



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NYERI
APPEAL NO.69 OF 2014
(Formerly High Court Civil Appeal No. 40 of 2008 at Meru)
Being An Appeal From the Ruling and Order of Hon. Mr. J.N. Nyaga,
Principal Magistrate in Civil Suit No. 139 of 2003
at Maua Given on 28.02.2008

MICHIMIKURU TEA FACTORY COMPANY LIMITED.....APPELLANT

-VERSUS-

**JOHNSON MUTABARI (Suing as the legal representative of the estate of
PRISCILLA KINYA-Deceased).....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 7th November, 2014)

JUDGMENT

The circumstances of the appeal before the court are set out in the ruling delivered by the learned trial magistrate on 28.02.2008. The plaintiff in civil suit no. 139 of 2003 in the Senior Principal Magistrate's Court at Maua was Priscilla Kinya and the defendant was the appellant, Michikuru Tea Factory Company Limited. The plaint was filed on 5.08.2003 and the hearing of the suit commenced on 10.06.2004 and adjourned for hearing on a future date. Unfortunately, the plaintiff died on 22.06.2004. Counsel for the plaintiff filed an application on 27.04.2005 seeking to substitute the departed plaintiff with her brother Johnson Mutabari. At the time of filing the application, the applicant had not obtained the letters of administration to the estate of the deceased plaintiff. The defendant in the suit, the current appellant, filed in the trial court an application for orders that the suit had abated as provided in rule 3(2) of the then order 23 of the Civil Procedure Rules. The relevant provisions, currently under order 24 rule 3 of the Civil Procedure Rules stated as follows:

“3. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or 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.

(2) 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.”

The respondent was granted on 20.07.2007 the letters of administration of the estate of the deceased plaintiff by the High court at Meru. The applications filed for the parties were heard together and the trial court made orders allowing the application for substitution of the plaintiff and dismissing the application for orders of abatement of the suit. The appellant was dissatisfied and filed the memorandum of appeal against the ruling and orders as made by the learned trial magistrate. The grounds of appeal were as follows:

1. That the learned trial magistrate erred in fact and in law in finding that the deceased's suit before him had not yet abated.
2. That the learned trial magistrate erred in fact and in law in allowing the respondent's application dated 22.04.2005 and filed in court on 27.04.2005 that sought to have the deceased substituted from the suit by the respondent yet the respondent was only appointed a legal representative of the deceased vide a limited grant issued on 20.07.2007. That the learned trial magistrate erred in fact and in law in finding that the deceased's suit which was a claim for terminal benefits was capable of surviving the death of the deceased.
3. That the learned trial magistrate erred in fact and in law in finding that the appellant's application dated 14.03.2006 that sought to have the deceased's suit to be declared as having abated lacked merit.
4. That the learned magistrate erred in fact and in law in finding that the respondent had the requisite *locus standi* to agitate the application dated 27.04.2005 that he had filed on behalf of the deceased.

The claimant prayed for orders:

1. That the appeal be allowed with costs.
2. That the ruling and order of the subordinate court issued on 28.02.2008 permitting the respondent to be substituted into the suit in the place of the deceased (who was the plaintiff before the subordinate court) be set aside and vacated.
3. That there be an order and finding that since the deceased (plaintiff before the subordinate court) died on or about 22.06.2004 and no action was taken to substitute her from the suit within a period of one (1) year from the date of death that her suit before the said lower court automatically abated on or about 22.06.2005.
4. That there be a further finding and order that the deceased's cause of action having been a claim for terminal benefits (contract) did not survive the deceased's death.
5. That the respondent's application dated 27.04.2005 be dismissed with costs to the appellant.
6. That the appellant's application dated 14.03.2006 be allowed with costs to the appellant.

The **1st issue** for determination is whether the respondent acted regularly and competently when he filed the application for substitution long before he obtained the letters of administration of the estate of the deceased plaintiff. It is not in dispute that the respondent's application dated 22.04.2005 was made before the letters of administration had been obtained. The appellant submitted that in filing the application, the respondent had clearly intermeddled in the estate of the deceased plaintiff contrary to section 45 of the

Law of Succession Act, Cap.160 and the learned magistrate should not have entertained the application. It was submitted that the learned trial magistrate applied the said grant to the respondent's application dated 27.04.2005 retroactively. It was submitted for the appellant that as per **Wankford –versus- Wankford [1702]** as referred to in **Otieno –versus- Ougo and Another (No.2) (2008)1 KLR (G&F) 948 at 964**, an administrator cannot act before letters of administration are granted to him. To further support that position, it was submitted for the appellant that section 82(a) of the Law of Succession Act provides that personal representatives shall, subject to any limitation imposed by their grant, have the power to enforce by court or otherwise all causes of action which by virtue of any law survive the deceased or arise out of his death for his estate. Further, it was submitted that section 3 of the Act defines administrator to mean a person to whom a grant of letters of administration has been made under the Act.

The court has considered the submissions and finds that as submitted for the appellant, the respondent could not file the application for substitution before obtaining the relevant letters of administration for the plaintiff's estate either generally or limited for the purpose of being substituted in the suit. It was, in the opinion of the court, an error of law for the learned trial magistrate to find that the respondent not being an administrator could nevertheless file the application for substitution of the deceased plaintiff in the pending suit. Rule 3(1) is clear that an application in that behalf is made for the court to cause the legal representative of the deceased plaintiff to be made a party and to proceed with the suit. It is obvious that at the time of the application the respondent was not a legal representative of the deceased plaintiff and the court finds that the prayers made were at that time misconceived as far as it was applied that the respondent who was not a legal representative substitutes the deceased plaintiff.

The court's opinion is that the proviso to the rule as quoted above is clear that the court may, for good reason on application, extend the prescribed time of a year within which the application should have been made. It was submitted for the respondent that the High Court at Meru delayed to make the relevant grant for letters of administration and the respondent made the application within the one year to ensure that it was within the time as prescribed in the rule. It is the opinion of the court that it was open for the respondent to regularize his standing by acting diligently in obtaining the relevant grant for letters of administration and thereafter seeking extension of time as envisaged in the proviso to the rule. The court further finds that even if the suit abated or was dismissed, the legal representative would be entitled to apply for setting aside the dismissal or for reviving the abated suit as envisaged in rule 7 of order 24 of the Civil Procedure Rules. Accordingly, to answer the 1st issue for determination the court finds that the respondent did not act regularly and competently when he filed the application for substitution long before he obtained the letters of administration of the estate of the deceased plaintiff.

The **2nd issue** for determination is whether the appellant is entitled to the prayers made in the memorandum of appeal. The court makes findings as follows:

1. The appellant prayed for an order that the ruling and order of the subordinate court issued on 28.02.2008 permitting the respondent to be substituted into the suit in the place of the deceased (who was the plaintiff before the subordinate court) be set aside and vacated. The court has found the application was irregular and incompetent and the appellant is entitled as prayed for.
2. The appellant prayed for an order and finding that since the deceased (plaintiff before the subordinate court) died on or about 22.06.2004 and no action was taken to substitute her from the suit within a period of one (1) year from the date of death that her suit before the said lower court automatically abated on or about 22.06.2005. The rule as quoted in this judgment provides as much and the appellant is entitled as prayed for.
3. The appellant prayed that there be a further finding and order that the deceased's cause of action having been a claim for terminal benefits (contract) did not survive the deceased's death. The appellant did not make submissions and the legal basis for the prayer. Thus, the court finds that the prayer will fail.
4. The appellant prayed that the respondent's application filed 27.04.2005 be dismissed with costs to the appellant. The court has found that the application lacked merits and the appellant is entitled

as prayed for.

5. The appellant prayed that the appellant's application dated 14.03.2006 be allowed with costs to the appellant. The court finds that the appellant was entitled to the prayer since the plaintiff's suit had abated upon lapsing of the one year.

It was submitted for the respondent that the only reason for the respondent's predicament was delay in obtaining the letters of administration due to heavy work load in the High Court at Meru and the respondent urged the court to look at the justice of the case. The appellant has not opposed that line of submission as made for the respondent. The court has considered that submission and all the circumstances of the case and finds that ends of justice would be served if the respondent was granted extension of time to file an application for substitution and if the applicant applied for revival of the abated suit. In the opinion of the court, such are positive actions available to the respondent consequential to the making of this judgment but as of now, such applications are not before this court.

In conclusion the court allows the appeal and judgment is entered for the appellant against the respondent with orders:

1. That the ruling and order of the subordinate court issued on 28.02.2008 permitting the respondent to be substituted into the suit in the place of the deceased (who was the plaintiff before the subordinate court) is set aside or vacated.
2. That since the deceased (plaintiff before the subordinate court) died on or about 22.06.2004 and no action was taken to substitute her from the suit within a period of one (1) year from the date of death the suit before the said lower court automatically abated on or about 22.06.2005.
3. That the respondent's application filed 27.04.2005 is dismissed with costs to the appellant and the trial court's order allowing the application is set aside.
4. That the appellant's application dated 14.03.2006 is allowed with costs to the appellant and the trial court's order dismissing the application is vacated.
5. The respondent to pay the appellant's costs of the appeal.

Signed, dated and delivered in court at Nyeri this Friday, 7th November, 2014.

BYRAM ONGAYA

JUDGE