



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 542 OF 1999(O.S)

WALLACE KINUTHIA.....PLAINTIFF

VERSUS

ANTHONY ND'UNG'U MUONGI.....DEFENDANT

DAMARISE MURUGI ND'UNG'U.....1ST DEFENDANT

ROBERT NGUGI.....2ND DEFENDANT

SARAH NJERI.....3RD DEFENDANT

RULING

The Plaintiff filed a Notice of Motion dated 22nd January 2013 under certificate of urgency seeking the following substantive orders:

1. That leave be granted to the Plaintiff to substitute the Defendant's name with the ones of Damarise Murugi Ndungu, Robert Ngugi and Serah Njeri.
2. A temporary injunction do issue restraining Damarise Ndungu, Robert Ngugi and Serah Njeri, their agents or anyone acting under them or under their authority, or otherwise whomsoever from dealing with parcel of land known as L.R. No. Limuru/Bibirioni/T. 308 (hereinafter referred to as the suit property), pending the hearing and determination of the said application and suit herein.

The first prayer in the Plaintiff's Notice of Motion was granted *ex parte* on 22nd January 2013 by Mutunji J., and he gave directions that the prayers for temporary injunction proceed to *inter partes* hearing.

The grounds for the Plaintiff's Notice of Motion in summary are that the Plaintiff bought the ½ share of the suit property in 1958 and entered possession but that no transfer was executed in his favour. The suit property was later transferred and registered in the name of the Defendant, who is now deceased. That thereupon the Defendant's widow, the 1st Defendant herein was granted the letters of administration with respect to the suit property, and proceeded to sell the property to the 2nd and 3rd Defendants despite there being court orders in existence that restrained the Defendant from interfering with the suit property. The Plaintiff claimed that he is now threatened with eviction by the 1st, 2nd and 3rd Defendants and will in that event be rendered homeless.

The Defendant subsequently filed a Notice of Preliminary Objection dated 4th February 2013 which was later amended on 11th February 2013. He argued that the Plaintiff's Notice of Motion was an exercise in futility, and should be struck out with costs to the 1st, 2nd and 3rd Defendants. His objection was based on the following grounds:

1. The suit herein abated as against the deceased Defendant, Antony Muongi, on 25th February, 2005 and as such this suit is long dead and cannot be resurrected eight (8) years after.
2. The Plaintiff's application dated 22nd January, 2013 is thus premised on a suit that abated and as such the said application is a non-starter, fatally defective and ought to be struck out with costs to the 1st, 2nd, and 3rd Defendants.
3. No claim of adverse possession can lie against the Defendants in place of the deceased Defendant as the cause of action, if any, of adverse possession is not one that survives or continues upon the death of the sole Defendant, it dies with the deceased and cannot be claimed against the deceased estate.

The parties were directed to file written submissions on the Amended Notice of Preliminary Objection, and the 1st – 3rd Defendants' counsel highlighted his submissions at a hearing held on 2nd May 2013. The Counsel in his written submissions dated 21st March 2013 and oral submissions made in court argued that the suit herein is non-existent in law and ceased to exist in law on 25th February, 2005 when it abated as against the Defendant, Anthony Muongi.

He submitted that the court herein by allowing the substitution of the Defendant *ex parte* when this matter first came under certificate of urgency on 22nd January 2013 without hearing the 1st, 2nd and 3rd Defendants, and while no application was before the court to revive the abated suit herein and/or while no application was before the court for extension of time within the substitution of the defendant could be done, acted without jurisdiction. Further, that the Plaintiff is so applying on the other hand, abused the court process.

The counsel for the Defendant contended that Order 24 Rule (3) of the Civil Procedure Rules 2010 is very clear that abatement of a suit operates by operation of law and not by any party applying for a suit to be declared as having abated. Further, that the effect of abatement is clearly set out in Order 24 Rule 7, and that Order 24 Rule 7(2) as read with Order 24 Rule 3 only gives provision of extension of time to substitute where a suit abates at the instance of the Plaintiffs' death. He submitted that in the instance of a Defendant dying and no substitution is done within one year, the suit thus abates and no fresh suit shall be brought on the same cause of action. It was submitted that the law does not allow for revival of the suit in this regard.

Counsel for the Defendant also argued that by the time the 1st Defendant became the administrators and by the time the 2nd and 3rd Defendants bought the suit property as *bona fide* purchasers, the claim of adverse possession had already been extinguished by operation of the law when the suit abated. Further, that no fresh suit in claim of the same can be properly brought before any court and especially against 1st, 2nd and 3rd Defendants. The counsel relied on the decisions in **Janet Wangari Mwangi vs James Muchoki Kariuki and Bidco Oil Refineries ,Nakuru H.C.C.C No. 262 of 199, Kenya Farmers Cooperative Union Limited vs Charles Murgor (Deceased) T/A Kaptabei Coffee Estate, (2005) e KLR** and **Ngure vs Gakuya & Another, (2005) e KLR** on his arguments on the effect of abatement of suits.

The Plaintiff's Counsel on his part relied on the written submissions dated 25th March 2013 filed in court. He submitted that the Plaintiff made an oral application to the court to have the Defendant substituted within a year as it is required by law, and later formalized the same by way of the application dated 22nd January 2013 after the confirmation of grant of the Defendant estate had been confirmed. He stated that the record of the court proceedings indicate that the Plaintiff did make an oral application to his advocate and a judge. Further, that the application could be made orally as the law does not make it mandatory for a formal application to be made.

The counsel further submitted that the court records indicate that after the oral application was made, the matter was mentioned severally awaiting the substitution of the deceased, and that the last time the matter came up in court for hearing of the Plaintiff's application for substitution was on 1st February 2011 before Justice Mwera J. (as he then was), but that the Defendant advocate was not present.

The counsel for the Plaintiff argued that adverse possession of land applies to the one in occupation and ownership of land, and in this case the Plaintiff is still in a position to claim for the same. Lastly, the counsel distinguished the judicial authorities cited by the Defendants on the ground that they applied to situations where no attempt were made to substitute a deceased party, and that in the present case the Plaintiff had undertaken due diligence and has proof of the same to substitute the Defendant.

I have read and carefully considered the pleadings and submissions made. The main issue before this court is whether the objection raised by the Defendant is on a point of law, and if so whether it has merit and should be upheld. In the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, it was held that

“a preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

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.”

It is clear from the said provisions that a suit abates by operation of the law when no substitution is made within one year on the death of a Defendant and the objection raised by the 1st, 2nd and 3rd Defendants is therefore on a point of law. The outstanding issue is whether the objection has merit.

The Plaintiff brought evidence of the death of the Defendant on 24th February 2004 by way of a death certificate annexed to his application. His counsel claims that an oral application was thereafter made in court for substitution of the Defendant within one year. I have perused the court record and the last appearance in court before the death of the Defendant was on 21st July 2003 before Aluoch J. (as she then was) when parties were directed to take out new dates at the registry for a pending application. The next appearance was on 10th November 2010, before Mwera J. (as he then was) when the Plaintiff's Advocate informed the court that the Defendant had died, and the court directed that the Defendant's lawyer be served for the court to decide the way forward. Even if this information were to be interpreted to be an oral application it was made over six years after the Defendant's death.

There is thus no record of an oral application being made within one year of the Defendant's death as alleged. There is also no record of any orders or directions on enlargement of time for substitution, or for substitution of the Defendant until the *ex parte* directions given herein on 22nd January 2013.

The effect of a suit that has abated is that it ceases to exist in law. Black's Law Dictionary defines abatement as **“the suspension or defeat of a pending action for a reason unrelated to the merits of the claim”**. I am also persuaded by the ruling in Kenya Farmers Cooperative Union Limited vs Charles Murgor (Deceased) T/A Kaptabei Coffee Estate, (2005) e KLR that in such an event the court has no jurisdiction to hear and determine a suit that has abated, until its revival as provided by law. Waweru J. stated as follows in the cited case:

“But it is really a matter that goes to the jurisdiction of the court. Does the court have jurisdiction to order substitution (except in an application to revive the suit) where the suit has already abated by operation of the law? Obviously not. Does the court have jurisdiction to hear and determine a suit that has already abated by operation of the law? Certainly not. If a suit has abated it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time.”

It is therefore my finding that as at 22nd January 2013 when the *ex parte* orders were granted as to substitution of the Defendant, the suit against the Defendant had abated and had not been revived. There was thus an error of jurisdiction on the part of the court, and the 1st, 2nd and 3rd Defendants' preliminary objection is found to have merit. The *ex parte* orders of this court given herein on 22nd January 2013 substituting the 1st, 2nd and 3rd Defendants in place of the Defendant are therefore set aside, and the Plaintiff's Notice of Motion dated 22nd January 2013 is hereby struck out. The Plaintiff is however at liberty to apply.

The Plaintiff shall meet the costs of the 1st -3rd Defendants preliminary objection and of his Notice of Motion dated 22nd January 2013 .

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 12th day of June , 2013

P. NYAMWEYA

JUDGE