



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ELC CASE NO. 44 OF 2012

BEATRICE MUTHONI MURAGE1ST PLAINTIFFn

PERIS KARUANA MURAGE2ND PLAINTIFFn

VERSUS

JOSPHAT KARIMI KAMAU1ST DEFENDANT

TERESIA WANGU KARIMI (Intended substituted for

JOYCE NJOKI KAMAU2ND DEFENDANT

RULING

This is in respect to the application dated 24th October 2014 and filed herein by the 1st defendant/applicant seeking the following orders:-

1. ***That this Court do revive this suit and substitute the deceased 2nd defendant with TERESIA WANGU KARIMI***
2. ***Costs be provided for.***

The application is based on the grounds that the 2nd defendant died on 20th June 2011 and on 23rd November 2012 the suit against her abated and it was only on 4th July 2014 that the intended substitute TERESIA WANGU KARIMI was granted letters of administration to her Estate following citation in the High Court Succession Cause No. 214 of 2014 Kerugoya.

That the 2nd defendant JOYCE NJOKI KAMAU is a necessary party to this case as her parcels of land have a boundary dispute with the plaintiff's land. The said application is supported by the 1st defendant's affidavit in which he has deponed, inter alia, that the suit involves a boundary dispute between his land and that of the 2nd defendant hence the need to revive this suit and substitute the 2nd defendant with TERESIA WANGU KARIMI.

The Intended substitute TERESIA WANGU KARIMI has sworn a replying affidavit in which she states that the suit against the 2nd defendant abated on 19th October 2012 and this application is being brought more than two (2) years after the suit abated without sufficient cause. In any event, there is a District Surveyor's report indicating that the boundary dispute is between the 1st defendant's land and that of the plaintiff.

Submissions have been filed by both Ms Thungu for the 1st defendant/applicant and Mr. Muchira for the Intended Substitute. I have considered the application and the submissions by counsels.

This application is premised under the provisions of **Order 24 Rules 4 and 7 of the Civil Procedure Rules**. **Rule 4** deals with substitution of deceased defendants while **Rule 7** deals with effects of abatement of suits. It is not in dispute that this suit abated as against the 2nd defendant on 19th October 2012 following a Court order.

The suit having abated as against the 2nd defendant, **Rule 7(2) of Order 24 Civil Procedure Rules** cannot aid the 1st defendant/applicant herein. That rule provides as follows:-

“The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit”

From the above provisions, it seems clear that only a plaintiff or his legal representative can move the Court to revive a suit that has abated. That remedy is not available to a defendant unless of course the defendant has a counter-claim in which case the situation may be different. I would therefore agree with the submissions by Mr. Muchira that from a plain reading of **Order 24 Rule 7(2) of the Civil Procedure Rules**, there is no provision for a defendant like in the instant suit to revive a suit against another defendant who is deceased.

Further, the applicant depones in her replying affidavit that although the 2nd defendant died on 20th June, 2011 the intended substitute only obtained a grant of letters of administration in respect of her Estate on 4th July 2014 in KERUGOYA SUCCESSION CAUSE NO. 214 OF 2014. This application was filed on 13th November 2014. It is also clear from paragraph 4 of the applicant’s affidavit that as far back as 14th May 2014, the intended substitute had revealed to her that she had filed for a grant of letters of administration. There is no explanation as to why the applicant took four (4) months to file this application. Even assuming that the applicant is entitled to revive this suit, she is obliged under **Order 24 Rule 7(2)** to satisfy the Court that she was “***prevented by any sufficient cause***” from doing so. No sufficient cause has been placed before this Court by the applicant to explain why she took four (4) months from the time the grant of letters was issued to the intended substitute before filing this application.

In the circumstances the 1st defendant/applicant’s application dated 24th October 2014 is dismissed with costs to the Intended Substitute.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015

18/9/2015

Before

B.N. Olao – Judge

Gichia – CC

Plaintiff

Ms Muthike for Ms Thungu for 1st Defendant – present

Mr. Muchira for Intended Substitute – present

COURT: Ruling delivered this 18th day of September 2015 in open Court.

Ms Muthike for Ms Thungu for the 1st Defendant – present

Mr. Muchira for the Intended Substitute – present.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015

Explanatory note on delay

This ruling was due on 14th May 2015 but I was bereaved and out of the country until 7th July 2015 when I resumed duties and the Court thereafter proceeded on vacation. Hence the delay which is regretted.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015