Mohamed & another v Kenya Power & Lighting Company Limited (Commercial Suit 73 of 2016) [2024] KEHC 1674 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1674 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL SUIT 73 OF 2016

DKN MAGARE, J

FEBRUARY 22, 2024

BETWEEN

ABDULHAKIM ABDULLA MOHAMED & 1 OTHER .... APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED .... RESPONDENT

RULING

1. That this matter is still in our court corridors speaks Volume. The suit was filed on 21/7/2016. The defendant entered appearance On 22/8/2016 and filed defence 2 days later. Judgment in default of defence for Kshs. 522,713,576 was entered by the Deputy Registrar, wrongly, if you ask. The claim is not for a liquidated sum but for special damages.
2. In respect thereof the Court of Appeal has made it succinct in the case of David Bagine Vs Martin Bundi [1997] eKLR, the Court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:
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> > "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
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> > > "Plaintiffs must understand that if they bring actions for damages, it is for them to prove damages, it is not enough to write down the particulars and, so to speak, throw them at the head of the court,

saying, 'this is what I have lost, I ask you to give me these damages.'
They have to prove it"

3. In the case of Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR, the court of Appeal had this to say in respect of the same issue: -

> " Special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR, Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur). In the latter case this Court was emphatic that
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> > "... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...".
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> > The appellant apart from listing the alleged loss and damage, it did not, according to the respondent lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed there was not credible documentary evidence in support of the alleged special damages."

4. On 7/12/2016 – the court delivered its ruling allowing filing of defence. The defence was filed denying liability in regard to the transformer. They stated that the 70 mm cable which extended underground 25 mm cable from the metre were intact. The issues were joined.

5. From the plaint the 1st plaintiff is the Registered owner of the premises situate on land parcel Numbers 105VI/MN and 2921/VI/MN situate in Changamwe while the 2nd plaintiff is the occupier of the premises and owner of all goods and stock within the building housing 3 warehouses in 1 for storage of goods and administrative offices.

6. The claim relates with fire that broke out on 21/7/2015. The parties claim for: -

   a. Ksh 301,421,250 in cost of reconstruction.

   b. Ksh 221,292,326 in equipment and stock

   c. 1 Ksh 95, 867,161 value of stock

   d. Ksh 3,611 304 for filings and computers.

   e. Ksh 10,943,861 for loss of profits.

   f. Ksh 10,870,00 for loss of exchange on imports.

7. The parties have been doing a Zumba dance with hearings. The matter stalled due to the failure of some mediation. Thereafter the 1st plaintiff died on 10/3/2021. The suit by the plaintiff abated on 10/3/2023.

Respondents submissions

8. The Respondent submitted that the application is vexatious and waste of time. They relied on the case of In Samuel Kirubi Njukia -vs- Margaret Wangari Macharia (2017) the Court cited with approval the case of M'Mboroki M'Arangacha v Land Adjudication Officer Nyambene & 2 others [2005] eKLR: -

> " My understanding of Order 23 rule 3 (1) & (2) quoted above is that where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on the application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party in the suit and the court shall then proceed with suit. But it is clear that such an application seeking that the legal representative be made a party in the place of the deceased plaintiff, must be made within one year. In default of bringing the said application as I understand the rule, the surviving suit shall abate so far as the deceased plaintiff is concerned. The language used by the legislature is mandatory as the words used are" the suit shall abate". It is my understanding and view therefore that the abatement of the suit is automatic and does not, as Mr. Kioga argued, need an order of the court to abate the suit."

9. They state that the intention of the oxygen principle is not a magic wand. They further relied on the case of Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji - Civil Application No. Nai. 179 of 1998 (unreported) where it was stated as follows: -

> " The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

10. The 1st plaintiff/ Applicant filed submissions stating that the applications dated. 13/4/23 was brought under Order 27 Rule 3 and 7 of the Civil Procure Rule, and is supported by the annexed affidavit of Twaha Abdulhakim Abdalla. They raise one issue only whether the plaintiff has established the case to warrant a revival of suit and the legal representatives/ administrators of the 1st defendant's estate be made party to the proceedings in place of the deceased.

11. They set forth what Order 24 Rules 2, 4 and 7 provides. They relied on the case of said Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR where the Court stated as doth:-

> " There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.
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> Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.
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> Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "sufficient cause" from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which

flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.

12. They are of the view that the cause of action continued with the surviving plaintiff. The estate will prejudiced unless the application is allowed. They admit that they did not file since the instructions escaped the advocates.

13. They rely on the case of Mathenge Ngatia Ngari (suing for himself and on behalf of his deceased brothers represented by their wives) v Christopher Wangombe Ngatia & another [2020] eKLR, twhere J. O. Olola stated as doth: -

> "25. Although the Applicant had not given any explanation for not filing the Application within the time stipulated, yet under the circumstance of the prevailing situation, I feel the need to invoke the provisions of Sections 1A and 1B of the *Civil Procedure Act* Cap 21 Laws of Kenya where the court is enjoined to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil proceedings in a just, expeditious, proportionate and affordable cost to the parties. Article 159 (2) (a) (b) (c) and (d) of *the Constitution* further underscore the role of the court in the administration of Justice. Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.
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> 26. These Constitution provisions mirrored against sections 1A and 1B of the *Civil Procedure Act* clearly enjoin the courts to endeavor to do substantive justice to the parties without necessarily being shackled by procedural technicalities.
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> 27. While it is true that the application was filed after the expiry of the stipulated period yet in my view and noting from the annexures herein attached, the fact that when the original Plaintiff obtained a grant of letters of administration on behalf of the Defendants and subsequently the Applicant obtained the letters of administration ad litem on the 22nd January 2019 and filed this application 14th June 2019 in my humble view is an indication that the Plaintiffs were desirous to have this matter heard and determined."

14. They relied on the case of James Mwaniki Kinuthia v Hemed Iddi Mukui & another [2019] eKLR, where Justice J G Kemei stated as doth: -

> "17. I have seen a number of decisions of Courts in this country where suits have been revived outside the one year period depending on the circumstances of the case. In all these cases the decisions were informed by the Court's cardinal duty to meet the ends of justice. In the case of Issa Masudi Mwabumba vs Alice Kavenya Mutunga & 4 others [2012] eKLR, Koome, JA invoked those principles when dealing with an application for revival of an appeal "made two years and eight months" after the death of a party. After setting out the principles that guide the Court in the exercise of judicial discretion, the Judge, in allowing the application for revival in that matter stated:
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> > "………. I am also guided by the provisions of Section 3A and 3B of the *Appellate Jurisdiction Act* otherwise known as the oxygen principle. Stemming from the overarching objectives in the

administration of justice the goal is at the end of day, the Court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through *the Constitution* of Kenya, 2010 in particular Article 159."

15. They urge them to allow the application.

Analysis

16. The application is fairly straight forward. It is agreed that the suit by the 1st Plaintiff has abated. The only question is whether this court can revive such a suit. I had a misfortune of holding the short end of the tick in Joseph Kirui v Said K. Keitany [2021] eKLR. The Court of Appeal (Okwengu, Gatembu & M' inoti JJA) stated as doth for an application filed 6½ years after the demise of the deceased.

"(7) We have considered the applicants motion and the respondent's reply. It is evident to us that although the applicant's motion has been filed about 6½ years after the death of the deceased, the applicant has demonstrated that he made serious efforts in seeking to identify the persons concerned with the deceased's estate but his efforts were not successful.

(8) In the circumstances, we think that this is an appropriate situation in which the Court should apply Article 159 of *the Constitution*, revive the appeal and allow the application for substitution in order to give the applicant an opportunity in having his day in Court. This would allow for substantive justice and fairness. This Court proceeded in similar terms in Elizabeth Wanjiru Njenga & Another -vs- Margaret Wanjiru Kinyara & 2 Others [2018] eKLR, with which we agree."

17. In that connection the said decision is bidding on this court. The delay for less than one year is not inordinate. The parties cannot ride on the misfortune of the plaintiff. In the circumstances I find the application merited and I allow the same.

Determination

18. The upshot of the foregoing is that I make the following determination: -

a. The suit filed by the Deceased 1st plaintiff is hereby revived. The administrator(s) of the estate of the late Abdulhakim Abdulla Mohamed (Deceased), that is Twaha, Abdulhakim Abdalla and Zainab Abdulhakim Abdalia be substituted in place of the Deceased, 1st plaintiff.

b. The 1st Plaintiff to file an amended plaint within 14 days from the date hereof.

c. The Defendants to file Amended defence if any within 14 days of service.

d. The matter be mentioned before the Deputy Registrar on 14/4/2024 to fix a date for directions before Court 4.

e. Costs be in the cause.

f. The suit be concluded by 14/2/2025 failing which it stands dismissed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 22ND DAY OF FEBRUARY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mohamed for the plaintiff

No appearance for the Respondent

Court Assistant - Brian