



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Civil Case 113 of 2008

IN THE MATTER OF THE REGISTERED LAND ACT

CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT CAP 21 OF LAWS OF KENYA

MARY NJERI KABUNDIPLAINTIFF

-VERSUS-

CHRISTINE MITHIRI MBUGUA1ST DEFENDANT

MARGARET NJERI2ND DEFENDANT

RULING

Margaret Njeri the 2nd Defendant in this matter died on 11th August, 2010. The Plaintiff in this matter is the daughter-in-law of the 2nd Defendant. By way of a Notice of Motion dated 11th July, 2011, Samuel NgaraKabudi who is a son of the 2nd Defendant and a husband of the Plaintiff seeks to be substituted in place of the 2nd Defendant. This application is premised on the grounds that Samuel is the personal representative of the estate of the 2nd defendant. He was issued with Limited Grant of Administration of the estate of the 2nd Defendant on 11th January, 2011.

This application is brought under the provision of Order 24 Rule 4 of the Civil Procedure Rules which provides as follows:-

“Where one or two or more Defendant dies”

In further arguments, Mr. Nyaga learned counsel for the Applicant submitted that since the Applicant is the legal representative of the Estate of the 2nd Defendant. The court has no discretion as the provisions of Order 24 Rule 4 are coached in mandatory terms. Thus the court is enjoined to administratively substitute

the legal representative who is coming in his capacity as legal representative.

As regards the issue of conflict of interest as the Applicant was sued by the 11th Defendant in Kiambu CMCC No. 67 of 2008 which suit was consolidated with this suit thus there was no conflict of interest.

This application was opposed by the 1st Defendant, reliance was placed on the replying affidavit sworn on 4th August, 2011 and a further affidavit sworn on 1st October, 2011.

It was submitted that there are peculiar reasons why the applicant should not be substituted. Firstly, the applicant is a party to this suit because he swore an affidavit to support the Plaintiff's case. This suit is instituted by the wife of the Applicant. The 2nd Defendant had sworn an affidavit which is at reliance with the contention by the Applicant therefore the Applicant cannot be a Plaintiff and a Defendant at the same time. Secondly, it was argued that the Applicant intends to sabotage the Defence by the 1st Defendant. The claim is over a parcel of land which the 2nd Defendant transferred to the 1st Defendant and since both 1st and 2nd Defendants had taken a common stand, the Applicant cannot be trusted to be a substitute of the 2nd Defendant. Mr. Thuku, learned counsel for the 1st Defendant urged the court to consider substituting the 2nd Defendant with the other children who have no interest in the subject matter. As regards the Grant of Letters of Administration, one of the Beneficiaries of the deceased estate challenged the process. Counsel urged that the court to find that the Applicant is not a suitable substitute. A further issue of representation of applicant was also raised as to whether the law firm of P. K. Njiri was properly on record as no notice of change of Advocates was filed.

Lastly, it was submitted that the suit against the 2nd Defendant abated after one year.

On the part of the Plaintiff, Mr. Kalau, learned counsel support this application for substitution.

The issues raised by counsel for the 1st Defendant regarding conflict of interest by the Applicant are matters for determination by the trial court. It is the trial court that will determine the weight to attach to the evidence of the Applicant in view of the fact that he is a husband of the Plaintiff and he had sworn an affidavit to support the Plaintiff's case.

This application is made under the provisions of Order 24 Rule 4 by a legal representative of the 2nd Defendant's estate. It was submitted and rightly so that it is only the legal representative of the deceased who can be substituted. This is because it The present representative who has the legal capacity to represent the estate of the 2nd Defendant. This court cannot deal with the issue of the validity of the Grant of Letters of Administration.

On the issue of whether the suit against the 2nd Defendant abated, the record shows the deceased died on 11th August, 2010 and this application was filed on 14th July, 2011 before the suit abated. I find the suit cannot be deemed to have abated when this application was already on record.

I find the Notice of Motion dated 11th July, 2011 has merit, to enable this suit more to trial, the Applicant should be granted to substitute the 2nd Defendant. I have also considered that a party seeks to be enjoined at a Defendant at their owncosts.

The Notice of Motion dated 11th July, 2011 is allowed. Costs shall be in the cause.

Ruling Read and Signed this 20th day of January, 2012.

MARTHA KOOME

JUDGE OF APPEAL