



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 220 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**BONIFACE MASIME NYASEMBE ..... CLAIMANT**

**-Versus-**

**HASHI ENERGY LIMITED ..... RESPONDENT**

**RULING**

By an application by motion dated 8th June 2016 filed under certificate of urgency on 9th June 2016 the applicant seeks the following orders:

1. THAT this application be certified urgent and be heard on a priority basis.
2. THAT the honourable Court be pleased to grant leave for the Claimant to be substituted by STELLA ATIENO MIGAI.
3. THAT upon prayer 2 above being granted the Claimant be granted leave to amend the memorandum of claim.
4. The costs of this application be in the cause.

The application is grounded on the supporting affidavit of G.O. ANYUMBA, Advocate for the Applicant and on the following grounds:

1. That this claim was filed by the Claimant on 2/09/2015.
2. That the Claimant died on 1/3/2016.
3. That the intended Claimant Stella Atieno Migai is the Legal Administrator and/or the Personal Representative of the estate of the deceased Claimant.
4. That in the circumstances it is in the interest of justice that the deceased Claimant be substituted by Stella Atieno Migai.

The Respondent opposed that application and filed a replying affidavit of CHARITY MAINA, the Respondent's Legal Manager in opposition to the Application. In the Replying Affidavit the deponent raises the following grounds in opposition to the Application:

THAT the application is defective as it is supported by an affidavit sworn by an advocate

concerning matters of fact which should only be deponed by the claimant/Applicant.

THAT in response to paragraph 2 and 3 of the supporting affidavit, I would like to state that the said orders cannot be granted since as per the law, substitution is supposed to be done within one(1) year and it has been over one year since the Claimant passed on.

THAT in response to paragraph of the Supporting Affidavit, I would like to state that the intended administrator is not a person capable and competent to substitute the Claimant since she is not the person who was employed by the Respondent and is not conversant with the circumstances surrounding his termination.

The application was argued in court on 19th July 2017. Mr. Anyumba appeared for the Applicant while Mr. Bagada appeared for the Respondent.

Counsel for the Applicant Mr. Anyumba submitted that the application was filed in time as the Claimant died on 1st March 2016. The widow obtained letters of Administration Ad Litem on 8th June 2016 and the application was filed on 9th June 2016, within the period stipulated in law of one year. He referred the court to the Death Certificate, Letter of Introduction by the Area Chief and the Limited Grant of Letters of Administration Ad Litem all annexed to the application.

Responding to the issues raised in the Replying Affidavit he submitted that the suit was filed by his firm and he is competent to swear the affidavit in support of the application. He submitted that it is not in dispute that the Claimant is deceased and the application was filed within a year. He submitted that there was no legal basis for the averment at paragraph 5 of the replying affidavit to the effect that the widow of the deceased Claimant is not competent to be substituted as Claimant in this case.

Mr. Bagada on his part opposed the application and relied on the replying affidavit sworn on 5th July 2017. He submitted that the application is defective as the affidavit in support thereof is sworn by an advocate instead of the new party as the new party had not indicated her willingness to be enjoined in the suit. He further submitted that substitution was being done after more than one year after death of the Claimant, and further that the intended new party will not be able to be cross examined. He further submitted that the course of action does not survive the deceased Claimant.

I have considered the application, the affidavit and grounds in support thereof as well as the annexed documents. I have further considered the replying affidavit and the arguments of counsel for both parties.

Substitution of parties is not provided for either in the Employment and Labour Relations Court Act or the rules made under the Act. The court therefore falls back on the provisions of the Civil Procedure Act which at Order 24(1) provides that the death of a plaintiff does not abate the suit if the cause of action survives or continues and at Rule 3(2) provides that the suit abates if **NO APPLICATION** is made for substitution within one year. [Emphasis added] In this case the application for substitution was made within 3 months of the death of the Claimant.

Mr. Bagada further submitted that the cause of action does not survive the Claimant but did not support that contention with any backing in law or authority. Under the Law Reform Act suits in respect of termination of employment survive a deceased employee as provided in section 2(1) as follows:

## **PART II – SURVIVAL OF CAUSES OF ACTION**

### *2.Effect of death on certain causes of action*

*(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.*

The Respondents argument is thus not valid.

The Respondents argument about cross examination of witnesses is a matter for trial as it relates to evidence which is not limited to *viva voce evidence*.

For the foregoing reasons I find that the application is merited and make the following orders:

1. The Applicant is granted leave to substitute the name of the deceased Claimant with that of STELLA ATIENO MIGAI;
2. The Applicant is granted leave to amend the Memorandum of Claim to give effect to the substitution of the name within 14 days;
3. There shall be no orders for costs of the application.

**Dated and signed and delivered this 20TH day of JULY, 2017**

**MAUREEN ONYANGO**

**JUDGE**