



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT 3274 OF 1994**

**NAOMI WAIRIMU KIBUGI.....PLAINTIFF**

**VERSUS**

**NJERI KIBUGI.....1<sup>ST</sup> DEFENDANT**

**HENRY KIMANI.....2<sup>ND</sup> DEFENDANT**

**JOYCE WAMBUI KIBUGI.....3<sup>RD</sup> DEFENDANT**

**JEMIMA WANJIRU.....4<sup>TH</sup> DEFENDANT**

**MRS NJERI KIMANI.....5<sup>TH</sup> DEFENDANT**

**RULING**

By a Notice of Motion dated 29<sup>th</sup> August 2011, expressed to be brought under Order 2 rule 15, Order 24 rule 4 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act and all enabling provisions of the law, the defendants seek the following orders:

- 1. That the suit herein be marked as having abated as against the 3<sup>rd</sup> Defendant/Applicant.**
- 2. That the suit herein be struck out against the 4<sup>th</sup> Defendant/Applicant.**
- 3. The cost of the suit and this application be borne by the plaintiff.**

The application is supported by an affidavit sworn by **Jemima Wanjiru**, the 4<sup>th</sup> defendant herein on 29<sup>th</sup> August 2011 as well as submissions of **Mr Koceyo**, learned counsel for the defendants. According to the defendants **Joyce Wambui** (hereinafter referred to as the deceased) died on 3<sup>rd</sup> August 2003. The deceased was the registered proprietor of Land Parcel No. Ngenda/Nyamangara/1321 which was transferred to the 4<sup>th</sup> defendant. According to the defendants the 4<sup>th</sup> defendant is the indefeasible title holder of the said parcel of land and the suit against the 1<sup>st</sup> defendant having been marked as abated and the suit against the 3<sup>rd</sup> defendant having similarly abated by operation of law, there is no case of action disclosed against the 4<sup>th</sup> defendant who derived title from the 3<sup>rd</sup> defendant.

On her part the plaintiff through her affidavit sworn on 23<sup>rd</sup> May 2012 as well as the submissions of her learned counsel **Mr Njiru**, the applicant is the daughter of the deceased and therefore, according to the

plaintiff this application is misconceived and merely meant to gain a technical advantage over the plaintiff and thus evict her from the land. The plaintiff's case, further, is that **Herman Ngugi Kibugi** was substituted for the 1<sup>st</sup> defendant and is thus a party to the suit while **Mrs Njeri Kimani** was joined in this suit as the 5<sup>th</sup> defendant. Because the suit involves land and raises substantial matters coupled with the age of the suit, the same should be set down for hearing instead of being dismissed on technicality according to the plaintiff. The plaintiff's view is that to dismiss the suit would be a violation of the Constitutional provisions which require that justice be dispensed. According to the plaintiff the 4<sup>th</sup> defendant, a daughter to the 3<sup>rd</sup> defendant, was joined in these proceedings in her own right and has never objected, hence the suit against her should remain intact. Since the 4<sup>th</sup> defendant claims to be a daughter to the deceased, the plaintiff contends that the suit should proceed and she should defend the suit. It is submitted that as **Herman Ngugi** was duly substituted for the 1<sup>st</sup> defendant, the Court should not make the same error that was made by the Court when it was declared that the suit against the 1<sup>st</sup> defendant had abated. In the exercise of the Court's inherent Jurisdiction, it is submitted, that directions should be given on how the matter is to be disposed of.

In a rejoinder, **Mr Koceyo** submitted that the issue raised is not procedural but substantive since it involves parties.

I have considered the application, the rivalling affidavits as well as the submissions of counsel.

Order 24 rule 4 of the Civil Procedure Rules provides as follows:

***(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 therefore clear that the rule does not leave any room for the exercise of discretion. Once no substitution is made within one year of the death of a defendant the suit automatically abates as against that defendant and no order is required for the suit to abate although, in my view it, would be prudent for the purposes of cleaning the record that such an order be made. In **Vamus & Partners vs. S. F. Hassan [1964] Ea 644** it was held that a suit having been abated a declaration to that effect is unnecessary but the estate is entitled to costs.

The reason for not requiring such an order is clear that in certain cases the person expected to move the Court for such an order may be the deceased. Where no step is taken within the stipulated period, the plaintiff is at liberty to proceed with the suit as against the remaining defendants or make an application for the revival of the abated suit in terms of the provisions of Order 24 rule 7(2) of the Civil Procedure Rules.

As the death of the 3<sup>rd</sup> defendant is not disputed to have occurred more than a year ago and since it is not contended that the 3<sup>rd</sup> defendant has been substituted, it is clear that the suit against the 3<sup>rd</sup> defendant has abated. Abatement, in my view, cannot be cured by the provisions of the Constitution. In fact to proceed with a suit against a dead man, an action which in itself is a nullity, is what in my considered view, would be unconstitutional. Accordingly, I declare the suit against the 3<sup>rd</sup> defendant to have abated with costs to the estate of the 3<sup>rd</sup> defendant.

With respect to the dismissal of the suit against the 4<sup>th</sup> defendant, it is contended by the plaintiff that land parcel no. Ngenda/Nyamangara/1321 which was initially registered in the name of the deceased was transferred to the 4<sup>th</sup> defendant who is the 3<sup>rd</sup> defendant's daughter. However, the plaintiff claims that this parcel of land amongst others is held in the names of the registered proprietors in trust for her. She also claims the said parcels on the basis of adverse possession. Whether or not the claim for adverse possession can be sustained based on the procedure adopted here is another matter. Whether or not the plaintiff will succeed in her claim to the parcels of land is another matter. The defendants' case is that once the suit against the 3<sup>rd</sup> defendant is terminated, the suit against the 4<sup>th</sup> defendant who derived her title from the 3<sup>rd</sup> defendant must similarly come to an end. I am, however, unable to conclude that in the absence of the 3<sup>rd</sup> defendant the plaintiff will not be able to prove her case a case against the 4<sup>th</sup> defendant. The mere fact that a party faces an uphill task in proving his or her case does not warrant dismissing the suit. The plaintiff's claim is that the 4<sup>th</sup> defendant holds the said land in trust for her. Whether she will be able to prove that claim without impeaching the title from which the 4<sup>th</sup> defendant's derives her estate is a matter which must await the hearing of the suit.

Accordingly, the suit against the 3<sup>rd</sup> defendant is hereby declared to have abated with costs to the estate while the claim to have the suit against the 4<sup>th</sup> defendant dismissed is disallowed with costs thereof in the cause.

**Ruling read, signed and delivered in Court this 19<sup>th</sup> day of July 2012.**

**G.V. ODUNGA**

**JUDGE**

In the absence of the parties.