



**Mbaire (Attorney and agent of Marianne Diekhans) & another v Stefan & 2 others
(Civil Suit 61 of 2014) [2024] KEHC 10299 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 10299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 61 OF 2014
F WANGARI, J
APRIL 29, 2024**

BETWEEN

**MARY MBAIRE (ATTORNEY AND AGENT OF MARIANNE
DIEKHANS) 1ST PLAINTIFF**

SUFI LTD (FORMERLY HEINZ DIEKHANS LTD) 2ND PLAINTIFF

AND

RUDOLF STEFAN 1ST DEFENDANT

ZIIDA SADIQ BRUNO 2ND DEFENDANT

REGISTRAR OF COMPANIES 3RD DEFENDANT

RULING

1. The ruling relates to a Notice of Motion by the 1st and 2nd Defendant dated 17/10/2023, seeking for the following orders;
 - a. That the 1st Plaintiff's suit as against the 1st and 2nd Defendants be marked as abated with costs to the Defendants.
 - b. That the 2nd Plaintiff's suit as against the 1st and 2nd Defendants be struck out with costs for failing to comply with the requirements of a verifying affidavit and resolutions of the 2nd Plaintiff.
 - c. That costs of the application be borne by the Plaintiff.
2. The application was supported by the affidavit accompanying the application, and further affidavit dated 6/2/2024. The Defendants deponed that the Principal and the donor of the Power of Attorney to the 1st Plaintiff had died over a year before this application was filed, and no action had been taken.



The suit by the 2nd Plaintiff was filed without the Resolution by the Directors of the Company, and that the amended Plaint discloses no cause of action against the Defendants.

3. The Plaintiff/ Respondent filed a Replying Affidavit dated 19/1/2024. It was admitted that indeed the donor of the Power of Attorney to the 1st Plaintiff died over one year ago, but stated that the 2nd Plaintiff being a body corporate and distinct from the 1st Plaintiff was capable of continuing with the suit on its own.
4. Directions were taken that the application be canvassed by way of written submissions. Only the Plaintiffs complied by filing submissions and cited various authorities in support of their position.

Analysis and Determination

5. I have duly considered the application, submissions together with the authorities relied as well as the law and in my view, the following issues are for determination;
 - a. Whether the Notice of Motion is merited;
 - b. Who bears the costs?
6. This is a rather straight forward application. The question to be answered is whether the 1st Plaintiff's suit has abated as against the Defendants, and whether the 2nd Plaintiff's suit was filed without the resolution of the Company Directors.
7. On abatement of suits, Order 24 Rules 1,2 and 3 of the [Civil Procedure Rules](#) provides as follows;
 1. No abatement by party's death if right survives
The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.
 2. Procedure where one of several plaintiffs or defendants dies and right to sue survives

Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.
 3. Procedure in case of death of one of several plaintiffs or of sole plaintiff
 - (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 subrule (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



8. The 1st Plaintiff did not deny that the Power of Attorney donor had died over one year and no action had been taken. She however argued that the cause of action had survived and the 2nd Plaintiff would continue with the suit. The question of whether or not the suit by the 1st Plaintiff has abated after determining whether or not the cause of action survives as per Order 24 Rules 1 and 2 above.
9. The Defendant stated that the 2nd Plaintiff's suit could not stand as they had no resolutions from the Directors of the company. They stated that the 1st and 2nd Defendants were still Directors of the 2nd Plaintiff company and they had no resolutions to have the suit filed.
10. On the other hand, the Plaintiffs stated that the 1st and 2nd Defendant had fraudulently caused themselves to be Directors of the 2nd Plaintiff company, an issue subject to the determination of this suit. The Plaintiffs said there were new Directors and they passed the resolution to file suit on behalf of the 2nd Plaintiff.
11. I have perused the said Resolution dated 2/7/2018 relied on by the Plaintiffs. Even though the Plaintiffs were to be given the benefit of doubt that the Directors of the 2nd Plaintiff company were properly on record, the Amended Plaint was filed on 21/11/2017. The Resolutions were made over 7 months after the Amended Plaint was filed. The 2nd Plaintiff had no authority to file the suit. The suit is therefore not properly on record and ought to be struck out. The issue of the cause of action surviving the abatement of the 1st Plaintiff's suit need not be addressed at this stage.
12. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. Having considered the relationship between the parties, I shall make no order as to costs.
13. Following the foregoing discourse, the upshot is that the following orders do hereby issue: -
 - a. The Notice of Motion dated 16/10/2023 is merited and is hereby allowed on the following terms.
 - i. The suit against all the Defendants has abated.
 - ii. The 2nd Plaintiff's suit is hereby struck out as no authority to institute suit had been given.
 - b. Each party to bear their own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 29TH APRIL, 2024

.....

F. WANGARI

JUDGE

In the presence of;

Odongo Advocate h/b for M/S Thungu Advocate for the Plaintiff/ Respondent

M/S Githinji Advocate for 1st and 2nd Defendants

Barile, Court Assistant

