



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO 214 OF 2004**

**LYDIA WANJIKU DUBA.....PLAINTIFF**

**VERSUS**

**MARY WANJIRU KAMAU.....1<sup>ST</sup> DEFENDANT**

**NEW ROYSAMBU HOUSING LIMITED.....2<sup>ND</sup> DEFENDANT**

**KIBE KINYITA.....3<sup>RD</sup> DEFENDANT**

**MBURU KINYITA.....4<sup>TH</sup> DEFENDANT**

**AND**

**JULIUS KABECHA NDUBA**

**PETER MBUGUA NDUBA.....APPLICANTS**

**RULING**

**INTRODUCTION**

1. The 1<sup>st</sup> Defendant's Notice of Motion application dated 25<sup>th</sup> September and filed on 26<sup>th</sup> September 2017 was filed pursuant to the provisions of Order 22 Rule, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act. Prayers Nos (1) and (3) were spent. It sought the following remaining orders:-

**1. Spent.**

**2. THAT this honourable court be pleased to substitute the 1<sup>st</sup> Defendant herein with the applicant.**

**3. Spent.**

**4. THAT this Honourable court be pleased to set-aside the judgment herein and allow the applicant to defend the suit on its merits.**

**5. THAT the costs of this suit be provided for.**

2. The Plaintiff Preliminary Objection dated on 13<sup>th</sup> February 2018. The grounds were as follows:-

**1. The application was incompetent and not properly on record.**

**2. It was otherwise an abuse of the process of the honourable court.**

**3. It was intended to embarrass the speedier finalisation of this matter and delay the judgment –creditors from realising the fruits of their judgment.**

3. When the matter came before the court on 2<sup>nd</sup> May 2018, parties agreed that both the 1<sup>st</sup> Defendant's present application and the Plaintiff's Preliminary Objection would be heard together. The Plaintiff's and 1<sup>st</sup> Defendant's Written Submissions in respect of the said application and Preliminary Objection were filed on 28<sup>th</sup> May 2018 and 14<sup>th</sup> September 2018 respectively.

4. When the matter came again before the court on 20<sup>th</sup> September 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE 1<sup>ST</sup> DEFENDANT'S CASE**

5. The 1<sup>st</sup> Defendant died on 24<sup>th</sup> February 2009. Before then, the matter had proceeded ex parte and in 2005, judgment was entered against her. Peter Kamau Kihungo, the personal administrator of her Estate had now sought to be substituted with her to enable him proceed with the case on her behalf as the Plaintiff's suit which had abated had been revived.

6. It was his contention that her Estate would be prejudiced and suffer substantially if execution of the decree was executed as they had sufficient documentary evidence to show that the property in question was hers.

7. He also averred that the 1<sup>st</sup> Defendant had been unwell and suffered from dementia which could explain the number of lawyers who had tried to represent her in this matter.

8. He therefore urged this court to allow his application as prayed.

**THE PLAINTIFF'S CASE**

9. In response to the said application and in addition to the aforesaid Preliminary Objection, Muchangi Nduati Ngingo, the Plaintiff's advocate, swore a Replying Affidavit on 10<sup>th</sup> May 2018. It was filed on even date.

10. He contended that the firm of M/S Ngugi Mwaniki & Co Advocates was not properly on record as they had withdrawn an application dated 30<sup>th</sup> November 2016 and consequently, the present application as drawn was incompetent. He also stated that the assertions by the 1<sup>st</sup> Defendant's Personal Administrator that the 1<sup>st</sup> Defendant was sickly and incapacitated at the time of delivery of the judgment was a falsehood and a flimsy excuse given her many changes of advocates to represent her.

11. He contended that the application had come thirteen (13) years after the death of the 1<sup>st</sup> Defendant and hence, it had been caught up by the doctrine of laches. He pointed out that litigation must come to an end because the Personal Administrator of the 1<sup>st</sup> Defendant's Estate was trying to hang on to the straws and prolong the proceedings which was unacceptable.

12. He therefore urged this court to dismiss the application herein.

**LEGAL ANALYSIS**

13. As a preliminary issue, this court deemed it prudent to consider the question of whether or not M/S Ngugi Mwaniki & Co Advocates were properly on record for the 1<sup>st</sup> Defendant (now deceased).

14. A perusal of the Notice of Motion application dated 1<sup>st</sup> March 2016 and filed on 2<sup>nd</sup> March 2016 showed that the firm of M/S Wanjohi Gachie & Co Advocates had sought to be granted leave to come on record for the 1<sup>st</sup> Defendant in place of M/S Gichugi, Burugu & Co Advocates. It was this application that was withdrawn by the firm of M/S Ngugi Mwaniki & Co Advocates.

15. There was no indication in the court file if any other application was filed by the firm of M/S Ngugi, Mwaniki & Co Advocates before they came on record. Suffice it to state that the said firm of M/S Ngugi Mwaniki & Co Advocates filed its Notice of Appointment of Advocates dated 30<sup>th</sup> November 2016 on 22<sup>nd</sup> May 2017.

16. Notably, judgment in this matter was delivered on 15<sup>th</sup> April 2005. The effect of this was that any advocate who was to take over the matter post- 2010 had to seek leave to come on record for the party he was representing.

17. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides as follows:-

**When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court:-**

**a) Upon an application with notice to all the parties; or**

**b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in**

**person as the case may be”.**

18. It was therefore clear to this court that the firm of M/S Ngugi, Wachira & Co Advocates were not properly on record and consequently, their application as drawn was incompetent and incurably defective *ab initio*.

19. Having said so, this court took the view that even if the said firm of advocates had been properly on record, their application could still not have been allowed.

20. It is true as the said firm of advocates argued that under Order 24 Rule 4 and 5 of the Civil Procedure Rules, a deceased defendant could be substituted in accordance with Order 24 Rule 4 of the Civil Procedure Rules. Order 24 Rule 4(1) of Civil Procedure Rules provides as follows:-

**“Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit”.**

21. However, Order 24 Rule 4(3) of Civil Procedure Rules states that:-

**“Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant”.**

22. It is important to point out that whereas a Plaintiff’s suit that had abated could be revived, it was therefore not so in the case of a defendant. Any application seeking extension of time to apply for the revival of an abated suit only applied to a deceased plaintiff and not a deceased defendant.

23. Notably, the law did not appear to have any such provisions where the deceased was a defendant. The purport of the aforesaid provisions were that whereas an application could be made to substitute a deceased defendant with his or her personal representative, such an application could only be made within a year of defendant’s death. If the drafters of the law had intended that both a deceased plaintiff and deceased defendant were to be treated equally as regards extension of time to file applications to be substituted by their legal representatives or to have an abated suits revived, nothing would have been easier than for the drafters of the piece of legislation to have said that a suit that had abated against a defendant be revived after one (1) year of a deceased’s death.

24. It was therefore the finding and holding of this court that the suit as against the deceased 1<sup>st</sup> Defendant herein could not be revived under the provisions of Order 24 Rule 4 (1), Rule 4 (3) and Rule 5 of the Civil Procedure Rules as had been sought by the 1<sup>st</sup> Defendant’s Personal Representative for the simple reason that there was no provision for revival of an abated suit as against a deceased defendant under Order 24 of Civil Procedure Rules.

25. This court found that it could not have allowed an order for the substitution of the representative of the estate of the 1<sup>st</sup> Defendant to be made a party of the suit herein because firstly, it would be futile for this court to cause him to be made a party to the suit herein under the provisions of Order 24 Rule 4 (1) of the Civil Procedure Rules because Order 24 Rule 4(3) of the Civil Procedure Rules was clear that where no such application is made within a year, the suit against a defendant shall abate. Secondly, an abated suit against a deceased defendant cannot be revived.

26. This was an issue that this court addressed in the case of **Lucy Wanjiru Kamau vs K.H. Osmond Advocate [2018] eKLR** where this very court held that a suit that had abated against a deceased defendant could not be revived if the application for substitution was not done within a year of such a deceased defendant’s death.

27. Accordingly, having considered the affidavit evidence, the Preliminary Objection, the Written Submissions by the respective parties and the case law that was relied upon by the Plaintiff, this court came to the firm conclusion that the 1<sup>st</sup> Defendant’s application was not merited both on a technicality and on merit and neither Prayer No (2) nor Prayer No (4) of the application could be granted. The long and short of this was that the Plaintiff’s suit against the 1<sup>st</sup> Defendant had abated and could not be revived as she died on 24<sup>th</sup> February 2009.

## **DISPOSITION**

28. For the foregoing reasons, the upshot of this court’s decision was that the 1<sup>st</sup> Defendant’s Notice of Motion application dated 28<sup>th</sup> September 2017 and filed on 26<sup>th</sup> February 2017 was not only incurably defective and incompetent *ab initio* but it was also unmerited. The same is hereby dismissed with costs to the Plaintiff. The converse of this was that Ground No (1) of the Plaintiff’s Preliminary Objection dated and filed on 13<sup>th</sup> February 2017 was merited and the same is hereby upheld.

29. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 27<sup>th</sup> day of November 2018**

**J. KAMAU**

**JUDGE**