



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MALINDI

ELRC CAUSE NO 76 OF 2017

FREDRICK YAA CHARO.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF KILIFI.....RESPONDENT

RULING

1. The current application seeks to reinstate this Claim. According to the Applicant, the Claim was dismissed by this court on an undisclosed date after no action was taken to prosecute it after the death of the Claimant sometime in June 2018.

2. For the avoidance of doubt, I wish to point out that after scrutinizing the court record I was unable to see any proceedings in which the action was dismissed by the court. By mentioning a dismissal, perhaps the Applicant was referring to the process of abatement of the Claim rather than a dismissal of the action by the court.

3. The application is said to be brought under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act as read with Order 12 rule 7 and Order 50 rule 1 of the Civil Procedure Rules. It is opposed. The Respondent has filed Grounds of Opposition dated 30th September 2021.

4. According to the Respondent, the application is misconceived and bad in law. In the Respondent's view, the Claim abated by operation of law one year after 15th June 2018, the date the Claimant passed on. The time for applying for substitution of the deceased Claimant with the legal representatives of his estate is long past. As a consequence, the Applicant ought to have applied for extension of time to seek substitution before applying for revival or reinstatement of the Claim.

5. Abatement of actions derives from the common law. At common law, the doctrine denoted the immediate cessation of ongoing legal proceedings on account of some reason that is known to law. It has been described as follows:

“Abatement of an action is the cessation of a particular judicial proceeding because of some fact not affecting the merits of the controversy. The commonest grounds for abatement are the pendency of another suit or the death of a party.”

6. However, the doctrine did not operate to extinguish all types proceedings. It only came into effect in respect of proceedings premised on causes of action that were of a personal nature. Expressed in the Latin maxim *“actio personalis moritur cum persona”* the generally accepted common law position in this respect was that a personal right of action died with the person.

7. For all other causes of action not being of a personal nature, the proceedings did not abate. Rather, the right to sue or continue with the proceedings survived and devolved to or against the deceased party's legal representatives. As such all that was required was for the legal representatives, upon an appropriate application, to be joined to the proceedings in place of the deceased party.

8. In Kenya, this doctrine found application in our courts courtesy of section 3(1)(c) of the Judicature Act. By this piece of legislation, Kenyan courts are permitted to inter alia, apply the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897.

9. The fact that some causes of action in Kenya will survive the death of a party or a proposed party to proceedings whilst others will abate is now legislated mainly under the Law Reform Act. Section 2 (1) of the Act 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.’’

10. Apart from the Law Reform Act, the only other laws that deal with survival and abatement of proceedings in Kenya are perhaps Order 24 of the Civil Procedure Act, the Court of Appeal Rules and the Supreme Court Rules, 2020. However, the latter three are all procedural laws.

11. In my view, what these procedural laws do is to extend the doctrine of abatement to proceedings which would otherwise survive the death of a party if such deceased party’s legal representatives are not joined to the proceedings within a fixed time frame. For instance, Order 24, rule 3, of the Civil Procedure Rules provides as follows in instances where a cause of action survives the death of a party to an action: -

‘‘ a) Where a sole plaintiff or sole surviving 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.

b) 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.’’

12. The Employment and Labour Relations Court (Procedure) Rules, 2016 (ELRC rules) make no mention of how to proceed with a matter before the Employment and Labour Relations Court (ELRC) in the event of the death of a party to the dispute. However, it is not in doubt that the substantive law on abatement and or survival of causes of action as received through the Judicature Act and enacted under the Law Reform Act apply to causes of action arising from employment and labour relations.

13. As has been observed time and again, the applicability of the Civil Procedure Rules to disputes before the ELRC remains a fairly contested matter. While some honourable Judges have expressed the view that these rules can be invoked to fill lacunas that exist in the ELRC rules, others have expressed the view that this is perhaps incorrect: the Civil Procedure Rules simply do not apply save for where this is expressly permitted. For my part, I hold the view that these rules do not apply save for where the ELRC rules have expressly permitted their application.

14. To my mind, the definition of the term ‘‘court’’ in section 2 of the Civil Procedure Act appears not to contemplate courts of equal status. The term denotes the High Court or a subordinate court, acting in the exercise of its civil jurisdiction. This can only be understood to mean that these rules do not extend to cover proceedings before the ELRC.

15. In my view therefore, parties before the ELRC must refrain from importing the provisions of the Civil Procedure Act and Rules where they have not been expressly sanctioned by the ELRC rules as this goes to the jurisdiction of the court to entertain proceedings brought under the wrong provisions of law.

16. While I appreciate the sorry state of the ELRC rules, I reckon that section 3(1) of the Employment and Labour Relations Court Act (ELRC Act) as read with Section 12 [3] [viii] thereof and Rule 17 of the ELRC rules provide grounding for moving the ELRC where the ELRC rules are silent. In this matter for instance, the application ought to have been premised on the provisions of the Judicature Act, the Law Reform Act as set out above together with the provisions set out in the ELRC Act and Rules.

17. Under section 2 of the Law Reform Act, causes of action arising from contracts of service appear to survive the death of a party. And since the ELRC rules do not provide that such cause of action will abate if no application is made to join the legal representatives within one year of a party’s death, all that is required in my view is to apply to join the legal representatives of such deceased party under the provisions of law set out above.

18. This approach of course does raise concerns over what happens to those causes of action in respect of which parties die and no action is taken in them for unduly long durations of time. Are such causes then to just lie in court without being processed because of the inaction of the legal representatives of the deceased party’s estate? For me, this scenario is easily resolvable by resorting to rule 16 of the ELRC rules. By this rule, either the court or the surviving party can move to have such suit dismissed for want of prosecution.

19. To the extent that the application has been filed under inapplicable provisions of law, the court is deprived of the requisite jurisdiction to entertain it as is suggested in *Jiwa Nadmudin Dhanji v Teborah Naliaka Wabwayi & another [2006] eKLR*. In any event, the application appears premature as there is no record that this Claim has ever been dismissed for whatever reason.

20. Accordingly, the application is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 27TH DAY OF OCTOBER, 2021

B. O. M. MANANI

JUDGE

IN THE PRESENCE OF:

N/A FOR THE APPLICANT

MR. GITARI FOR THE RESPONDENT

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 judgment 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.

B O M MANANI

JUDGE