



REPUBLIC OF KENYA



KENYA LAW
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**Malinga v National Government Constituencies Development Fund Board
(Cause 1212 of 2016) [2022] KEELRC 1593 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1593 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1212 OF 2016
AN MWAURE, J
JUNE 2, 2022**

BETWEEN

GEORGE MALINGA CLAIMANT

AND

**NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND
BOARD RESPONDENT**

RULING

1. The applicant filed an application by way of a notice of motion dated August 30, 2021.
The prayer of the applicant is that the claimant who died on February 14, 2018 be substituted with the applicant one Loise Museo Malinga.
2. The applicant also prays for the costs of this application.

Claimant's Case

3. The claimant had been interdicted on December 23, 2015 and he filed suit on June 21, 2016. He died on February 14, 2018.
4. The applicant Loise Museo Malinga obtained a limited letter of administration for purposes of prosecuting a suit at the Employment and Labour Relations Court dated May 19, 2021. Hence this application was filed on August 30, 2021.
5. The applicant claims she survived the deceased claimant. She says after the demise of her son she took time to stabilise before she could take action. She says the respondent will suffer no prejudice if the substitution is granted.



Respondent's Case

6. The respondent caused his corporation Secretary Simon Ndwakato swear an affidavit where he stated that the application for substitution was brought well over one year after the demise of the claimant and so was time barred.
7. He also said that it was well over three years since the demise of the claimant.
8. He also says that the cause of action does not survive the deceased.
9. The court considered the submissions by both the respective parties as well.

Decision

10. The issues for determination before this court is whether the cause of action survives the claimant.
11. The other issues is whether the prayer for substitution is time barred due to expiry of three years since the demise of the claimant and one year has passed before the substitution.
12. Injury to the deceased estate as contemplated in section 2 of the *Law Report Act* is personal if damage is only to personal suffering and only deceased representative would then personally pursue the case.
13. Further article 22 (2) of the *Constitution* a person acting on behalf of another or in public interest can institute a claim that a right or fundamental freedom has been infringed or threatened.
14. The claimant (now deceased) in his memorandum of claim prayed in one of the prayers that a declaration that the claimant be paid general damages for discriminating against him on medical grounds.
15. Going by article 41 of the *Constitution of Kenya 2010* provides that every person is entitled to fair labour practices. Article 27 of the *Constitution of Kenya 2010* also provide that no person will be discriminated inter alia on health grounds.
16. Discrimination is not personal to the deceased and any payments would be to the benefit of the estate.
17. Therefore the right to institute proceedings for the enforcement of the bill of rights and the *Constitution* in general is not personal right exercisable by a person in his own interest alone. On that ground the substitution would have been justified
18. The court has also considered the time limitation however. The claimant died on February 14, 2018 and application was filed on August 30, 2021. There is no provision on timelines on substitution of a party under the *Employment and Labour Relations Court Rules* and so the court is guided by Order 24 rule 3 of the *Civil Procedure Rules*. The same provides the substitution should be with one year.
19. However, the applicant could apply for revival of the abated suit and hopefully be able to proceed with the matter.
20. Regrettably in this matter the application has been brought too late and there has been no efforts to apply for extension of time for an abated suit but probably applicant can still attempt to make such application with good reason.

The court therefore disallows the application to substitute the claimant with the applicant.

The court will give no order as to the costs.



Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF JUNE, 2022.

ANNA NGIBUINI MWAURE

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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE

