



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 441 OF 2003

NJOROGE MAKUMI.....PLAINTIFF/APPLICANT

VERSUS

ESTHER MUTHONI KIBE (Sued as the legal representative of

The estate of Mwarangu Makumi, deceased).....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. Vide Notice of Motion dated 24th February 2022, and which is intertwined with another Application dated the 31st January 2022, the Plaintiff/Applicant has approached the court seeking the following Orders:

(i)*Spent.*

(ii)*Spent.*

(iii) *The Applicant's suit, namely ELC NO. 441 OF 2003, which was Dismissed pursuant to an Order made on the 29th October 2018, be reinstated for Hearing and Determination on Merits.*

(iv) *The Order Dismissing the Suit be Set aside and/or Reviewed and the Applicant be given an Extension of time within which to Set Down the Suit for Hearing.*

(v) *Pending the Hearing and Determination of this Application, this Honourable Court be pleased to issue Orders of Temporary Injunction to Restrain the Defendant/Respondent either by herself or through her agents, relatives, servants, assigns, personal representatives or any other person acting on her behalf from intering the remains of the deceased Jane Wanjiku Mwarangu on L.R Komothai/Thuita/352 and the resultant titles Komothai/Thuita/610, 611 and 612 and/or interfering with the said Property in any manner whatsoever.*

(vi) *Costs of the application be provided for.*

2. The Subject Application is premised on the Grounds contained on the face thereof and the same is further supported by the affidavit sworn by one Njoroge Makumi, namely, the Plaintiff/Applicant herein, sworn on the 24th February 2022.

DEPOSITIONS BY THE PARTIES:

DEPOSITION BY THE PLAINTIFF/APPLICANT:

3. Vide Supporting Affidavit sworn on the 24th February 2022, the Plaintiff/Applicant has deponed as hereunder;

4. That he, namely, the Plaintiff/Applicant is the brother of one Mwarangu Makumi, now Deceased, who was/is the husband of Jane Wanjiku Mwarangu, who is now deceased.

5. It is similarly averred that during the life time of the deceased, the deceased's husband, namely Mwarangu Makumi held **L.R**

Komothai/Thuita/352, on trust, for himself, namely the deceased and the Deponent.

6. However, the deponent has further averred that despite the fact that the title of the suit property was held on trust, the deceased died before same could be subdivided and the portion of the Suit Property belonging unto him (Plaintiff/Applicant), was not transferred unto him and as a result of the failure to do so, the Plaintiff/Applicant was obliged to file the subject suit.

7. Nevertheless, the Plaintiff/Applicant has further averred that before the subject suit could be heard and concluded, his brother, namely Mwarangu Makumi, passed on and consequently same was constrained to take out citation against the wife of his Deceased brother.

8. It is further averred that the citation that was filed and/or mounted by the Plaintiff/Applicant herein was heard and determined vide ruling of the court rendered on the 19th December 2019, whereby the widow of the Plaintiffs/Applicant's Deceased brother, was ordered to take out Grant of Letters of Administration, albeit within sixty (60) days.

9. Nevertheless, the Plaintiff/Applicant has averred that the widow of his Deceased brother did not comply with and/or adhere to the terms of the Ruling of the court and as a result, same, namely the Plaintiff/Applicant proceeded to and applied for Grant of Letters of Administration in respect of the portion of the suit property that same claimed to be his.

10. Be that as it may, the Plaintiff/Applicant has further avers that upon taking out the Grant of Letters of Administration, same discovered that the Suit Property had been illegally subdivided culminating into various subdivisions, namely **Komothai/Thuita/610, 611 and 612**.

11. Based on the foregoing, the Plaintiff/Applicant has further averred that it is necessary and/or appropriate to issue and/or grant an order of Temporary injunction to avert and/or stop further alienation and/or disposal of the Suit property.

12. Finally, the Plaintiff/Applicant has averred that same has also discovered that upon the death of one Jane Wanjiku Mwarango, the Defendant/Respondent, is now keen to bury the body of the Deceased on the Suit Property or the sub-divisions arising therefrom.

DEPOSITION BY THE DEFENDANT/RESPONDENT:

13. It is worthy to point out that the Defendant/Respondent in this matter died and/or passed on the 31st May 2012. For clarity, the death of the Defendant/Respondent, was communicated and reported to the court and same was duly minuted vide the proceedings of the court made on the 29th October 2018.

14. Pursuant to and upon confirming that the Defendant had died and that no action had been taken by the Plaintiff to cause the substitution of the Deceased by any of the Deceased's Legal Representative, the court proceeded to and declared the suit to have abated. Consequently, the suit was thereafter dismissed for want of prosecution.

15. In the premises, though the subject Application bears the name of one, Esther Muthoni Kibe, who is purported to be the Defendant/Respondent, it is appropriate to point out that no Person has ever been substituted in place of the Deceased Defendant/Respondent.

16. In a nutshell, there being no Defendant/Respondent, no deposition could be tendered or be made by (*sic*) the Defendant, either post humously or at all

SUBMISSIONS:

17. The Application herein came up for hearing on the 2nd March 2022, when same was canvassed vide oral submissions and counsel for the Plaintiff/Applicant raised two pertinent issues.

18. First and foremost, counsel for the Plaintiff/Applicant conceded that the original Defendant, who had been sued in respect of the subject matter died and/or passed on, on or about the year 2012, and that upon the death thereof, in the year 2012, there has been no substitution to date.

19. Based on the foregoing submissions, counsel for the Plaintiff confirmed that same was aware that the court proceeded to and marked the suit as having abated and thereafter dismissed same for want of prosecution primarily on the basis of abatement.

20. Secondly, counsel for the Plaintiff/Applicant also submitted that despite the fact that the current Application seeks an order for Temporary Injunction to stop and/or avert the burial of one Jane Wanjiko Mwarangu, deceased, on the suit property, same has already been buried. In this regard, counsel acknowledged that the order of temporary injunction would therefore be in vanity.

21. Notwithstanding the foregoing, counsel for the Plaintiff/Applicant submitted that the court still has jurisdiction to grant the orders for the revival and restoration of the subject suit which has since abated and in respect of which, there has been no substitution of the Defendant, who is admitted to be long Deceased.

22. Further, counsel for the Plaintiff submitted that the court similarly, has the jurisdiction to grant the orders of Temporary Injunction in respect of the acts and/ or activities complained of, which have since accrued, occurred and/or been undertaken.

23. In the premises, it was the Plaintiff's submissions that the court should allow the Application and reinstate the suit and hear the matter on

the Merits.

ANALYSIS AND DETERMINATION:

24. Having reviewed the Application dated the 24th February 2022, the Supporting affidavit thereto, as well as the Oral submissions tendered by the counsel for the Plaintiff/Applicant, I find and hold that there is only one issue for Determination as hereunder;

a. Whether the Court can revive and /or reinstate a Suit which was Dismissed on the basis of abatement and in respect of which there has been no Substitution.

ISSUE NUMBER 1

Whether the Court can Revive and /or Reinstate a suit which was Dismissed on the basis of abatement and in respect of which there has been no Substitution.

25. When the subject matter came for Notice to Show Cause why same should not be dismissed for want of prosecution on the 29th October 2018, counsel for the Plaintiff informed the court that the Defendant died on the 31st May 2012.

26. Besides, the same counsel for the Plaintiff thereafter informed the honorable court that same was seeking for sixty (60) within which to take out citation against the heirs or beneficiaries of the Estate of the Deceased Defendants.

27. Nevertheless, being alive to the Provisions of Order 24 of the Civil Procedure Rules 2010, the Honorable court proceeded to and ordered that the suit having abated same was thereby dismissed for want of prosecution. For clarity, the said order was made in the presence of counsel for the Plaintiff.

28. Suffice it to say, that up to and including the time of filing the Application dated the 24th February 2022, the Defendant, who died more than 10 years ago, had never been substituted. In any event, it is trite law that substitution of a Deceased Party, can only be done within 12 months of the date of death of a Party.

29. Nevertheless, I am alive to the window that is provided for vide Order 24 Rule 7(2) of the Civil Procedure Rules, 2010. However, it is worthy to note that even that window can only be appropriated with the exercise of Due Diligence and care.

30. On the other hand, before a court of law can be persuaded to exercise the discretion to set aside an order dismissing a suit for want of prosecution on the basis of abatement, sufficient cause and/or basis, has to be laid out and/or established. Suffice it to say, that no such cause has been placed before the court, to warrant exercise of such discretion, whatsoever.

31. In support of the foregoing observation, I adopt and restate the holding in the decision in the case **Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR**, where the Court Of Appeal observed as hereunder;

“Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit.

The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.

There have been arguments, as to whether or not a formal order is necessary to confirm the fact of abatement. See M’mboroki M’arangacha v Land Adjudication Officer, Nyambene and 2 others, Meru H.C.C. Application No.45 of 1997 where the High Court held that an order to record the abatement of a suit was not necessary.

See a similar holding in KFC Union v Charles Murgor (Deceased) NBI HCCC No.1671 of 1994. From the language of Order 24 Rule 3(2) aforesaid, earlier reproduced and highlighted, the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs.

It means that even though the legal effect of abatement may have already taken place, for convenience an order of the court is necessary for a final and effectual disposal of the suit. We borrow the statement of Lord Denning in MacFoy v United Africa Co. Limited (1961) 3 All ER 1169, that

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so....”

It follows that the question of whether or not to extend time or grant an order for revival of an abate suit is essentially one of discretion.

32. Finally, it is admitted and acknowledged that the Defendant herein is long dead and the same was never substituted. To the extent that the defendant was never substituted, it therefore means that there is no Defendant against whom the suit can be reinstated.

33. In the premises, the Plaintiff/Applicant is seeking an order for the reinstatement and/or restoration of a suit against no one and the question is, supposing the suit is reinstated what shall happen. In short, the Application is a nullity.

34. To my mind, this court cannot grant an order which is void and whose import is to operate in vacuum.

35. Suffice it to say, that nothing can be issued to resuscitate a suit which is dead, and in this regard the words of Lord Denning, M R in the case of **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169** Lord Denning while delivering the opinion of the Privy Council at page 1172 (1) are relevant. For clarity, the revered Judge said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.

And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

36. In my humble view, the Defendant having died more than a decade ago and the window for variation and or discharge of the order of abatement having long been shut, the intended reinstatement and restoration of the suit, would thus be an act in futility.

37. I am afraid that a court of law, like nature, does not act in vain. Consequently the inescapable conclusion is that the subject Application that is being conducted against a dead Party is itself a nullity.

FINAL DISPOSITION:

38. In a nutshell, I have come to the conclusion that the subject Application, which is seeking the reinstatement and/or restoration of the suit against the Defendant, who died on the 31st May 2012 and who has never been substituted, is a nullity ab initio.

39. Consequently and in the premises, the Application dated the 24th February 2022 and 31st January 2022, the latter, which seeks similar Orders, are Devoid of Merits and hence same be and is hereby Dismissed.

40. The Defendant is long dead and the estate of the Defendant has never been substituted in the matter. Consequently, there is no one to be awarded costs.

41. In the premises, there shall be no Orders as to Costs.

42. Those shall be the orders of the court

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25th DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Miss Wanjiku H/B for Mr. Mburu Mashua for the Plaintiff/Applicant