24 Rule 2 of the Civil Procedure Rules and the suit has abated accordingly.
12. That the application is visited by inordinate delay having, been brought 4 years after the death of the deceased who died on 11/5/2020 and the application was filed on 21/3/2024.
13. The application was also filed 2 years after this suit was dismissed. That application for grant of letters of administration was lodged at the Chief Magistrate's Court, Milimani in 2023, about 3 years after the death of the Plaintiff. This application was lodged 22 days after obtaining the grant of letters of administration.
14. That no clear, cogent or valid explanation to justify delay in filing the instant application has been made and it is not clear why limited grant ad Litem was not obtained to enable the administrators filing the instant application.
15. That in any event, this suit sought to be reinstated is statute barred because 7 years have elapsed since the cause of action arose. That the application be dismissed with costs.
16. The parties filed written submissions and the issues for determination are: -
 - i. Whether the application brought in the name of the deceased without the administrators first obtaining leave to be substituted in place of the deceased is tenable?
 - ii. Whether the suit filed by the deceased abated by fact of her death since it is based on a personal contract, between the deceased and the respondent.
 - iii. Whether the suit may be revived, after expiry of 7 years from the time the cause of action arose and about 4 years from the date of death of the deceased applicant



17. The court will first deal with the issue of abatement of the suit by fact of the death of the deceased and the same having been dismissed for want of prosecution.
18. It is not in dispute that the deceased died on 11/5/2020 and the suit was dismissed on 30/9/2022 for want of prosecution.
19. This application which has been filed after the death of the deceased cannot be brought or sustained in the name of the deceased. The application may only be brought by the administrators of the estate of the deceased, firstly seeking to be enjoined in the suit as substitute Plaintiffs instead of the deceased and secondly seeking orders to have the suit reinstated on grounds permissible in terms of the law and rules of procedure applicable.
20. Section 2(1) of the *Law Reform Act*, Cap 26 Laws of Kenya provides: -

Subject to the provisions of this section on the death of any person after the commencement of this Act, all cause of action subsisting against or vested in him shall survive against or as the case maybe, 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 claim for damages on the ground of adultery.”

21. The claim for terminal benefits and damage arising from a contract of employment does not abate by fact of death of the employee. The claim survives the deceased and may be pursued to its full conclusion by the administrators of the estate of the deceased for the benefit of the beneficiaries of the estate of the deceased.
22. The right the deceased had to apply to this court to have the suit dismissed for want of prosecution reinstated is a right that survived the deceased but may only be pursued under the name administrators of the estate having a full grant of administration or a limited grant ad litem.
23. This application is totally defective for having been filed in the name of the deceased who has no capacity to litigate after death as against her former employer.
24. The case of Fredrick Yee Chana versus County Government of Kilifi [2021] eKLR is on point that a suit abates, upon death of a litigant only with regard to named cause of a personal nature but not as against all other causes not being of a personal nature including the present suit which was founded on a contract of employment as was confirmed by Onesmus Makau J. in the case of Kevina Akinyi Wepukhulu versus Kenya Power and Lighting Company Limited [2021] eKLR where he stated: -

Cause 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.”

25. To the extent that no application has been made for purpose of joinder or substitution under Order 24 Rule 3(2) of the Civil Procedure Rules, this application is bad in law, incorrect, totally defective and a non-starter as it were.
26. In Civil Appeal No. 283 of 2015, Rebecca Mijide Mungala and another versus Kenya Power and Lighting Company Ltd and 2 others [2017] eKLR, the Court of Appeal in interpreting Order 24 held as follows:-

Quote{StartQuote ”}

Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate,



where, within one year of death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings it is imperative and we may add logical, where the legal representative is not so joined within one year, that an application be made for the extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party.”

27. In the present matter, this application has been brought in the name of the deceased which makes it fatally defective abinitio. Furthermore, the application is brought without leave of extension of time having been sought by the representative of the deceased to be joined in the suit, the application coming 4 years from the date of the death of the deceased. The present cause of action abated upon expiry of one year from the date of the death of the deceased. This situation was compounded by the fact that the suit had already been dismissed for want of prosecution two years before this application was brought.

28. Accordingly, this application is fatally defective, same lack any merit and is dismissed with no order as to costs.

DATED AT NAIROBI THIS 5TH DAY OF DECEMBER 2024.

MATHEWS NDUMA

JUDGE

Appearance:

Mr. Koceyo for Applicant

Mr. Anyuor for respondent

Mr. Kemboi – Court Assistant

