



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELC APPLICATION NO. 24 OF 2017

IGNATIUS NDIRANDU.....PLAINTIFF/ RESPONDENT

-V E R S U S-

NJUGUNA JESSE KURIA.....DEFENDANT/ APPLICANT

RULING

1. Before me is a Notice of Motion dated 1st October 2015 and filed on the same day pursuant to Order 24 (3)(2), 4(3)(sic) of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act and Section 76 (1) (9)(sic) of the Land Registered Act, Cap 300 and all other the enabling provisions of the Law, where the Applicant seeks for orders that:-

- i. That this case being originally High court Civil Case No 56 of 2011 be declared having abated and no longer legally tenable.
- ii. That any cautions, encumbrances prohibiting orders or any other injunction orders placed on the suit land Number Nyandarua /Mawingo/ 2040 by the deceased plaintiff/Respondent or any other person claiming through him to the plaintiff be removed and/or vacated forthwith by this honorable court.
- iii. That the Costs of this Application and/or suit be awarded to the Defendant/Applicant.

2. The application is based on the grounds that:

- a. The plaintiff died on the 28th May 2012 and since then there is no change (sic) of legal representation that has been filed.
- b. That it is over three years that the law stipulates under order 24, 3 (2) and 7 (sic) of the Civil Procedure Rules and no substitution has been made for his legal representation.
- c. That this case is now abated and is untenable any further even one more day (sic).
- d. That it is in the interest of justice and fair play (sic) without shifting goal posts to declare their case as have abated (sic) and untenable with cost to the Applicant /Defendant.

3. The application is predicated upon the annexed affidavit of Njuguna Jesse Kuria the Applicant herein sworn on the 1st October 2015 and filed on the same date.

4. The application was canvassed by way of written submission and thereafter parties through their counsel highlighted the said submissions. It is worth noting that after the Applicant had filed his papers in person, he appointed counsel on the same day to represent him.

5. The Applicant's submission was to the effect that since the passing away of the Plaintiff/Respondent in the year 2012, there has been no effort by the plaintiff's estate to apply for letters of administration in the bid to deny the applicant fruits of a decree that was issued in the Nyahururu Principal Magistrate's court in PMCC No. 109 of 1988 wherein the deceased Plaintiff was to transfer to the Applicant/defendant 8 acres of land.

6. That the Respondent cannot come before the court to submit that they have filed a Succession Cause No 329 of 2013 as a copy of the same not an annexure to their submission and neither has it availed to the court. The Respondent did not file an application of extension of time and neither did they file their grounds of opposition when they were served with the current application. Further that if their reason for not concluding this matter was by reason that the succession cause had been protracted, they ought to have applied for limited grant of letters of succession so as to finalize this matter.

7. The Applicant's submission was that there were avenues for the Respondent to deal with this matter but they chose not to use any of them so as to defeat the Applicant's fruits of the judgment awarded to him in the Magistrate's court. The Applicant further distinguished the authorities relied upon by the Respondent to the effect that the court in that case was dealing with the issue of the extension of time which was not the case in the present case. Counsel submitted that the Respondent cannot now come to court on the maxims of equity as the same cannot oust the express provision of the law which was provided for under order 24 of the Civil Procedure Rules. It was submitted that the application was unopposed and as such the orders sought to be granted.

8. The application was opposed by counsel to the Respondent who submitted that indeed there was no contestation that the Plaintiff had passed away and there was Succession Cause No. 329 of 2013 which had been filed but could not be finalized as the Plaintiff had two families and the members had not agreed on who was to be the administrator of the deceased's estate and as such the application or the suit could not be defended for lack of an Administrator.

9. Counsel submitted that Nyahururu PMCC No. 109 of 1988 was set aside by the Court of Appeal sitting in Nakuru vide Appeal No 55 of 1992 on the grounds of irregularities. That order 24(1) of the Civil Procedure Rules stipulates that the death should not cause the suit to abate.

10. The death of the plaintiff cannot legitimize the suit land that was unlawfully held by the Defendant/Applicant herein. And that litigation must come to an end the same must be in a just and fair way.

11. Counsel submitted that there would be no prejudice occasioned to the Applicant /Defendant if time is extended to the Plaintiff/Respondent and asked the court to utilize the provisions of Order 50 Rule 6 of the Civil Procedure Rules to extend time to the plaintiff/Respondent to as to enable him substitute the deceased Plaintiff.

12. I have considered the application herewith as well as the reasons given for and against the said application to have the suit marked as abated under Order 24 Rule3(2) of the Civil Procedure Rules and/or whether to grant or not to grant extension of time to the Plaintiff/Respondent as to enable him substitute the deceased Plaintiff.

13. Because the basis of this application is Order 24 of the Civil Procedure Rules I shall reproduce below the pertinent part.

"1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

...

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.

14. There are two 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.

15. 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.

16. 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. It follows that the question of whether or not to extend time.

17. Was there any "good reason" advanced by the Plaintiff /Respondent to warrant the exercise of the discretion on whether or not to extend time? The Plaintiff/Applicant submitted in opposition of the application that due to family wrangles following the death of the plaintiff who had two families, the family members were not able to agree on who should bring probate proceedings and therefore the application or the suit could not be defended for lack of an Administrator.

18. A look at the annexure to the Plaintiff's replying affidavit, the same is clear that the deceased plaintiff died on the 28th May 2012 wherein one Josephine petitioned for Grant of probate on the 28th May 2015, two years after the plaintiff's death. To date letters of administration to administer the estate of the plaintiff have not been granted. The court finds that although reason given for failure to substitute the plaintiff within the stipulated one year was a good reason yet the delay in substituting the Plaintiff for close to 5(years) was not only inordinate but also inexcusable.

19. For interest of justice, however this court shall exercise its discretion and show mercy upon the plaintiff by invoking the provisions under

order 50 rule 6 of the Civil Procedure Code to extend time to the Plaintiff/Respondent.

20. To this effect thereof it is herein ordered that the substitution of the deceased Plaintiff be effected within the next 60 days upon delivery of the ruling failure to which the suit shall stand abated with no further reference to the court.

21. That the Costs of this Application be awarded to the Defendant/Applicant.

Dated and delivered at Nyahururu this 25th day of April 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE