



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 240 of 2007

1. AIRCON ELECTRA SERVICES LIMITED

2. JIM CHOGE.....PLAINTIFFS

VERSUS

1. IMPULSE DEVELOPERS COMPANY LIMITED

2. COMMISSIONER OF LANDS.....DEFENDANTS

AND

BYRON GAWON KIPNGETICH CHOGE.....APPLICANT

RULING

1. By a Notice of Motion dated 9th February, 2012, brought under **Order 24 rule 1, 3(1) order 8(1)** of the **Civil Procedure Rules 2010** the Applicant Byron Gawon Kipng'etich Choge one of the administrators of the estate of the deceased Jim Choge, seeks the following orders:

a) The suit herein for and on behalf of the following deceased person:

- i. Jim Choge 2nd Plaintiff is revived.
- ii. The following person be substituted as the new Second Plaintiff by Byron Gawon Kipng'etich Choge.
- iii. That on substitution and amendment of the Plaintiff, the Second Plaintiff to file a list of documents; witness statements as provided by law.

b) The Applicant do bear the costs of the application.

2. The grounds on the face of the application are that the deceased died before the suit was heard and

determined. That the parties to the suit agreed to consolidate civil suits No. 236 of 2007 and 240 of 2007 and suit No. 240 of 2007 was made the counter-claim in the 236 of 2007 case. That the subject matter in both cases is the same and the cause of action touches on the suit property.

3. From the supporting affidavit of the said administrator sworn on 9th February, 2012, it is averred that the suit property, land parcel number L.R. 9042/686 was listed in the inventory of the assets owned by the deceased which property is subject matter in the suit herein. That the applicant ought to be enjoined to enable him to participate in this suit to protect the deceased's property since the authority given by the grant of letters of administration intestate limits the administrator's mandate to collecting the estate of the deceased only. The rest of the supporting affidavit details the transactions related to the suit property and advice given by counsel to file this application.

4. The application is opposed. There is a replying affidavit of Mohamed Yusuf Kermali; a Managing Director of the 1st Plaintiff dated 1st March, 2012. The 1st Plaintiff contends that the application is incurably defective and fatally incompetent for the reasons that; the suit in which the applicant seeks to substitute the deceased has abated; that no orders for extension of time were sought and obtained by the applicant before making the application herein; that the application has not been made timeously and there is no explanation for the inordinate delay; that the applicant has failed to disclose to this court that the letters of administration being relied upon are subject to a pending objection proceedings and that the application has not been made with the consent of his co-administrators. Further, it is contended that the current suit is not between the deceased and the 1st Plaintiff Company over a purported sale agreement dated 14th June, 2000 but the two were co-plaintiffs in the current suit and co-defendants in Nairobi ELC No. 236 of 2007. In both suits the subject matter involves two competing titles held by the 1st Plaintiff herein on the one hand and 1st Defendant on the other hand. The deceased has never sued or claimed against the 1st Plaintiff. It is also contended that the deceased has no legal rights to the suit property.

5. The 1st and 2nd Defendants did not oppose the application. The applicant filed written submissions which I have read and considered, the 1st Plaintiff too filed written submissions which I have read and considered. Each party has put up strong arguments on the application. It is not in doubt that the suit against the 2nd Plaintiff has abated. Having considered the submissions I find as follows; the application as sought cannot be granted. The applicant seeks to revive a suit of which he is not a party. His second prayer is for an order of substitution. In my view the applicant should first file an application seeking extension of time to file an application for revival of the suit and substitution. I will not go into the merits of this application. I therefore decline to grant the orders sought. I order that the applicant does file a proper application for consideration by the court. The application is therefore dismissed with no orders as to costs.

Dated, signed and delivered this 19th Day of March 2013

R. OUGO

JUDGE

In the presence of:.....1ST PLAINTIFF

In the presence of:.....APPLICANT

In the presence of:.....1ST DEFENDANT

In the presence of:.....2ND DEFENDANT

.....COURT CLERK