



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 219 OF 2013

KABOI MACHERUPLAINTIFF

VERSUS

GAKUU MACHERU MBUGI DEFENDANT

RULING

On 16th March 2015, this Court made an order declaring this suit to have abated. This was following an application by the defendant seeking that order on the ground that although this suit was filed on 9th January 2011, it had never been set down for hearing and the plaintiff had passed away on 24th May 2013 and no application had been made to substitute him.

The dispute itself involved the parcels of land No. MUTIRA/KIRUNDA/2197, 2198, 2199 and 2200 which the deceased plaintiff claimed were registered in the name of the defendant to hold in trust for his siblings and therefore the plaintiff sought the determination of the trust and that the said parcels of land be sub-divided equally between the plaintiff and defendant. The plaintiff also sought an order of permanent injunction against the defendant restraining him from trespassing, selling, disposing, wasting, alienating or leasing the said parcels.

While this suit was still pending at the High Court Embu before it was transferred to this Court, Okwengu J. (as she then was) issued a temporary order of injunction restraining the defendant from dealing with the said parcels of land on 16th February 2011 pending the hearing of this suit. Those prohibitory orders were registered against the titles of land parcel No. MUTIRA/KIRUNDA/2198 and 2200.

On 16th March 2015, this Court, upon an application by the defendant, not only declared the suit abated but also lifted the prohibitory order upon parcel No. MUTIRA/KIRUNDA/2200.

A caution and prohibitory order still subsists upon the title to parcels of land No. 2198 and 2200 and the plaintiff has by his Notice of Motion dated 4th May 2015 moved this court seeking the following orders: _

- 1. That the caution and prohibitory order registered against the title of land parcel No. MUTIRA/KIRUNDA/2198 and 2200 be lifted***
- 2. That the costs of the application be provided for and be recovered from the Estate of the deceased plaintiff.***

That is the application before me and on which the submissions have been filed by both Mr. Kagio for the defendant and Ms Wangechi for the deceased plaintiff. While it is the contention of Ms Wangechi that the defendant cannot get orders against a deceased plaintiff and that his only option is to file a fresh suit against the legal representatives of the deceased, it is the submissions of Mr. Kagio that no one has come

forward to be made a legal representative of the Estate of the deceased plaintiff and in any event, the defendant is not interested in any of the properties of the deceased. Therefore, the suit having abated, there is no basis for maintaining the prohibitory orders and caution placed by the deceased plaintiff on the land parcels MUTIRA/KIRUNDA/2198 and 2200.

As indicated earlier, this suit abated and the Court did declare so. It is indeed clear from the provisions of **Order 24 Rule 3(2) of the Civil Procedure Rules** that in the case of a deceased plaintiff as is the position in this case, abatement is by operation of the law unless substitution of the plaintiff is made within one year of the plaintiff's death. There is therefore really no requirement that a Court should make a declaration to that effect.

The effect of a suit that has abated is that it ceases to exist. **BLACK'S LAW DICTIONARY** defines abatement as

"..... the suspension or defeat of a pending action for a reason un-related to the merits of the claim"

Once a suit has abated, nothing is left because the suit is dead and it cannot be the basis upon which any order can continue to exist. It is in the light of the above that this Court must look at the caution and prohibitory orders that were issued by Okwengu J. (as she then was) on 22nd March 2011 in relation to parcels of land No. MUTIRA/KIRUNDA/2197, 2198 2199 and 2200. Those orders were to remain in force pending the hearing and determination of this suit which has now abated. The substratum upon which Okwengu J. (as she then was) issued the orders no longer exists. Those orders cannot stand on nothing and in my view it is in the interest of justice that they be lifted. I do not think that it is in line with the principles of efficient equitable and productive use and management of land as enshrined under **Article 60 of the Constitution** to keep land under perpetual inhibition on the basis of a suit that has abated and which there appears to be no effort to revive.

In the circumstances, and for the reason given above, I allow the Notice of Motion dated 4th May 2015 and lift the caution and prohibitory orders registered against the title of land parcel No. MUTIRA/KIRUNDA/2198 and 2200. There shall be no orders as to costs.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015

18/9/2015

Before

B.N. Olao – Judge

Gichia – CC

Ms Muthike for Mr. Kagio for Defendant – present

Ms Wangechi for Plaintiff – absent

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

Ms Muthike for Mr. Kagio for Defendant – present

Ms Wangechi for Plaintiff – absent

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015