



**Kabugi v Standard Newspaper Limited (Civil Case 514 of 2010)
[2024] KEHC 307 (KLR) (Civ) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 307 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE 514 OF 2010**

**JN MULWA, J
JANUARY 25, 2024**

BETWEEN

COLONEL GEORGE GIKONYO KABUGI PLAINTIFF

AND

THE STANDARD NEWSPAPER LIMITED DEFENDANT

RULING

1. The Plaintiff sued the Defendant by a Plaint dated 2/11/2010 seeking damages arising from an alleged defamatory statements published at its Newspaper, “The Standard” dated 25/10/2010 which in his statement of claim alleged to have defamed him in his work then the Deputy Commander Armor in the Defence Forces of Kenya seeking damages and permanent injunction restraining the defendant from further publication, printing, circulating or distributing the said article.
2. Other Senior Officers of the Defence Forces of Kenya filed similar suits in different courts seeking similar reliefs, being HCC No. 511, 512, 513, 514, 516, 517 and 527 of 2010.
These suits were consolidated for purposes of determining liability.
3. This case was the test suit and upon hearing the same, judgment on liability was delivered in favour of the various Plaintiffs against the Defendant as being wholly liable in damages as sought by each of the Plaintiffs on the 30/11/2015. Thereafter, the plaintiff testified in support of quantum of damages he sought before Msagha Mbogholi J.
4. On the 28/06/2018, the court (Mbogholi Msagha J) awarded the Plaintiff general damages in the sum of Kshs. 10 million, aggravated damages at Kshs. 2 million plus costs and interest at court rates. This award of damages was appealed against, and the Court of Appeal is yet to hear and determine the Appeal as informed by counsel for the parties.



However, on the 10/03/2019, the plaintiff died, before the appeal could be determined.

On the 19/08/2019, Grant of letters of Administration of the estate of the deceased were granted to Jane Wairimu Gikonyo and Georgina Wambui Gikonyo both of Nakuru.

5. By an Application dated 14/09/2023, brought under provisions of Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 24 Rule 3 and 51 Rule 1 of the *Rules*, one of the deceased's legal representative Jane Wairibu Gikonyo sought leave to be substituted in place of the deceased plaintiff on grounds that she is the legal representative of the deceased, and grant of representation was granted to her in succession cause No. 248 of 2019, and that delay to apply for substitution was caused by the trial court that went missing at the court registry and only leant of its reappearance in court on the 13/07/2023. This is the Application for determination before this court.

6. The Application was opposed via a Replying Affidavit sworn by Bernard Ogutu, an advocate for the Respondent on the 13/10/2023.

I have carefully considered the parties averments and particularly those in opposition to the Application.

The material facts precedent to the death of the deceased are not in dispute, nor is the death on 10/03/2019, and particularly that there is a judgment in favour of the deceased plaintiff, which was appealed against on the matter of quantum of damages only.

7. The main issue for determination is whether or not the deceased's suit abated pursuant to provisions of section 2(1) of the *Law Reform Act*, Cap 26 Laws of Kenya.

The Applicant's case is as stated in the grounds in support of the Application particularly that the delay to move the court for the orders sought earlier was due to non-availability of the court file in the court registry.

8. The Respondent's case was supported by a Replying Affidavit sworn on 13/10/2023, to the effect that the suit abated with the death of the plaintiff as a defamatory suit does not survive a deceased plaintiff.

Analysis and Determination

9. By the time the Plaintiff died, there was a judgment both on liability and quantum of damages in favour of the deceased, and against the defendant, through the Appeal to the Court of Appeal on the award of damages. was yet to be determined on the issue of quantum of damages.

Section 2(1) of the *Law Reform Act* provides: -

“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. The High Court in the case of *Hon. Emmanuel Karisa Maittha v The Nation Media Group Ltd* [2007] eKLR rendered that: -

“-----This suit, being a defamation suit, by reason for the Proviso to Section 2(1) of the Law Reform Act [cap 26) which is in mandatory terms, the suit does not survive the deceased



plaintiff even if the plaintiff died after an interlocutory judgment had been entered in his favour.....”

11. The rationale by the court of appeal in *Kiagi Peter wa Mochana & another v Standard Chartered Bank Ltd* [2016] eKLR held that:-

“...in defamation Law, the dead cannot be defamed. Defamation suits do not survive the deceased because defamation is a personal action that cannot be assigned or brought on someone’s behalf. The reason why defamation suits do not survive is that the right of action dies with the person and once you are dead, you are taken not to have reputation in legal terms that is capable of being damaged. The reputation of a person dies with him..... There is no liability for defamation for the dead either to the estate of the deceased or to the deceased’s descendants or relatives.... A reputation is perishable as the person who earned it. The dead have no rights of reputation and can suffer no wrong....”

12. What is the case when a Plaintiff has a judgment that has not been executed, or if there is an Appeal pending for hearing against the judgment and the Plaintiff dies before it is determined? This is the issue the court is called upon to determine.

Before his demise, the plaintiff held a judgment in his hands, but due to the pending appeal on quantum of damages, could not execute the same unlike in the Hon. Emmanuel Karisa Maitha case (*Supra*) where no judgment had been delivered in his favour.

13. The deceased had been defamed in his lifetime and the court agreed with him in the judgment delivered on 28/06/2018 awarding him damages in compensation for the defamation. That award of damages has not been set aside, as the court was informed that it is on Appeal.

In an Indian case *Raju v Chacko* [2005]4KLT197 the court held that: -

“..... There is no liability for defamation of the dead either to the estate of the deceased or to the deceased’s descendants or relatives.”

See also *Joseph G. Njoka & 5 others v Rose Mutitu Gachoki* [2018] eKLR.

14. The matter as to whether or not the Estate of the deceased should proceed to execute the judgment obtained before the deceased’s demise, in my view is a grey area that ought to be properly heard and determined, and as the High Court has in several decisions pronounced itself on the matter as demonstrated in the decisions I have cited above, but not on when there is already a judgment, only pending execution.

However, the court pronouncements are distinguishable in that whereas the plaintiffs therein died before determination of their cases, and therefore had no judgments in their favour, the position in this case is different, in the manner I have stated above.

15. Section 2 (1) of the *Law Reform Act* reproduced above presupposes that a cause of action in defamation does not survive a deceased person as reputation of a dead person has no reputation to protect, as rendered in Kiagi Peter wa Mochana case (*Supra*). However, in my considered view, and I stand corrected by a Court of Appeal decision, that a judgment obtained before death, and only pending execution may be an asset of the Estate if recovered even after his death, so that the sum that the amount adjudged as payable by the appeal court may be an asset to the estate, liability having been determined before his death.



16. This is only possible in my view if the Applicant in the instant Application is granted leave by this Court to substitute the deceased with the Legal Representative who will then be in a position to progress this case as well as the pending appeal before the Court of Appeal.
17. I agree the delay in bringing the Application for substitution is rather inordinate, and the reasons not so persuasive as nothing has been placed before the court to show that the trial Court file could not be traced at the Court registry for the period of close to three years.

However, for ends of justice to be done and to be seen to be done, and guided by provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, I am inclined to allow the Application dated 14/09/2023. It is so allowed as prayed.

The Applicant is allowed 30 days to effect the substitution of the deceased with the Legal Representatives.

Each party shall bear own costs on the Application.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 25TH DAY OF JANUARY, 2024.

J. N. MULWA

JUDGE

