



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 494 OF 2014

(Formerly NYERI HCC No. 16 of 2011)

CHRISTOPHER MUKUNGA MUNYI.....PLAINTIFF

-VERSUS-

ELIAS MWANGI KIHOGO.....DEFENDANT/DECEASED

AND

PETERSON KABUITU MUNYI.....RESPONDENT

RULING

1. By a notice of motion dated 7th December, 2017 brought under **Order 24 Rules 1, 4 and 7(2)** of the Civil Procedure Rules, **Sections 1A, 1B and 3A** of the Civil Procedure Act, the plaintiff/applicant seeks the following orders;

1. That this Honourable court be pleased to substitute the original defendant herein, Elias Mwangi Kinogu (now deceased) with Peterson Kabutu Munyi, the legal representative of the estate of Kinogu Mukira

2. That this Honourable court be pleased to revive this suit.

3. That costs of this application be provided for.

2. The application is premised on the grounds that:-

(a) The original defendant died in 2015;

(b) The cause of action survives the deceased defendant and

(c) The intended proposed defendant is the legal representative of the estate of Kinogu Mukuria

3. The application is supported by the affidavit of the applicant in which he deposes that he instituted the suit in 2011 against the legal representative of the estate of Kinogu Mukuria who died in 1980; that before the suit could be heard and determined, the defendant passed on in 2015; that he (applicant) only managed to establish the details of the new representative in 2017, (the proposed defendant herein), who had been issued with letters of administration on 7th September 2016; that the original parcel of land Kiine/Ruiru/646 (herein- after “the suit property”) has since been subdivided into Kiine/Ruiru/1978, 1979, 1980, 1981, 1982, 1983 and 1984 and the proposed defendant is the registered owner of land parcel Kiine/Ruiru/1979 (one of the resultant parcels).

4. The application is opposed vide the replying affidavit of **Peterson Kabuthu Mwangi** sworn on 5th March, 2018. He deposes that the suit property does not form part of the estate of Kinogu Mukuria because the land was subdivided into 7 portions and distributed among the beneficiaries of the deceased, vide Nyeri Succession Cause No. 174 of 1999. He avers that he is registered as owner of only parcel No. 1979 while the other portions are registered in the names of other family members not before the court. It is his contention that been substituted in this matter will not serve any meaningful purpose because the other parcels are not in his name. He urges that the court to dismiss the application with costs.

5. When the application came up for hearing on 6th March, 2018 both parties chose to rely on their pleadings as filed.

Analysis and determination

6. From the affidavits filed in support and opposition of the motion, it is clear that the suit abated against the defendant one year after he died without been substituted as by law required. The suit property ceased to exist after subdivision and distribution of the resultant parcels among the beneficiaries of the estate of Elias Mwangi Kinogu. I agree with the respondent that it will serve no purpose to substitute him as a defendant in the current suit as the original parcel no longer exists and he is not the only registered owner of the subdivisions of the original parcel of land. If the applicant has interest in any of the other parcels, then his claim cannot be against the respondent alone.

7. Having found that this suit is not the proper forum to bring his claim against the respondent, I find the application without merit and dismiss it with costs to the respondent.

Orders accordingly.

Dated, Signed and Delivered in open court at Nyeri this 21st day of June, 2018.

L N WAITHAKA

JUDGE

Coram:

Ms Muthoni h/b for Maina Kagio for the plaintiff/applicant

N/A for the respondent

Court assistant - Esther