



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO.186 OF 1988

ESTHER WANJA GITHIRI

BERNARD KINYUA GITHIRI

JULIA WANJIRA JOB (Substituted).....PLAINTIFFS

VERSUS

MURIUKI GITHIRI

MARION MUTHONI MURIUKI (Substituted)

JOSEPH MWANGI MURIUKI (Substituted).....DEFENDANTS

RULING

Introduction

1. The plaintiff, **Julia Wanjira Job** (hereinafter referred to as “the applicant”), brought the notice of motion dated **20th July, 2011** praying that judgment in this matter be entered in terms of the arbitrators award filed therewith.
2. The application is grounded on the affidavit of the applicant wherein she has deposed that her late husband (**Job Gichira Githiri**) who was the 3rd plaintiff in this suit passed on on **1st August, 2005**; that she was substituted in place of her deceased husband on **23rd March, 2011** and that the award she seeks to be adopted as judgment of this court was read to the parties on **15th July, 2005**.
3. There being no pending application in the suit, the applicant argues that it is necessary that judgment be entered as per the arbitrators’ award hereto. The applicant has also deposed that she is authorised by the 1st and 2nd Plaintiff to swear this affidavit in order to avoid any further delay in the matter; and that **Muriuki Githiri** and **Marion Muthoni Muriuki** (1st and 2nd defendant) passed on and got survived by their son, **Joseph Mwangi Muriuki**, the respondent herein.
4. In reply and opposition to the application, the respondent herein filed grounds of opposition dated **4th December, 2012** where he contends that the application is incompetent, bad in law, lacking in merit and an abuse of the court process; that he has never been substituted in place of the former defendants (**Muriuki Githiri** and **Marion Muthoni Muriuki**) who have since passed on and that no letters of administration have been taken out in respect of the estate of the original defendant. Further, that he never participated in the arbitration proceedings and that he was neither served with a hearing notice in respect of proceedings leading to the award nor the award sought to be adopted as a judgment of this court.

5. In addition to the grounds of opposition aforementioned, the respondent also filed the replying affidavit sworn on **6th December, 2012** wherein he has deposed that he was previously represented by the firm of Wairagu & Wairagu Company Advocates; that he has never received any communication from the said advocates concerning his alleged substitution as a defendant in this suit and that upon being served with the hearing notice of the current application he went to the offices of the said advocates whereat he was informed that his file could not be traced.

6. The respondent explains that he thereafter went and perused the court file and learnt about the current application. Terming the award ought to be adopted as an order of this court illegal, the respondent contends that he was not notified about the award.

7. The respondent challenges the award on the grounds that it is not dated; that the original defendant died on **22nd April, 1990**; that it is indicated in the proceedings leading to the award that the original defendant was summoned on **30th April, 1992, 9th June 1992 and 1st September, 1992** yet he was already dead; that no letters of administration were obtained in respect of the estate of the original defendant(s).

8. It is the respondent's case that all proceedings conducted after the demise of the original defendant are null and void. The defendant further contends that by the time the award was filed in court the suit against the defendant had already abated by operation of law.

9. While admitting that the original defendant was substituted by his mother, **Marion Muthoni Muriuki**, the respondent argues that neither his mother nor he had the capacity to be substituted with the original defendant because no letters of administration were obtained in respect of the estate of the original defendant.

10. Explaining that he was not served with the application in which he was purportedly substituted for his mother or the original defendant, the respondent explains that had he been served with the said application, he would have opposed it on the aforesaid reason (want of letters of administration in respect of the estate of his original defendant).

11. Urging the court to dismiss the application with costs, the respondent argues that any proceedings in respect of the estate of the original defendant would be tantamount to intermeddling with the estate of a deceased person. In his view, the right forum for the applicant to raise her claim to the estate of the deceased person herein, if any, would be in succession proceedings in respect of the estate of the original defendant.

12. In support of his contention the respondent has annexed to his replying affidavit the following documents:- a copy of letter dated **14th April, 2005** and a copy of a business card of his advocates marked **JMM-1** and **JMM-2** respectively to show that some court documents in the suit were sent to the wrong address; a copy of the award sought to be adopted as the judgment of this court marked **JMM-3** and the certificate of death issued in respect of the initial defendant, Muriuki Githiri marked **JMM-4**.

13. By consent of the advocates of the respective parties the application was disposed of by way of written submissions.

Submissions by the applicant

14. In the submissions filed on behalf of the applicant, it is pointed out that the applicant filed succession cause No.84 of 2010 and obtained limited grant of letters of administration *ad litem* so that she could be substituted in this suit. Arguing that the current suit was filed before the Land Disputes Tribunals Act of 1990 came into force, the applicant explains that elders decided that the suit land should be shared equally. The award of the elders is said to have been read in court.

15. The applicant, who allegedly resides on the suit property together with the respondent, argues that it is

prudent to share out the suit property amongst the parties in this suit who are relatives and entitled to the suit property.

16. The respondent is faulted for having failed to disclose to the court how he wishes to co-exist with the applicant in the suit property.

17. Terming the issues raised in the respondent's replying affidavit mere rhetoric, counsel for the applicant urges the court to disregard them and allow the application as prayed.

Respondent's submissions

18. In the submissions filed on behalf of the respondent, it is reiterated that the award sought to be adopted as an order of this court is irregular for the reasons listed in the respondent's replying affidavit.

19. Referring to **Order 24 Rule 4(3)** of the Civil Procedure Rules, counsel for the respondent has submitted that the suit against the original defendant abated on **22nd April, 1999** and that all the proceedings in respect of this matter that took place after **22nd April, 1990** were a nullity and in contravention of the Law of Succession.

20. Flowing from the foregoing, it is submitted that the current application was filed in a non-existent suit. In that regard, reliance is made on the case of **M'Mboroki M'Arangacha v. Land Adjudication Officer Nyambene & 2 others (2005) eKLR** where **D.A Onyancha J.**, stated:-

“The language used by the legislature is mandatory as the words used are “the suit shall abate”. It is my understanding and view therefore that the abatement of the suit is automatic.....and does not need an order of the court to abate the suit.”

21. Terming the alleged substitution of the original defendant irregular, counsel for the respondent explains that it was effected without any letters of administration in respect of the estate of the original defendant. The alleged substitution of the original defendant is said to have been in contravention of **section 45(1)** of the **Law of Succession Act, Cap 160 Laws of Kenya** which provides as follows:-

“Except as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession, or dispose of or otherwise intermeddle with any free property of a deceased person.”

22. Maintaining that any dealings with the estate of the original deceased without letters of administration in respect thereof would offend the aforementioned section of the Law, the defendant urges the court to direct that the status quo which obtained at the time the original defendant passed on be maintained.

23. With regard to the award sought to be adopted as the judgment of this court, it is reiterated that the same is a nullity in Law having been entered after the death of the original defendant.

Analysis and determination

24. From the documents filed in this application and in particular the supporting affidavit sworn by the applicant and the replying affidavit by the respondent, it appears that the suit herein abated long before the current application was filed. I say so because in her own application the applicant has deposed that she was substituted in the suit in place of her husband on **3rd June, 2011**. Her husband died on **1st August, 2005** more than 5 years before she was substituted.

25. Under **Order 24** of the Civil Procedure Rules, the claim by the applicant's husband in respect of which she sought to be substituted had abated long before the applicant sought to be substituted. Similarly, the claim against the original defendant abated after a period of one year lapsed without the original defendant being substituted as by law required. See **Order 24 Rule 4** as read with **Rule 3**.

26. In view of the above facts concerning the suit herein, I find and hold that the current application and the application for substitution of the applicant were premised on a none existent suit and as such a nullity in law. In this regard see the case of **Leonard Mutua Mutevu v Benson Katela Ole Kantai & another [2014] eKLR**. **Gikonyo J.**, stated:-

“...unless revived, the effects of abatement of suit are dire as provided under Rule 7(1) that:

Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.....the suit having abated, the only remedy in law, was to apply for revival of the abated suit under rule 7(2) of Order 24 of the CPR ...If for a moment the said application pretends to be made under rule 4, it has contravened all procedural rectitude provided under Order 24 of the CPR; it is founded on nothing and will elicit nothing; it has no foot on which to stand for the suit has abated. On the other hand, if it masquerades as an application for revival of the abated suit...”

27. Having found the current application to be bad in law, it follows that it cannot form the basis of granting the orders sought. Consequently, I dismiss the application with costs to the respondent.

Dated, signed and delivered at Nyeri this 23rd day of March 2015

L N WAITHAKA

JUDGE

In the absence of:

The plaintiff and the defendant

Lydia – Court Assistant