



**Nduyo v St. Martin’s Girls Secondary School (Cause 1920 of 2017)
[2023] KEELRC 1681 (KLR) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1681 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1920 OF 2017
JK GAKERI, J
JULY 11, 2023**

**BETWEEN
AMOS MUTEGI MUCHUNKU NDUYO CLAIMANT
AND
ST. MARTIN’S GIRLS SECONDARY SCHOOL RESPONDENT**

RULING

1. Before the court for determination is a Notice of Motion by the respondent/applicant dated February 17, 2023 seeking Orders That;
 1. Spent.
 2. The suit herein be struck off.
 3. Costs of this application be provided for.
2. The Notice of Motion is expressed under section 1A, 1B, 3A of the *Civil Procedure Act*, section 2(1) of the *Law Reform Act*, Orders 24 of the *Civil Procedure Rules*, 2010 and is based on the grounds set out on its face and the affidavit of Sister Maria Felix sworn on February 17, 2023 who deposes that the claimant died on May 8, 2022 but before then, he had filed the instant suit seeking reimbursement of medical expenses, 2 months salary in lieu of notice, 12 months compensation, service pay, certificate of service, access to the office and costs.
3. The affiant states that she verily believed that the suit has abated as the cause did not survive the claimant and the suit was an abuse of court process.

Response

4. The claimant/respondent did not file a replying affidavit to the respondent/applicant’s notice of motion dated February 17, 2023.



Respondent/Applicant's submissions

5. Counsel relies on the decision in *James Mwangi Kamau v Barclays Bank of Kenya Ltd* (2022) eKLR to urge that *actio personalis moritur cum persona* that a personal right of action dies with the person.”
6. Counsel urges that since the relationship was contractual, only the claimant could enforce it.
7. Reliance was also made on the Court of Appeal decision in *Savings & Loans (k) Ltd v Kanyenje Karangaita Gakombe & another* (2015) eKLR on the doctrine of privity of contract and enforceability of contracts by 3rd parties.
8. Counsel urged the court to strike out the suit on the premise that the issues raised in the Memorandum of Claim are contested and the proposed substitute was not an employee of the respondent/applicant.

Claimant's submissions

9. Counsel submitted that after the claimant's death, his wife Lucy Kagendo applied for and was granted Limited Grant of Letters of Administration *ad litem* dated February 24, 2023 to continue the suit as a legal representative for the benefit of the claimant's estate and applied to be substituted in the claim on March 21, 2023.
10. Counsel urged the court to decline the orders sought and substitute the claimant's name.
11. Reliance was made on Order 24 Rule 1 of the *Civil Procedure Rules*, 2010 which provides that a suit shall not abate merely on the ground of death of a party if a right survives.
12. That the suit only abates as far as the deceased is concerned if no application for substitution is made within one (1) year and the court had discretion to extend the time for filing such an application.
13. That the claimant's wife had the right to have her name entered in the suit in *lieu* of the deceased claimant.
14. According to counsel, the claimant's case had not abated as the application for substitution was made within the one (1) year limitation.
15. Counsel further relied on the provisions of section 2 of the *Law Reforms Act* on survival of actions in the event of death and the decision in *Karl Webner Claasen v Commissioner for Lands & 4 others* (2019) eKLR.
16. As to whether the existence of the suit was prejudicial to the Respondent, counsel urged that the respondent had not demonstrated any prejudice.
17. Counsel urged the court to find and hold that it was in the greater interested of justice to have the claimant's name substituted by that of his wife for the benefit of the deceased's estate.

****Determination****

18. The only issue for determination is whether the suit herein has abated and the cause of action did not survive the deceased.
19. The law on survival of causes of action is statutory.
20. Section 2 of the *Law Reform Act* provides that;



1. 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.

21. On the face of it, only causes of action identified by the foregoing proviso do not survive against or for the benefit of the deceased person's estate.

22. These provisions are embellished by Order 24 Rule 3 of the [Civil Procedure Rules](#), 2010 which provide that;

1. Where one or 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 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 sub rule (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.

23. The court is additionally guided by the sentiments of P.J. O. Otieno J. in [Mbaya Nzulwa v Kenya Power & Lighting Co. Ltd](#) (2018) eKLR as follows;

“I understand that law to say that upon death of sole plaintiff or the surviving plaintiff and on application, the court has the discretion to substitute the deceased plaintiff and that even after the suit abates, there is jurisdiction in the court to extend time.”

24. In the instant suit, the claimant commenced the suit on September 26, 2017 and died on May 8, 2022 and the application for substitution was filed in March 2023 less than one (1) year after the death of the claimant.

25. The suit herein has not abated by operation of law.

26. In [James Mwangi Kamau v Barclays Bank of Kenya Ltd](#) (supra) relied upon by the applicant, the suit had already abated by operation of law and no application for extending time had been made as explained in [Rebecca Mijide Mungole & another v Kenya Power & Lighting Co. Ltd & 2 others](#) (2017) eKLR.

27. The application in the instant case is not for extension of time but for substitution of the claimant and the same was made before the suit abated.

28. The two cases are distinguishable on material facts.

29. Finally, in [Karl Webner Claasen v Commissioner of Lands & 4 others](#) (supra), the Court of Appeal stated as follows;

“Causes of action of a personal nature do not survive for the benefit of a deceased's estate. The legal maxim *actio 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. Other causes of action of a personal nature within the maxim include an action for divorce and custody dispute of minor children.”

30. Further, the learned judges were unambiguous that;

“The right to institute court proceedings is expressly given by article 22(1) of the Constitution. That right to institute court proceedings is undoubtedly a chose in action. It does not matter that such right is exercised through the Procedure of a petition as Rule 10(1) of the Practice Procedure Rules stipulates. The cause of action is also provided in article 22(1) that is, a claim that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened . . .

Undoubtedly by our law, the right to institute court proceedings for enforcement of the Bill of Rights and the Constitution in general is solely not a personal right exercisable by a person in his own interest. It is also a collective obligation of every person to defend the Constitution. It follows that the findings that a right to institute proceedings were not a chose in action and the right to bring proceedings by means of a petition were personal to the deceased petitioner are both erroneous in law.”

31. Based on the foregoing analysis, it is the finding of the court that the instant suit survived the claimant’s death and the manifest desire by the personal representative to pursue the claim against the respondent cannot be faulted.

32. From the foregoing, it is clear that the Application dated February 17, 2023 is for dismissal and it is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11TH DAY OF JULY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the *Civil Procedure Act* (**Chapter 21 of the Laws of Kenya**) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE



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