



**Enterprises & another v Langat & another (Suing as the Legal Administrators
of the Estate of the Late Chepkwony Kiplangat Denis) (Civil Appeal
E955 of 2023) [2024] KEHC 6101 (KLR) (Civ) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6101 (KLR)

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

CIVIL

CIVIL APPEAL E955 OF 2023

HI ONG'UDI, J

MAY 30, 2024

BETWEEN

PRITAM ENTERPRISES 1ST APPELLANT

PRAVIN RABADIA 2ND APPELLANT

AND

CAROLINE LANGAT 1ST RESPONDENT

KIPTONUI ROBERT KIPKIRUI 2ND RESPONDENT

**SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF THE LATE
CHEPKWONY KIPLANGAT DENIS**

*(Being an appeal against the Ruling and order by Hon. Ruguru N. Senior Principal
Magistrate in Nairobi CMCC No. 9338 of 2019 delivered on 28th August, 2023)*

JUDGMENT

1. This appeal arises from the decision of the trial court in respect of a Notice of motion dated 20/09/2022 filed by the appellants (who are the defendants therein). In the said application the appellants sought orders namely:
 - i. Orders of 6/06/2022 be reviewed and set aside.
 - ii. The suit filed on 18/12/2019 and all the subsequent amended plaints be dismissed with costs.
 - iii. Costs of the application plus entire suit be awarded to the applicants/defendants.
2. The said application was heard and a ruling dismissing the same delivered on 28/08/2023.



3. Being dissatisfied with the said ruling the appellants filed this appeal dated 19th September, 2023 citing the following grounds:
 - i. That the learned Magistrate erred in both law and fact in failing to find that the suit was null and void ab initio as it was filed on 18/12/2019 in the deceased's name long after the deceased's death on 12/09/2019 thus defective.
 - ii. That the learned Magistrate erred in both law and fact in upholding the orders that the defective suit could be revived and/or reinstated when it was defective at the time it was filed.
 - iii. That the learned Magistrate erred in both law and fact in upholding the order for amendment of the plaint to substitute the deceased plaintiff with his estate where no provision of the law allows for such an amendment and substitution for a suit which was defective and dead from onset.
 - iv. That the learned Magistrate erred in both law and fact in relying on Order 12 rule 7 and Order 51, rule 15 of the *Civil Procedure Rules* to hold that the court had discretion to dismiss the applicant's application dated 20/09/2022 yet the said application was in form of a preliminary objection the original suit could only be withdrawn NOT amended as it was defective from the onset.
 - v. That the learned Magistrate erred in both law and fact in finding that the issue as to whether the correct party instituted a suit is a procedural technicality whereas that issue goes to jurisdiction of the court to proceed with a matter which was void ab initio and which it could dismiss on its own motion even without any application before it.
4. The Appeal was canvassed by written submissions.

Appellant's submissions

5. These were filed by C.W Ngala & Company advocates and are dated 20th March, 2024. Counsel has submitted that the suit in the lower court was filed on 13/12/2019 by Chepkwony Kiplangat Dennis who died on 12/09/2019. The said suit did not plead death but injuries suffered. He thus contends that a dead person cannot file a suit nor a suit in his name be filed by the living.
6. Counsel submitted that the original suit ought to have been filed under the *Law Reform Act* and *Fatal Accidents Act* through a representative of the deceased. That the filed suit was defective and could not be amended as was done vide the application dated 8/04/2022. Counsel submitted that this error could not be referred to as a procedural technicality. Further that no leave to substitute had ever been sought by the respondents and so none was granted. It is counsel's argument that Order 24 Rule 3(i) & (2) of the *Civil Procedure* court only apply if the suit was properly filed by the deceased in his lifetime so that in the event of death the said provision takes effect.
7. It is counsel's submission that the trial court acted without jurisdiction. Since the plaintiff in the suit filed on 13/12/2019 had already died before that date. He cited several cases on the importance of a court having to act only when it has jurisdiction see:
 - i. *Owners of Motor Vessels Lilian v Caltex Oil Kenya Ltd* Civil Appeal No 50 of 1989 [1989] eKLR
 - ii. *Alcott Wiz Trading Company Limited & 2 others v Jotum (K) Limited* Misc. Application E091 of 2023 [2023] KEHC 2742 (KLR in *ZM v CWK* [2006] eKLR among others.



8. Counsel blames the respondents who did not inform the court of the passing on of the deceased even as the trial court issued *ex parte* orders on 06/06/2022. He thus urged the court to find the Appeal merited and grant the orders sought.

Respondents' submissions

9. These were filed by Musili Mbiti Advocates LLP and are dated 17/04/2024. Counsel submitted that the deceased gave them instructions in August, 2019 – over the matter. They filed the suit on 18/12/2019 without any information on his death. The mistake was therefore theirs and not the deceased's. That upon receipt of the information on the demise of the deceased they acted swiftly by amending the original plaint on 10/6/2021 and filed in court on 1/7/2021 without leave of the court, as pleadings had not closed. Later they filed and served their application dated 08/04/2022 which was served on the appellants and their insurers. The application was scheduled for hearing on 06/06/2022 and a hearing notice was equally served on the appellants and their insurers. The appellants did not attend court on 06/06/2022 and the application dated 08/04/2022 was allowed. This led to the appellants filing the application dated 20/09/2022, whose ruling the appellants are challenging.
10. Counsel submitted that the amendment of the initial plaint cured the original defect in the plaint. This was before the appellants entered appearance. He accuses the appellants of laches in filing the application dated 20/09/2022.
11. What happened in the trial court has been clearly set out by both parties in their submissions. The trial court held that the applicants based their claim largely on procedural technicalities and so exercised discretion under Article 159(2) (d) of the [Constitution](#). The trial court also relied on Order 24 [Civil Procedure Rules](#) in making a determination.

Analysis and Determination

12. This being a first Appeal this court has a duty to re-evaluate and re-consider the evidence on record and arrive at its own conclusion. See:
- i. *Selle & another v Associated Moto Boat Company Limited & others* [1968] E. A 123
 - ii. [Kamau v Mungai & another](#) [2006] 1 KLR 150.
13. I have carefully considered the grounds of appeal, the record of appeal, both parties submissions and cited authorities. I find the main issue falling for determination to be whether the suit herein was defective ab initio.
14. There is no dispute that the deceased herein died on 12/09/2019. The initial plaint though dated 3/09/2019 was filed on 18/12/2019 i.e three (3) months after the deceased's death. The suit was therefore filed by a non-existent person.
15. In the case of [Kenya Power Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints](#) [2016] eKLR the Court of Appeal stated thus of such a party:
- “ A non-existent person cannot sue, and once the court is made aware that the plaintiff is non-existent, and therefore incapable of maintaining the action, it cannot allow the action to proceed since a non-existent plaintiff can neither pay or receive costs there can be no order as to costs”.



16. In the case of *Benjamin Leonard Mc Foy v United Africa Company Limited* [1961] ALL ER 1169 the court stated as follows:

“If an Act is void, then it is in Law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

17. Furthermore, the estate of a deceased person may take over proceedings in his favour if the person filed the suit while alive. There is a process for taking over such a matter and that is the essence of Order 24 of the *Civil Procedure Rules*. This could not take place in this case as the deceased died before filing the suit.

18. In the present case as at 18/12/2019 when the suit was filed the plaintiff was non-existent. Further, when counsel decided to amend the plaint without leave of the court, there was nothing to amend.

19. Order 24 of the Civil Procedure Rules which the trial court relied on to resurrect a dead suit was of no value to the scenario existing. The said provision deals with matters where an existing person sued or was sued and thereafter dies.

20. I have had a chance to peruse the amended plaint dated 10th June, 2021. Besides mentioning the word deceased as per the amendment, there is nothing in the pleadings to show that the suit has been filed under the *Law Reform Act* and *Fatal Accidents Act*. This aside, I find that the learned trial Magistrate did not fully appreciate what was being challenged by the appellant. The issue is whether an amendment could revive a non-existent suit.

21. What counsel for the respondents ought to have done in his circumstances was to withdraw the initial suit and file a proper suit. This was irrespective of the appellants filing an appearance or not. Failure to so act was fatal to the claim and could not be cured under Article 159(2) (d) of the *Constitution* as a technicality.

22. In view of the above analysis I find merit in this Appeal which I allow and set aside the ruling dated 28/8/2023 and order as follows:

- i. The orders made on 06/06/2022 are hereby set aside.
- ii. The plaint filed on 18/12/2019 and the amended plaint dated 10/06/2021 are hereby struck out, with costs.

23. Orders accordingly.

DELIVERED, VIRTUALLY DATED AND SIGNED THIS 30TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

