

REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 134 of 2008

ELIZAPHAN NJIRI TOBO MURUGA & ANOTHER.....PLAINTIFFS

VERSUS

GRACE NJERI MUGANE & ANOTHER..... DEFENDANTS

RULING

The application before court is dated 27th November 2012. the same is brought by way of Notice of Motion and supported by the affidavit of Elizaphan Njiiri Tobo Muruga sworn on 27th November 2012. The applicant, Elizaphan Njiiri Tobo Muruga is the first plaintiff in this matter. The second plaintiff is Erastus Muruga Njiiri.

The two plaintiffs filed Originating Summons under Order XXXVI rule 3D of the Civil Procedure Rules as the rules were then. With the Gazettement of the new rules in the Kenya Gazette Supplement No.65, in the Legislative Supplement No.42 made pursuant to Legal Notice No.151 of 10th September 2010 the application is now grounded on order 37 rule 7 of the Civil Procedure Rules, 2010.

The plaintiffs claimed to be entitled to be registered as proprietors of all that parcel of land known as No.LOC.2/KINYONA/544 under Section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya on the grounds that since October 1971, the plaintiffs have been openly, peacefully and of right in possession and occupation of suit land for a period of over 12 years immediately preceding presentation of the Originating Summons.

The second plaintiff, Mr. Erastus Muruga Njiiri died on the 30th August 2012 due to old age. He was 95 years old. He died in Nakuru District of the Rift Valley Province though he resided in Murang'a. Upon the death of the 2nd plaintiff the applicant herein has moved to court for orders that the claim of the deceased 2nd plaintiff survives in favor of the surviving plaintiff and that the name of the 2nd plaintiff be deleted from the record and the surviving plaintiff be allowed to proceed to prosecute the plaintiff's claim against the defendants.

I have considered the application by the 1st plaintiff and the submissions by his counsel and do find that the claim by the plaintiffs was based on prescriptive rights of adverse possession. It is my considered view that if a person dies after making a claim of adverse possession in court the said claim survives to his legal representative, as opposed to a person who dies in possession but before filing a claim in court as it was in the case of **Mombasa High Court Miscellaneous Civil Application No.343 of 2008, Everlyne Kambu Matendi and 2 others – VS – Bamtarama Wayama (2009) eKLR** where the judge held ,and I agree, that if a person who may be entitled to prescriptive rights to land dies before establishing the said right, then the said right cannot accrue to his estate. The case of **Everlyne Kambu Matendi** can be distinguished from the case before this court, in the former the deceased died before commencing the claim for adverse possession whilst in this case the deceased died after commencing the suit.

The question as to whether the cause of action commenced by the 2nd plaintiff survive for the benefit of the 1st plaintiff or the Estate of the deceased can be answered by strict interpretation of the Law Reform Act Chapter 26 Laws of Kenya. Section 2 of the Law Reform Act provides that;

“Subject to the provision of this section, on the death of any person, after the commencement of the

Act, all causes of action subsisting against or vested in him shall survive against or, as the case may be for the benefit of his estate.”

The proviso of this section excludes the application of the section to causes of action for defamation or seduction or for inducing ones spouse to leave or remain apart from the other or claims for damages on the ground of adultery. Strict interpretation of the section reveals that adverse possession is not excluded from the surviving causes of action as stipulated by the Law Reform Act.

Order 24 rule 2 provides for the procedure where one of several plaintiffs or defendants dies and right to sue survives. In this case we are dealing with the right of the 2nd plaintiff to sue surviving after his death. The 1st plaintiff has not demonstrated in the affidavit supporting the application how the 2nd plaintiffs right to sue continues to him. There is no evidence as to how the plaintiffs were to own the parcel of land in issue. Whether it was going to be ***co-tenancy***, ***joint tenancy*** or ***tenancy in common***, the same has not been disclosed. Though the deceased 2nd plaintiff was the father of the 1st plaintiff the affidavit does not explain whether there exist or not other relatives in the next line of consanguinity to the deceased plaintiff.

The upshot of the above is that the application is not allowed. Costs in the cause.

Dated, signed and delivered this 8th day of February 2013.

A. OMBWAYO

JUDGE