



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 705 OF 2007

TERESIAH WANGECHI & 2 OTHERS.....PLAINTIFFS

= VERSUS=

MBUGUA THIGA.....DEFENDANT

RULING

By a Notice of Motion dated 31st July,2013, the applicant herein **Mary Wanjiru Mbugua** (Administrator of the Estate of **Teresia Wangeshi Macharia** – 1st Plaintiff) has applied for the following orders:-

- a. *That the abatement of the suit in respect of the first plaintiff be set aside and the suit be revived.*
- b. *That Mary Wanjiru Mbugua be substituted for the 1st Plaintiff Teresiah Wangeshi Macharia who died on 17/9/2004.*
- c. *That Mary Wanjiru Mbugua be also appointed as guardian Ad litem for the second plaintiff/her son who cannot prosecute his case as he is an alcoholic and of unsound mind and is incapable to protecting his interests in this case.*
- d. *That the Plaint be amended to reflect the orders given by the court.*
- e. *Costs be in the cause.*

The application is supported by the grounds on the face of the application:- That on 21/5/2013, the applicant Mary Wanjiru Mbugua was given letters of Administration to represent the first Plaintiff who died on 17/9/2004. That the 2nd plaintiff who is the son of the applicant is such an alcoholic and of unsound mind that he is incapable of taking care of his interest in this case and therefore the Plaint should also be amended to reflect the above charges.

The application was also supported by the affidavit of Mary Wanjiru Mbugua who averred that she is the daughter in-law of the first plaintiff. That she is the daughter –in-law of the first plaintiff. That she is also the mother of the 2nd Plaintiff. She alleged that the 1st plaintiff died on 17/9/2004 and she took limited grant ad litem on 21/5/2013.(the same was marked annexure A). She asked the court to allow her be substituted in this case to replace the 1st Plaintiff. That the 2nd plaintiff is alcoholic and does not know how to take care of himself or his property. That for all intents and purposes, the 2nd Plaintiff is of unsound mind and the applicant is willing to be appointed his guardian ad litem as for the case is

concerned.

The applicant attached consent to act as guardian ad litem for the second Plaintiff marked annexure B.

The Defendant opposed the said application and averred that the suit by 1st Plaintiff has abated and is incapable of being revived and there is no good reason for the substitution. Further, that the prayer to act as guardian ad litem for the 2nd Plaintiff is not supported by any medical document that the 2nd Plaintiff is of unsound mind. He further stated that the application lacks merit and should be dismissed with costs.

The parties herein canvassed the Notice of Motion by way of written submissions. I have considered the pleadings generally and the written submissions and I make these findings. The Notice of Motion is premised under **Order 24 Rule 3(1) and Rule 7(2)**.

Order 24 Rule 3(1) of the Civil procedure Rules provides as follows:-

“ Where one or two or more plaintiff dies and the causes of action does not survive or ...to the surviving plaintiff or plaintiff alone, or a sole surviving plaintiff dies and the cause of action survives or continues the court on an application made on that behalf, shall cause the legal representative of the deceased Plaintiff to be made a party and shall proceed with the suit”

However, **Rule 3(2)** provides that where within one year no application is made under **Sub Rule 1**, the suit shall abate so far as the deceased Plaintiff is concerned.

The applicant alleged that the 1st Plaintiff herein died on 17/9/2004. Therefore the suit against the 1st Plaintiff abated on 17/9/2005 as no application was made under Rule 3(1) as provided by the law. The applicant alleged that a death certificate had not been obtained since 2004. The applicant obtained limited grant on 21/5/2013 as per annexure A.

The applicant beseeches the court to invoke the provisions of order 24 Rule 7(2) and revive the suit. The said rule provides as follows:-

“ The plaintiff or the person claiming to be the legal representative of a deceased 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 it thinks fit”.

The applicant herein alleges that she had not obtained Death Certificate for 1st Plaintiff. No reasons have been advanced as to why she did not obtain the said Death Certificate. She only obtained letter of Administration in the year 2013. That was after a period of 9 years. There was laches on her part and the applicant has not given any sufficient cause to satisfy this court why she delayed in obtaining the letters of administration to the Estate of the 1st plaintiff or even to obtain the Death Certificate as alleged by her. The applicant therefore cannot benefit from the provision of **Order 24 Rule 7(2)**.

The applicant also beseeched the court to appoint her as guardian ad litem for the second plaintiff whom she alleged is alcoholic and of unsound mind and is incapable of protecting his interest the said prayer is brought under Order 32 Rule 15 which provides that:-

“ The provisions contained in rules 1-14 so far as they are applicable, shall extend to person adjudged to be unsound mind and to persons who though not so adjudged are found by the court on inquiry by reason of unsoundness of mind or mental infirmity to be incapable of protecting their interests when suing or being sued”.

The applicant alleged that her son the 2nd Plaintiff is an alcoholic and of unsound mind. There is no

evidence that 2nd plaintiff has been adjudged to be of unsound mind through a medical report and the court has not found him upon inquiry that he is of unsound mind. I will concur with the Defence /Respondent submission that these are no material presented before the court for the court to adjudge or arrive at a conclusion that 2nd plaintiff is of unsound mind.

Having carefully considered the Notice of Motion dated 31/7/2013 and the pleadings in totality. I find that Notice of Motion not merited.

I light of the above findings, the court dismisses the applicant's Notice of Motion dated 31st July, 2013 with costs to the Defendant.

It is so ordered.

Dated, Signed and delivered this 28th day of March, 2014

L. GACHERU

JUDGE

In the Presence of:-

.....For the Applicant

.....For the Defendant

Lukas: Court Clerk

L.N. GACHERU

JUDGE