



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 859 OF 2019

KEVINA AKINYI WEPUKHULU.....CLAIMANT/ APPLICANT

-VERSUS-

KENYA POWER AND LIGHTING COMPANY LIMITED.....RESPONDENT

RULING

1. The Claimant filed the instant suit on 19.12.2019 but unfortunately she died on 7.8.2020. Her husband, the Applicant herein, applied and was granted a Limited Grant of Letters of Administration *ad litem* to pursue the suit.
2. Subsequently, he filed an application dated 26.4.2021 seeking the following orders:
 - a. That the Honourable Court be pleased to substitute the name of the Claimant herein Kevina Akinyi Wepukhulu (now deceased) with the name of John Wepukhulu Waliaula being the legal representative/administrator of the estate of the aforesaid deceased.
 - b. That costs of this application be provided for.
3. The application is premised on grounds that the Claimant passed away on 7.8.2020 leaving behind her widower and children as her beneficiaries to her estate; and that her husband, John Wepukhulu Waliaula, was granted the appropriate grant on 19.3.2021 and that leave of this Honourable Court is required for him being to be substituted as the Claimant in order to continue with the prosecution of the suit.
4. The application is supported by the affidavit of John Wepukhulu Waliaula sworn on 26.4,2021 in which he averred that the subject matter of the suit forms part of the estate of the deceased.
5. The Respondent has opposed the application by filing Grounds of Opposition dated 21.5.2021 in which it raised grounds that: the claim being grounded on alleged discrimination cannot survive the claimant or be assigned or brought on her behalf; that the employment relationship between the Claimant and the Respondent is personal and does not survive the Claimant; and that the application should be dismissed as it lacks merit and is abuse of the court process.

Applicant's submissions

6. Ms. Guserwa, learned counsel for the Applicant argued that the grounds of opposition are not meritorious and the prayers sought can be enforced by a representative of the estate. She submitted that the application should be allowed to let the administrator of the estate take charge of the suit.
7. Mr. Makori, learned counsel for the Respondent stated that the suit is based on discrimination which can only be enforced by the deceased thus the claim cannot survive the deceased. He submitted that before the death of the Claimant, the respondent had filed a Preliminary Objection on grounds that the suit was time barred by dint of section 4 of the Limitations of Actions Act and Section 90 of the Employment Act. He argued that the court might have exercised jurisdiction it did not have, and indicated that he will pursue the issue of limitation after the ruling on the instant application.
8. In a brief rejoinder, Ms. Guserwa submitted that the Applicant seeks 5 reliefs but the Respondent is unhappy with only one relief. Therefore she prayed that the application be allowed.

Determination

9. There is no dispute that the deceased claimant was employed by the respondent until she exited through Voluntary Early Retirement

(VER) agreement which provided for a specific package. The main issues for determination are:

- (a) *Whether the suit survived the claimant.*
- (b) *Whether the application for substitution should be allowed.*

Whether the suit survived the claimant.

10. The Respondent averred that the claim cannot survive the Claimant because she prays for a declaration that she was discriminated upon and that the employment relationship was personal. The Applicant contended that the prayers can be enforced by the legal representative.

11. The legal maxim *actio personalis moritur cum persona* provides that a personal cause of action dies with a person. Section 2 (1) of the Law Reform Act incorporates the said maxim and provides as follows:

“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.”

12. The Claimant, in her Memorandum of Claim dated 16.12.2019 the claimant prayed for declaration that she was declared redundant and discriminated against by the employer through underpayment. She further prayed for compensatory damages for discrimination and constructive redundancy plus terminal dues totaling to Kshs. 13,216,849.

13. In 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.

14. 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 representative under section 24 (2) of the Employment Act.

15. 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.

16. In addition, the Claimant stated in paragraph 8 of the Memorandum of Claim that the offer made to her was discriminatory and in breach of Articles 27 and 41 of the Constitution. Article 22 (2) of the Constitution provides that a person acting in behalf of another or in the public interest can institute a claim that a right or fundamental freedom has been infringed or is being threatened.

17. In accordance with the above constitutional provision, discrimination cannot be termed as a personal claim because any other person can allege that there was a violation of another’s constitutional right. Further, the payment of less dues as expected under the policy would be damage to her estate.

18. The Court of Appeal in **Karl Wehner Claasen v Commissioner of Lands & 4 others [2019] eKLR** held:

“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.”

19. In the end I find that the suit herein survived the claimant’s demise and her the legal representative can rightfully pursue the claim against the Respondent.

Whether the application should be allowed.

20. There no dispute that the applicant has applied and obtained a grant of letters of administration over the estate of the deceased claimant. It is also not in contest that a year has not lapsed since the deceased died and as such the suit has not yet abated. Consequently, I allow the application as prayed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2021.

ONESMUS N. MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE