



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 82 of 2012

SANTOKH KAUR SAGOO.....PLAINTIFF

VS

1. KENYA COMMERCIAL BANK LTD

2. SUPINDER SINGH SAGOO.....DEFEDANTS

(Abatement of Suit – Interpretation of Order 24 Rule 3 of the Civil Procedure Rules – Cost in an abated suit- Suit filed by Personal Representative – Whether Estate or Personal Representative should bear costs- Discretion of Court on award of Costs – Suit marked as abated with no orders as to costs.)

R U L I N G

The 2nd defendant has filed a Notice of Motion dated 28th September 2012 and filed on 29th September 2012 seeking the following orders :-

- (I) That this suit be marked as having abated.
- (II) That costs be in the cause.

The application is brought under the provisions of Order 24 Rules 3(2) and “all other enabling provisions”.The main ground upon which the application is founded is that the Plaintiff died on the 30th of August 2010. It is further stated that two years have lapsed since the Plaintiff died and that there has been no attempt to substitute the late plaintiff with his (sic) legal representative. The applicant further avers that it is unfair and not in the interests of justice to subject the defendant to the prejudice of pending litigation which has abated. The application is supported by an affidavit sworn on the 28th September 2012 by B.O. Manani who has described himself in paragraph 1 of the affidavit as an Advocate of the High Court of Kenya and as counsel for the 1st defendant. This may be an error as it is obvious from the record that Mr. Manani is on record for the 2nd Defendant and not the first defendant. It is deponed in paragraph 2 of the supporting affidavit that the plaintiff has died and annexed to the affidavit is a Certificate of Death indicating that one Sagoo Santokh Kaur died on the 30th August 2010. It is therefore discernable from the Certificate of Death that the plaintiff died on 30th August 2010.

The application was canvassed before me on the 14th September 2012. Mr. S.Anditi Advocate of the firm of Manani Lilan & Company Advocates appeared for the 2nd defendant/applicant. There was no appearance on the part of M/S J.C Chumba & Company Advocates who are on record for the 1st defendant although they were duly served. Neither was there any appearance on the part of M/S Machio & Company Advocates who are on record for the plaintiff. I was made to understand from the bar by Mr. Anditi, and I have no reason to doubt him, that the firm of M/S Machio & Company Advocates ceased to

exist after the demise of Mr. Machio Advocate who was its proprietor. Service could not therefore be effected upon the said firm. Mr. Anditi proceeded to argue that the suit has abated owing to the demise of the Plaintiff.

I have perused the record and observe that this suit was filed by the plaintiff against the two defendants vide a Plaint dated and filed on the 11th July 2001 by the firm of M/S Machio & Company Advocates. In the Plaint, the plaintiff described herself as suing on behalf of the Estate of one Surjit Singh Sagoo who died on the 24th July 1992. The Plaintiff averred in the Plaint that the said Surjit Singh Sagoo (deceased) was at the time of his death jointly registered as the proprietor of the land parcel registered as Eldoret Municipality/Block 23 (King'ong'o) /351 jointly with the 2nd defendant. The plaintiff further averred that on the 23rd June 1997 the defendants without authority or consent of the plaintiff as the sole administratrix of the estate of Surjit Singh Sagoo (deceased) caused the said property to be charged to the 1st defendant. The plaintiff inter alia sought a declaration that the charging of the suit land without the authority and consent of the plaintiff was unlawful. She further sought an order compelling the 1st defendant to discharge the charge on the said parcel of land and to return the documents of title to the plaintiff. Both defendants filed their defences; the gist of the defences being that since the property was jointly registered, the same devolved upon the 1st defendant as the survivor upon the demise of the said Surjit Singh Sagoo (deceased). To the date of the subject application, the suit had never been listed for hearing.

I have considered the application and the provisions of Order 24 Rule 3(2). Order 24 as its title suggests deals with instances where there is death or bankruptcy of the parties. Order 24 Rule 3 provides that:

3(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff

It is clear from the Certificate of Death annexed to the supporting affidavit that the plaintiff died on 30th August 2010. The Rules contemplate that if the cause of action survives or continues, then an application may be made by a legal representative of the deceased plaintiff to be made a party to the suit. If such application is made and allowed, the court shall proceed with the suit. However, where no application is made within one year of death of the plaintiff, the suit abates as far as the deceased plaintiff is concerned. It would appear that the suit abates by operation of law and strictly it is not necessary for an application to be made for an order that the suit has abated. It is however common for a defendant to make an application such as this to bring to the attention of the court that the plaintiff has died and that the suit should therefore be marked as abated. The rules only provide that the defendant may apply for an award of costs which he may have incurred in defending the suit, which costs the rules provide are to be recovered from the estate of the deceased plaintiff. The 2nd defendant has however not applied for costs to be recovered from the estate of the deceased plaintiff. He has prayed that costs be in the cause.

I observe that the plaintiff was suing in her capacity as administratrix of the estate of Surjit Singh Sagoo (deceased) and not in her own capacity. In such circumstances I would be inclined not to order costs against the Estate of the Plaintiff as strictly speaking it is the Estate of Surjit Singh Sagoo (deceased) which is the actual plaintiff. A reading of Order 24 Rule 3(2) will reveal that the award of costs is within the discretion of the court as the word 'may' rather than 'shall' is used. Ordinarily, costs should follow the event but in the unfortunate circumstances of this case, I am predisposed to order that each party bears its own costs.

I therefore order that this suit be marked as having abated with no orders as to costs.

DATED and DELIVERED this 20th day of November 2012.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Ruling Delivered in the presence of

Mr. Mwetich, of M/s Manani Lilan & Co Advocates for the applicant/2nd defendant.

N/A for M/s Machio & Company Advocates for the Plaintiff.

N/A for M/s J.C Chumba & Company Advocates for the 1st Defendant.