



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 602 OF 2014

HELLEN NJERI MUREITHI PLAINTIFF (APPLICANT)

Suing as administratrix of the estate of John Peter Mureithi

-VERSUS-

ANGELA NYAWIRA NDUINI..... 1ST DEFENDANT (NOW DECEASED)

CHIEF LAND REGISTRAR..... 2ND DEFENDANT (RESPONDENT)

1. HARRISON MWANGI MANGURU

2. DAVID WAHINYA MATHENGE..... INTENDED INTERESTED PARTIES

RULING

1. By a plaint dated **28th June, 2007** and filed on **29th June, 2007** the plaintiff filed the suit herein against the defendants, **Angela Nyawira Nduini** (1st Defendant) and the Chief Land Registrar (2nd defendant) seeking the following reliefs/orders:-

a) A declaration that L.R No. Tetu/Unjiru/1397 (hereinafter referred to as the suit property”) is part of the estate of John Peter Mureithi;

b) An order to compel the 2nd defendant to rectify the register and reinstate the name of John Peter Mureithi as the registered owner of the suit property or alternatively ordering the 1st defendant to transfer the suit property to the plaintiff to hold it in trust for the estate of John Peter Mureithi.

c) An injunction to restrain the 1st defendant, her agents, servants and assigns from subdividing, selling, transferring or in any other manner interfering with the suit property.

d) Any other or further relief that the court may deem fit to grant;

e) Costs of the suit and interest.

2. The plaintiff’s case is premised on the allegation that the suit property was at all times material to the

suit herein, registered in the name of John Peter Mureithi, (hereinafter referred to as the deceased person). The suit property is said to have been transferred to the deceased person by the 1st defendant who was the initial owner.

3. The plaintiff's case is that following the death of the deceased person herein, the defendants colluded and unlawfully cancelled the registration of the deceased person herein and substituted his registration with that of the 1st defendant. Particulars of the alleged unlawful conduct of the defendants are listed in paragraph 7 of the plaint.

4. Apparently, the case against the 1st defendant abated by operation of the law on 10th January, 2015 following the passing on of the 1st defendant on 10th January, 2014 without being substituted within the time stipulated by law.

5. On 22nd April, 2015 the plaintiff brought the notice of motion dated 20th April, 2016 seeking to enjoin Harrison Mwangi Manguru and David Wahinya Mathenge (hereinafter referred to as intended interested parties) to the suit as interested parties. The plaintiff also seeks to restrain the proposed interested parties from developing or accessing the parcels of land known as L.R Nos. Tetu/Unjiru 1774, 1775 and 1376 pending the hearing and determination of the suit herein.

6. The application is premised on the grounds that the intended interested parties have, in gross violation of the orders for maintenance of status quo issued on 31st July, 2013, constructed a sawmill, erected residential houses at the entrance of the applicants' matrimonial home on the suit properties. The applicant also claims that the intended interested parties have been intimidating her. The orders sought are said to be necessary as they will enable the court to determine all issues in question once and for all.

7. The applicant is apprehensive that unless restrained by way of the orders sought; the intended interested parties will continue occupying the suit property thus occasioning irreparable injury to her.

8. The application is supported by the supporting affidavit of the plaintiff/applicant, Hellen Njeri Mureithi, where the grounds on the face of the application are reiterated.

9. The application is opposed through the grounds of opposition dated 6th October, 2015. Vide those grounds, the intended interested parties contend that the application is misconceived, frivolous, vexatious, bad in law and otherwise an abuse of the process of the court.

10. When the matter came up for hearing, counsel for the plaintiff, **Ms Njoki**, informed the court that she was aware that the 1st defendant passed away in January, 2014 and has since made an application to substitute the 1st defendant, which is yet to be prosecuted.

11. Counsel for the 1st respondent pointed out that the 1st defendant is not a party to the application and urged the court to mark the suit against her abated. He submitted that by dint of the provisions of **Order 24** of the Civil Procedure Rules, nothing remains of the suit because there is no nexus between the plaintiff and the other defendants.

12. Pointing out no application for revival of the suit against the 1st defendant exists, he termed the current application a non starter and based on the decision in the case of **Troustic Union International & another v. Mbeyu & another (1993) KLR 230** urged the court to dismiss the application.

13. Counsel for the 2nd defendant/respondent **Ms Masaka** associated herself with the submissions by counsel for the intended interested parties Mr. Gikonyo, and submitted that there is doubt as to whether the cause of action survived her client, the 2nd defendant. She concurred with Mr. Gikonyo's submission that the intended interested parties cannot be enjoined in the suit because none exists.

Analysis and determination

14. It is common ground that the suit against the 1st defendant/respondent abated by operation of the law on or about 10th January 2015. In this regard see **Order 24 Rule 3** of the Civil Procedure Rules which provides as follows:-

“(3) where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant.”

15. From the foregoing provisions of the law, it is clear that the Court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. This notwithstanding, precedent seems to suggest that this Court may not extend time once the suit against a deceased defendant has abated. See **H. J. Shah –versus- Ladhi Nanji w/o Haridas Vasanji & 2 others [1960] E. A. 262, Dhanesvar –versus- Manilal M Shah [1965] E. A. 321, Soni –versus- Mohan Dairy [1968] E. A. 58, and Phillips, Harrisons & Crosfield Ltd –versus- Kassam [1982] K.L.R. 458.**

16. In the case of **Soni –versus- Mohan Dairy** (supra), it was held that for an applicant to succeed in having the suit revived, he has to prove that there was a sufficient cause that prevented him from seeking the substitution of a deceased litigant within the requisite period.

17. In the instant case, it is not in dispute that the 1st defendant was not substituted within the time provided for in law. Consequently, the case against him abated by operation of the law after one year lapsed without him being substituted as by law required.

18. It is common ground that no application for revival of the suit against the 1st defendant was made following abatement of the suit. The only application filed was for substitution of the 1st defendant to wit the notice of motion dated 10th March, 2015. That motion is, in my view, unsustainable for want of substratum.

The effect of abatement of a suit is to render it none existent.

19. Having found the suit against the 1st defendant none existent, the question to answer is whether the plaintiff's case can be continued against the 2nd defendant or even the intended interested parties. In answering this question I am persuaded by the decision in the case of **Leonard Mutua Muteru vs. Benson Katela Ole Kantai & another (2014)e KLR** where **F. Gikonyo J.**, observed:-

“...Now, the 1st defendant died on 2.1.2010. From the facts of and pleadings in this case, the 1st defendant is the principal party; the suit cannot be effectively proceeded with against the 2nd defendant alone. Accordingly, the personal representative of the 1st defendant ought to be made a party. That process is governed by rule 4 of Order 24 of the CPR. There are two important aspects of rule 4(1) of Order 24 of the CPR; 1) under rule 4(1) any party may apply; and 2) on such application being made, it is the court which *shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.* The party applying just needs to establish the personal representative of the deceased defendant and the rest is left to the court's administrative mechanisms of case management. For purposes of rule 24 of the CPR, the personal representative of the deceased defendant is the one appointed in accordance with the Law of Succession Act. Rule 4(3) of Order 24 of the CPR, however, places a limitation period and consequences of failure to apply within the prescribed time.....”

20. Although failure to allow the application will have serious ramifications on the plaintiff who seemingly has been in occupation of the suit property, in that he is by dint of the provisions of **Order 24 Rule 7(1)** estopped from filing a fresh suit on the same cause of action; having found the explanation offered for failure to substitute the 1st defendant within the time stipulated in law not to be persuasive, I can do no better than decline to grant the orders sought.

21. The upshot of the foregoing is that the application has no merit and is dismissed with costs to the respondent.

Dated, signed and delivered at Nyeri this 20th day of June, 2016.

L N WAITHAKA

JUDGE.

In the presence of:

Ms Njoki for plaintiff

Mr. Muthangari h/b for Mr. Wahome for the interested party

Mr. Muthoni h/b for Mr. Gichuhi Mwangi for the 1st respondent

Ms Masaka for the 2nd respondent