



REPUBLIC OF KENYA



KENYA LAW

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**Iraki & another v Ndung'u & another (Environment & Land Case
767 of 2017) [2023] KEELC 16424 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16424 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 767 OF 2017**

JG KEMEI, J

MARCH 16, 2023

BETWEEN

LIZA WAIRIMU IRAKI 1ST PLAINTIFF

PETER IRAKI MWAURA 2ND PLAINTIFF

AND

MAGDALENE WANGUI NDUNG'U 1ST DEFENDANT

**SAMUEL NGUMBA NGARUIYA (BEING SUED AS THE
LEGAL REPRESENTATIVE OF LILIAN WAIRIMU NGARUIYA
(DECEASED) 2ND DEFENDANT**

RULING

1. Before court is the 2nd defendant/applicant's notice of motion dated 28/9/2022 brought under sections 1A, 1B and 3A Civil Procedure Act, order 2 rule 15 (1) Civil Procedure Rules seeking in the main that the entire suit as contained in the amended plaint amended on 24/2/2022 and filed on 8/6/2022 be struck out with costs.
2. The application is based on the grounds on the face of it that the 2nd plaintiff died on 13/4/2021 and having not been substituted within the prescribed time, the suit stood abated against all Defendants on 14/4/2022. That the nature of the 2nd Plaintiff's alleged cause of action does not survive against him. This is because the 2nd Plaintiff during his lifetime was the registered proprietor of the suit land before transferring it to his wife, the 1st Defendant who in turn sold it to the late Lilian Wairimu Ngaruiya.
3. The Motion is supported by the Affidavit of even date of John Wamiti Njagi, the 2nd Defendant's Counsel. Echoing the grounds in the Motion, he averred that the suit land herein, L.R No. Karai/gikambura/482 belonged to the 2nd Plaintiff who died on 13/4/2021 as per copy of Death Certificate marked JWN2, and the nature of action therefore does not survive to the 1st Plaintiff. That she lacks locus standi to personally sustain a claim touching on the suit land against the Defendants. Copy of



the green card, JWN3 was annexed to show the aforesaid transfers. That the suit as currently contained in JWN1, copy of the amended plaint dated 24/2/2022 is fatally defective; discloses no cause of action and an abuse of Court process hence the Application.

4. The Application is opposed by the 1st Plaintiff only.
5. The 1st Plaintiff swore her Replying Affidavit on 27/10/2022. Conceding the 2nd Plaintiff's registration as the suit land owner and his subsequent death. She averred that she was the 1st Plaintiff's wife and that they built their matrimonial home on the suit land. That she has been advised by her Counsel that she has the requisite locus stand by virtue of marriage and beneficial rights of the matrimonial home. That the issue of determination of her proprietary and beneficial rights can only be determined at the hearing of the suit; the preliminary objection has been raised after close of pleadings and that the issue of abatement of suit only arises in the case of a sole Plaintiff. She urged the Court to strike out the Application with costs but if persuaded otherwise, the Court be pleased to extend time for the 2nd Plaintiff's substitution since she has already obtained a Limited grant of administration ad litem.
6. On 1/11/2022, parties took directions to canvass the Application by way of written submissions.
7. On behalf of the 2nd Defendant, the firm of Wamiti Njagi & Co. Advocates filed submissions dated 24/11/2022. It was submitted that the 2nd Plaintiff as registered as the suit land owner on 27/5/1996 by way of transmission after succession proceedings and therefore it is not true that the Plaintiffs owned the suit land in 1992 as deponed by the 1st Plaintiff. That the 1st Plaintiff has never applied to substitute the 2nd Plaintiff despite amending her plaint twice since the death of the 2nd Plaintiff. Accordingly, that she lacks the requisite locus standi as a mere beneficial owner and having failed to substitute her husband as his legal representative, the cause of action herein collapses in light of order 24 rules 3, 5 and 7 Civil Procedure Rules. On the meaning of locus standi, reliance was placed on various authorities including *Trouistik Union International & Anor vs Jane Mbeyu* (2008) and *Alfred Njau & Others Vs City Council of Nairobi* (1982-88) both cited in *Beatrice Wambui Kiarie vs Beatrice Wambui Kiarie (sic) & 9 Others* [2018] eKLR.
8. The law firm of Muhuhu & Co. Advocates filed the 1st Plaintiff's submissions dated 24/11/2022. The 1st Plaintiff submitted that striking out a suit is a draconian step that should be employed in the clearest of cases and only if the suit is beyond redemption. That there are factual matters regarding the 1st Plaintiff's beneficial rights as a spouse that can only be determined at the hearing. That it is trite that a suit can only abate where no application for substitution is made within one year but that was not the scenario herein as the cause of action survives through the 1st Plaintiff by dint of section 2(1) of the *Law Reform Act*. She relied on the cases of *Karl Webner Claasen Vs Commissioner of Lands & 4 Others* [2019] eKLR and *Khelef Khalifa El-Busaidy Vs Commissioner of Lands & 2 others* [2002] eKLR.

Analysis & Determination

9. The singular issue for determination is whether the application is merited.
10. The legal provisions governing abatement of suits are anchored in order 24 rules 1,2,3 and 5 *Civil Procedure Rules* that;

“



- “1. No abatement by party’s death if right survives [order 24, rule 1.]
 - (1) 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 [order 24, rule 2.]
 - (2) 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 [order 24, rule 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 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.

4. Determination of question as to legal representative [order 24, rule 5.]
 - (5) Where a question arises as to whether any person is or is not the legal representative of a deceased Plaintiff, or a deceased Defendant, such question shall be determined by the Court.”

11. The 2nd defendant contends that the 2nd plaintiff’s cause of action as instituted vide an amended plaint dated 21/7/2022 has abated due to the 2nd Plaintiff’s demise on 13/4/2021 and no substitution has been sought as at 14/4/2022. Copy of the Death Certificate is annexed as JWN 2 to buttress this position which in any event has been conceded by his wife, the 1st Plaintiff at para.3 of her Replying



Affidavit. However, the 1st Plaintiff holds a contrary view that the cause of action has not abated because she is agitating the suit as the 2nd Plaintiff's spouse with beneficial rights over the suit land which she avers is matrimonial property.

12. Has the 2nd Plaintiff's suit abated by operation of law? The answer is in the affirmative there being no application within one year of his death that is proven by way of the Death Certificate. The question that arises for determination is whether that abatement notwithstanding, the cause of action survived the deceased in favor of the 1st Plaintiff?
13. The *Black's Law Dictionary* 10th edition defines a cause of action as;

“A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person.”
14. Further Mr. Justice Waki J.A in the Court of Appeal case of *Attorney General & Another Vs Andrew Maina Gitbinji & Another* [2016] eKLR held that,

“A cause of action is an act on the part of the Defendant, which gives the plaintiff his cause of complaint.”
15. At para.4 of her Replying affidavit, the 1st Plaintiff deponed-

“That the suit property was registered under the name of the 2nd Plaintiff but that we built our matrimonial home on that parcel of land in 1992, where we both retired and carried out subsistence farming and built temporary mabati rooms for renting an extra income’.

No evidence was adduced to support this averment and which ownership the 2nd Defendant has refuted vide JWN3 – copy of green card that the 2nd Plaintiff was registered as the suit land owner on 27/5/1996.
16. Further in Ground ‘d’ of his motion, the 2nd Defendant stated that the 2nd Plaintiff during his lifetime transferred the suit land to the 1st Defendant who is also alleged to be the 2nd Plaintiff's wife too. JWN3 shows that the 1st Defendant was registered as the owner of suit land on 5/7/2010 before transferring it to the 2nd Defendant one year later on 6/7/2011. All these transactions took place in the lifetime of the 2nd Plaintiff, as is alleged.
17. Notably, the 1st Plaintiff avowed that if the Court was persuaded to allow the Application, it be pleased to grant the extension of time to substitute the 2nd Plaintiff since she has already been issued Limited Letters of Administration Ad Litem. However, no such Letters of Administration have been exhibited before this Court. Besides such substitution can only be preceded by revival of the now abated 2nd Plaintiff's suit.
18. There is another reason why the 1st Plaintiff's alleged cause of action fails. In the further amended plaint dated 21/7/2022, leave to amend the earlier plaint was granted by this Hon. Court on 18/5/2022 over a year after the 2nd Plaintiff's demise but at Para. 2 thereof the 1st Plaintiff pleaded that she has brought the suit on her behalf as the 2nd Plaintiff's wife who is currently ailing. As already enumerated above the fact of the 2nd Plaintiff's demise has been proven and the averment in para.2 is thus untrue and misleading.
19. The totality of the foregoing is that the Application is merited and the same be allowed with costs to 2nd Defendant/Applicant.



DELIVERED, DATED AND SIGNED AT THIKA THIS 16TH DAY OF MARCH, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

