



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL NO. 33 OF 2008

RAPHAEL NGUGI GITHUKU.....PLAINTIFF

VERSUS

DAVID THUO.....DEFENDANT

RULING

The plaintiff by a Notice of Motion dated 1st November 2013 and expressed to be brought under sections 1A and 3A of the Civil Procedure Act and order 24 of the Civil Procedure Rules (1) and (3) of the Civil Procedure Rules prays for the following order:-

1. That this Honourable court be pleased to order that **Samuel Kimani Ngugi & Esther Wanjiru Ngugi** be made parties to this suit as 1st and 2nd plaintiffs respectively and be at liberty to proceed with this suit in place of their late father and husband **Raphael Ngugi Githuku** now deceased.

The application is premised on the grounds that appear on the face of affidavit and the affidavit sworn in support thereof by **Samuel Kimani Ngugi**. The Applicants have set out the following grounds in support of the application:-

- a. That **Raphael Ngugi Githuku** the plaintiff died on the 6th day of January 2013 while this suit was pending hearing and determination.
- b. That **Samuel Kimani** and **Esther Wanjiru** have petitioned the High Court Family Division in **Succession Cause NO. 873/2013** and have been issued with letters of Administration.
- c. That the Cause of action survives the deceased.
- d. That no prejudice will be occasioned on the Defendant if the orders sought are granted.

Mr. Samuel Kimani Ngugi through his affidavit sworn in support of the application has annexed a copy of the Limited Grant of letters of Administration ad Litem to the estate of the late **Raphael Ngugi Githuku** (deceased) marked 'A' which indicates the deceased died on 6th January 2013 and that **Samuel Kimani Ngugi** and **Esther Wanjiru Ngugi** were appointed as administrators of the deceased estate for the purpose of filing suit.

The Defendant has opposed the application through grounds of opposition dated 25th February 2014 and has filed submissions herein and takes objection to the application on the basis that the applicants did not exhibit a death certificate to affirm the death of the plaintiff and further has taken issue with the limited grant of letters of administration arguing that the same was not in compliance with section 54 of the Law of succession Act Cap 160 Laws of Kenya and its 5th schedule as the same did not authorize the applicants to prosecute this matter but rather to file suit. The Defendant thus contends proof of death of the plaintiff was not established and that the Limited Grant of letters of administration did not relate to the prosecution of this suit. The Defendant thus submits the applicants application is misconceived and ought to be dismissed.

For their part the applicants submit they have brought the application in compliance with order 24 Rules 1 and 3 and have satisfied the requirements of bringing the application for substitution within a period of one year before the suit abated and they ought to be allowed to proceed with the suit on behalf of the deceased plaintiff.

Order 24 Rule 1 provides:-

24.(1) The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

Order 24 Rule 3 provides

24.3(1) Where one of two or more plaintiffs or defendants dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues the court on an application made in that behalf shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

3(2) Where within one year no application is made under subrule (1) the suit shall abate so far as the deceased plaintiff is concerned, and on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.

Provided the court may for good reason on application, extend the time.

The suit herein as per the plaint filed on 7/2/2008 related to a claim over land and the plaintiff was claiming and/or sought a declaration that he is the legal registered owner of land parcels **Ruiru West Block 1/2997** and **Ruiru West Block 1/2998** and thus there is no doubt that the cause of action would survive the plaintiff's death.

The Defendant by his objection and submissions appears to query the veracity of the claim that the plaintiff is dead because no death certificate was exhibited. I have perused the court record and I note that the suit was coming for hearing on 11/12/2012 when the hearing was adjourned on the application of the Defendant. On that day **Mr. Okinda Advocate** for the plaintiff while opposing the application for adjournment lamented that his client who was in court was elderly and sickly and had travelled from Naivasha. The court granted the adjournment and fixed a mention of the matter on 17/1/2013 to confirm the parties had filed the issues as directed. On the said 17/1/2013 the court was informed the plaintiff had passed on and the matter was stood over generally to enable the plaintiff's counsel to obtain letter's of administration and file the necessary application for substitution. **Mrs. Kuria Advocate** for Defendant was present in court.

I have not understood the Defendant to raise issue with the existence of **H.C Succession cause NO. 873/2013** in which the Limited Grant was issued. In my view as long as a grant of letters of administration is issued by a competent court it is sufficient evidence that the deceased in respect of whose estate it is issued is truly dead. The copy of the grant of letters of administration was sufficient.

I would not consider the limitation of the Grant of Letters of administration to filing suit critical since at the time the Applicants made the application for the grant of letters this suit was ongoing and there was no doubt that the intention was to be able to proceed with and prosecute the suit. The objective in the applicants filing the application for the limited grant of letters of administration is so that they could take up this suit and proceed with its prosecution. I do not agree the Defendant would in anyway be prejudiced if the applicants are allowed to be substituted. The Defendant was as wayback as 17/1/2013 expecting that there would be an application for substitution. Now that it has come and it has been brought well within the time limitation the Defendant ought not to be allowed to bar it by resorting to what I would describe as procedural technicalities. The court at any rate is enjoined under sections 1A and 1B of the Civil Procedure Act to effectuate the overriding objective of the civil procedure Act which is to render justice in a just expedient proportionate and affordable cost to the litigants. Section 3 of the Environment and Land Court equally echos the same principles while section 19 of the ELC Act enjoins this court to administer substantive justice without paying too much regard to procedural technicalities. The Constitution under Article 159 2(d) also implores the courts to do substantive justice without undue regard to procedural technicalities.

In this matter substantive justice demands that the Applicants be granted the chance and opportunity to ventilate the case for the deceased plaintiff and I accordingly grant Applicants Notice of Motion application dated 1st November 2013 in terms of prayer (1) and further direct the costs of the application to be in the cause.

Orders accordingly.

Ruling dated, signed and delivered this...**25th**.....day of...**September**.....**2014**.

J. M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendant