



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 535 OF 2017

JAMES MWANGI KAMAU.....CLAIMANT/APPLICANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

RULING

1. Before me for determination is a Notice of Motion Application dated 23rd September, 2021, expressed to be brought under Sections 1A, 1B, 3, 3A of the Civil Procedure Act, Order 1 Rule 10, Order 51 Rule 12 of the Civil Procedure Rules and all other enabling provisions of the law.

2. The Application seeks the following orders;

1. That the Honourable Court be pleased to substitute the name of the claimant herein James Mwangi Kamau (now deceased) with the name of Grace Wairimu Kamau and Maureen Wangu Mwangi being the legal representatives/ administrators of the estate of the aforesaid deceased.

2. THAT costs of this Application be provided for.

3. The Application is premised on the grounds set out in its body and on the Supporting Affidavit of Ms. Grace Wairimu Kamau, one of the administrators of the estate of the claimant herein. Briefly, the grounds are that;

i. the claimant passed on 14th December, 2019 much after the claim had been filed;

ii. the administrators to the estate of the deceased claimant wish to pursue the claim and defend the counterclaim;

iii. the administrators of the deceased estate applied for letters of administration-limited grant as litem and the same was granted and issued on 21st June, 2021; and

iv. the administrators seek to substitute the name of the claimant with the name of Grace Wairimu Mwangi and Maureen Wangu Kamau.

4. The Respondent objects to the Application through its Grounds of Opposition dated 22nd October, 2021, as follows;

i. The application is fatally defective and incompetent because the suit abated in December, 2020; and

ii. The application is an abuse of the court process.

5. The Application was canvassed by way of written submissions, duly filed by the respective advocates for the parties. The Applicant's submissions are to the effect that the cause of action survives hence the Respondent's opposition citing abatement, does not suffice. The Applicant further submitted that section 24(2) of the Employment Act allows for the legal representative to pursue the claim subject to proof of capacity. To fortify its submissions, the Applicant cited the case of **Loice Wanjiru Meru & 3 others vs John Migui Meru, ELC Appeal No. 3A of 2017**.

6. On its part, the Respondent argues that pursuant to the provisions of Order 24 Rule 3 of the Civil Procedure Rules, 2010, the Claim abated on 15th December, 2020, one year after the deceased Claimant passed on. That the Applicant has not brought an Application for extension of time hence the instant Application has no basis. The Respondent placed reliance on the case of **Kaburi Njoroge vs Lucy Wangui Njuguna & 2 others (2020) eKLR and Hottensiah Wambui Igogo vs Grace Kaiso & another (20118) eKLR**.

7. To my mind, the main issue falling for the court's determination is whether the suit survived following the death of the Claimant.
8. The Claim in issue relates to unfair and unlawful termination. As such, it revolves around the employment relationship that existed between the Claimant and the Respondent.
9. 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.
10. As can be discerned from the Claim, the reliefs sought are *in persona hence* the maxim "*action personalis moritur cum persona*" ("*a personal right of action dies with the person*") is applicable in this case.
11. 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 therefore follows that the Claim can only be prosecuted and defended by parties privy to the employment contract.
12. In the circumstances, I arrive at the conclusion that the claim did not survive the death of the deceased Claimant.
13. 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 *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."

14. I hasten to add that this position may have been 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 his Estate and enforced.

15. Even if the principle of survival of suits were to be stretched and the suit deemed to have survived the Claimant's death, the same would still have no legs to stand on as the suit would have abated by operation of the law.

16. Order 24 Rule 3 of the Civil Procedure Rules allows for the substitution of a party where the cause of action survives. However, such an application ought to be made within one year following the death of the deceased party. The provision is as follows;

"[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." Underlined for Emphasis

17. Flowing from the above provision, it is evident that a suit abates by operation of law. It is an undisputed fact that the Claimant passed away on 14th December, 2019 while the instant application was brought to court on 23rd September, 2021, more than one year later.

18. The Court of Appeal in the case of **Rebecca Mijide Mungole & another vs Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR**, determined as follows;

"Speaking generally, by operation of the law, a suit will automatically abate where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within one year following his death."

19. The Learned Judges went on to hold that;

"Because the suit will only abate where, within one year of the 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 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. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended."

20. As it is, there is no application on record for the extension of time as required under Order 24 Rule 3 (2) of the Civil Procedure Rules. What the Applicant seeks from this court is to substitute the Claimant with the administrators of the deceased's Estate, more than one year after his death. Logically, the same cannot happen as upon abatement by operation of the law, the suit could only be revived by an

application extending time.

21. Against the foregoing analysis, I cannot help but dismiss the Application.

22. Taking into account the circumstances pertaining the institution of the Application herein, it is only fair and just that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2022.

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STELLA RUTTO

JUDGE

Appearance:

Mr. Ongicho for the Claimant/Applicant

Mr. Angwenyi for the Respondent

Court Assistant Barille Sora

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 had 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.

STELLA RUTTO

JUDGE