



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 2863 OF 1993

HANNAH WAIRIMU1ST PLAINTIFF
NAOMI WANJIRU2ND PLAINTIFF
JULIA MUTHOMI.....3RD PLAINTIFF
MARTHA GATHONI.....4TH PLAINTIFF
RAHAB WANJIKU5TH PLAINTIFF
DANIEL KINUTHIA6TH PLAINTIFF
REUBEN KARANJA7TH PLAINTIFF

VERSUS

MOSES KINUTHIA GACHOKA.....1ST DEFENDANT
MARGARET NJANO ALFRED.....2ND DEFENDANT

RULING

1. The application dated 3rd November, 2016 seeks orders that the 1st Defendant Moses Kinuthia Gachoka now deceased be substituted with his sons and legal representatives George Muniu Kinuthia and Thomas Kabingu Kinuthia.
2. The application is premised on the grounds stated therein and is supported by the affidavit of the 1st Applicant, George Muniu Kinuthia. It is stated that the 1st Defendant, Moses Kinuthia Gachoka died on 7th February, 2004 and the grant of letters *ad litem* issued to his widow, Grace Wangechi Kinuthia on 10th June, 2005. That the said Grace Wangechi Kinuthia died on 3rd May, 2008 and the said grant became inoperable. That on 3rd July, 2009 the Applicants were issued with the grant of Letters *ad litem*. The Applicants as the legal representatives of the deceased 1st Defendant intend to carry on with the wish of the deceased to appeal against the judgment entered herein on 22nd August, 2003 wherein orders were made that the 1st Defendant's family be evicted from the suit premises.

3. In opposition to the application, the Respondents filed the grounds of opposition dated 31st August, 2017 which states as follows;

1. There is no suit pending to which the applicant may be substituted as the 1st Defendant. Order 24 rule (2) of the civil procedure Rules only contemplates substitution to a continuing or surviving suit. This suit was determined on 22nd August, 2003 as confirmed by the judgment marked as exhibit “GMK3” of the applicants supporting affidavit. The decree was issued on 21st May, 2007.

2. An eviction order was issued against the 1st Defendant- Moses Kinuthia Gachoka on the 29th January, 2009.

3. On the 8th May 2009 – this court gave another order for the OCS –Kikuyu to supervise the eviction. The Order was executed and the applicants are aware of this as they attempted to have the eviction Order stayed through an application dated 16th February, 2009 which was not granted.

4. An application similar to the current one was filed in this court on the 3rd February, 2005 and was dismissed on the 8th March, 2007. The said application was seeking the same Orders now being sought and the applicants are re-litigating a matter that has been dismissed.

5. The application offends the provisions of Section 4(4) of the Limitation of Actions Act as it is being brought more than 13 years after the judgment in this case was delivered and there being no appeal against that judgment there can be no action against the judgment.

6. All the Plaintiffs are deceased and the matter is closed.

4. During the hearing of the application, the learned counsel for the Applicants stated that the suit against the 2nd Defendant, Margaret Njano Alfred was discontinued during the trial; that the 1st Defendant is now deceased and that one of the Applicants has also passed away. Section 81 of the Law of succession Act Cap 160 Laws of Kenya was relied on. It was further submitted that the suit has not abated since there is already a judgment on record and that the issue of extension of time can be dealt with later. The following authorities were relied on:

(a) Geoffrey Mwangi Kihara v Mwhoko Housing Company Ltd & 3 others [2015] eKLR

(b) Registered Trustees of Ruiru Sports Club & 3 others v Isaac Karuri Nyongo & 15 others [2014] eKLR

(c) Titus Kiragu v Jackcksom Mugo Mathai [2015] eKLR

(d) Mary Nanjala Muhalya v Ambrose Kipruto [2014] eKLR

5. The Respondent’s counsel relied on the grounds of opposition. It is argued that the judgment of the court having been delivered when the 1st Defendant was alive and no application for substitution was made within one year of the 1st Defendant’s death. It is further averred that the delay is inordinate and no sufficient cause has been shown why the court was not moved in the year 2009 when the grant of letters *ad litem* was obtained. The court was referred to the orders herein relating to the eviction of the 1st Defendant and also referred to a similar application made herein which was dismissed on 8th March, 2007.

6. The facts of the matter are generally not in dispute. Indeed the Respondent’s counsel filed grounds of opposition only.

7. The application is explained to be brought, *inter alia*, under Order 24 rule 3 which provides for the procedure applicable in case of the death of a Plaintiff or Plaintiffs. The proviso to Order 24 rule 3 gives the court the leeway to extend the time for good reason if no application is made within the one year provided for abatement of suits. This provision of the law is encapsulated by the Court of Appeal in, for example **Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR**:

8. The Applicant herein is the Defendant. Order 24 rule 4 provides for the procedure applicable in case of the death of a Defendant or Defendants. If no application is made within one year, the suit abates. However, I am in agreement with the authorities cited by the Applicant's counsel that under Order 7 (2) Civil Procedure Act, a legal representative can apply for an order to revive a suit which is abated upon sufficient cause being shown for failure to continue with the suit.

9. As stated by the court of Appeal in **Rebecca Mijide Mungole** case (**Supra**).

“Where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff’s legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3 (2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted. The learned Judge, supported by the authority of Joseph Gachuhi Muthanji (*supra*) was therefore right in dealing with that aspect of the application in manner he did.”

10. In the case at hand, there is no application either for extension of time or revival of the suit. The substantive prayer is for substitution of the deceased Defendant. No substitution can be undertaken in a suit that has abated.

11. It is noted that the grant of letters of administration *ad litem* were issued to the Applicants in July, 2009. An earlier application by the widow of the deceased seeking similar orders was dismissed on 8th March, 2007 and eviction orders were granted on 15th January, 2009, yet the Applicants have not given any explanation for the delay.

12. With the foregoing, I find no merits in the application and dismiss the same with costs.

Date, signed and delivered at Nairobi this 15th day of Dec., 2017

B. THURANIRA JADEN

JUDGE