



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 69 of 2004

**MARY GACHAMBI KIBE..... PLAINTIFF
VERSUS**

DANIEL KIBE1ST DEFENDANT

SUSAN NJERI.....2ND DEFENDANT

RULING

The application for determination before the court is the Notice of Motion dated 27th August 2012 brought under Order 24 rule 4(3) and Order 50 Rule 6 of the Civil Procedure Rules, as well as under section 3A of the Civil Procedure Act and Article 159(2) (d) of the Constitution. The application is seeking the following orders:

1. That, the Honourable Court be pleased to extend time which to substitute the 2nd Defendant now deceased with her personal representatives.
2. That, the suit against the 2nd Defendant now deceased be reinstated for hearing.
3. That, Rose Njeri Njoki, Dancan Mbatha Njoki, Helena Mbaire Njoki and Nicholas Njau Njoki be substituted as personal representatives and/or 2nd Defendants in the suit herein.

The application is based on the grounds that the suit premises was fraudulently sold and transferred by the 1st Defendant to the 2nd Defendant who died on 24th December 2004. Further, that the time within which to make substitution has now passed and the suit survived the deceased. The Plaintiff also claims that the intended personal representative and/or 2nd Defendants are children of the deceased, and are living and using for gain the suit premises thus making them necessary parties in the suit. The application is supported by the affidavit sworn by the Plaintiff on 27th August 2012, and she avers that her previous Advocates had not rendered proper legal advice on the substitution of the 2nd Defendant leading to the suit herein abating, and that she should not suffer because of their mistakes.

One of the intended Defendants, Duncan Mbatha Kahunyo, opposed the application in a Replying Affidavit sworn on 27th October 2012. He stated that this suit was dismissed with costs on 3rd February 2005, and despite the Plaintiff having filed an application dated 18th July 2005 for the suit to be reinstated she had not taken steps to prosecute it. Further, that the suit has abated as against the 2nd Defendant upon her death, and the Plaintiff is guilty of inordinate delay as she was aware of the death and took no action for substitution.

The application was heard on 22nd November 2012, and the Counsel for the Plaintiff and the Intended Defendants both made oral submissions wherein they reiterated the facts stated in the foregoing. The Plaintiff's counsel in addition submitted that the intended Defendant's counsel had no right of audience as he had not filed any notice of appointment. Upon perusal of the court record it was indeed the case that there was no Notice of Appearance filed on behalf of the intended Defendants, and I therefore wholly relied on the Replying Affidavit filed by the said intended Defendant.

I have read and carefully considered the pleadings and submissions made. Order 24, Rule 4 of the Civil Procedure Rules provides the procedure to be followed in the case of death of one of several Defendants or of the sole Defendant. It states that:

“4. (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

Further, Order 24, Rule 7 states that:

“(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) 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 foregoing provisions it is clear that the Court is given the discretion revive a suit that has abated if sufficient cause is shown. The court record shows that the suit herein was dismissed for non-attendance by Osiemo J. on 3/2/2005, and that the Plaintiff filed a Notice of Motion on 18/7/2005 for reinstatement of the suit. The said application was heard by Nambuye J. (as she then was) on 9/6/2009, who granted the prayer for reinstatement of the suit.

At the time of dismissal of the suit on 3/2/2005 the suit had not abated as against the 2nd Defendant, as one year had not elapsed from the time of her demise on 24th December 2004 which date of death was not contested. Time only started running for purposes of abatement of the suit on 9/6/2009 after reinstatement of the suit, and I have also confirmed from the court record that the Plaintiff was indeed represented by a firm of Advocates from the date of reinstatement of the suit, until the filing of the notice of change of Advocates by her present Advocates on 29th August 2012.

I find that it would be unjust to penalize the Plaintiff for the omission by her Advocates to apply for substitution of the 2nd Defendant after reinstatement of the suit on 9/6/2009, and find this to be a sufficient cause to revive the suit herein. I accordingly grant prayers 1 and 2 of the application dated 27th August 2012, and hereby reinstate the suit against the 2nd Defendant, and extend the time for substitution of the 2nd Defendant.

On the prayer for substitution, I note from the Replying Affidavit by Duncan Mbatha Kahunyo that the 2nd Defendant was survived by the Deponent, Loise Njeri Njoki, Nicholas Njau Njoki, Anna Njoki who are all adults, and by Joseph Kimani, a minor. The names of the persons sought to be substituted in place

of the 2nd Defendant in the application are however slightly different. The issue also arises whether the persons sought to be substitutes are legal representatives of the 2nd Defendant for purposes of Order 24, Rule 4.

Under section 2 of the Civil Procedure Act “legal representative” is defined as “a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”. In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. The Plaintiff has in this respect not produced evidence to show that the proposed substitutes have been granted letters of administration or of probate with respect to the 2nd Defendant’s estate.

Prayer 3 of the Plaintiff’s application is therefore denied for this reason. The Plaintiff is however at liberty to apply for substitution of the 2nd Defendant by the appointed legal representatives. The Plaintiff shall bear the costs of the application.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____15th____ day of ____February____, 2013.

P. NYAMWEYA

JUDGE