



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 954 of 2012

BUSHASHA LUCHERI.....PLAINTIFF

VS

JOSEPH LANGAT SITIENEI & ANOTHER.....DEFENDANT

(Abatement of suit – application to have suit marked as abated – sole plaintiff having died – interpretation of Order 24 Rule 3(2) – Interim orders having been obtained and extended before plaintiff died – application seeking to have the interim orders of injunction discharged – injunction in face of an abated suit – principles to be applied in order of costs of an abated suit – Suit marked as abated and injunctive orders vacated – order that each party bear its own costs)

R U L I N G

The application before me is the Motion dated 27 June 2012 brought under the provisions of Order 24 Rule 3(2), Order 40 Rule 7 and Order 51 Rule (1) of the Civil Procedure Rules, 2010. The application has been filed by the defendants and is seeking orders ;-

- (a) That the suit herein be marked as abated.
- (b) The injunction orders of 28th April 2009 be discharged forthwith.
- (c) Costs in any event be paid to the defendants.

The application is based on the grounds :-

- (a) That the plaintiff has since died and no substitution has been done well over a year now.
- (b) That the continued pending of this suit has prejudiced the defendants improperly.
- (c) That is in the interest of justice and fairness that litigation must come to an end.

The application is supported by the affidavit of the 1st defendant. In the supporting affidavit, it has been deponed that the plaintiff instituted the present suit on 27 April 2003 and obtained orders of injunction on 28 April 2003. The 1st defendant has further deponed that it is within his knowledge that the plaintiff has died. He has further deponed that it is on record, that the plaintiff has died, a matter that was brought to the attention of the court on 18 September 2009. He has also deponed that it is over one year since the plaintiff died and to date there has been no substitution. It is on this basis that the defendants have sought to have this suit be marked as abated and for the discharge of the orders of injunction.

This application is not opposed. Counsel on record for the plaintiff were duly served with the application

and the hearing notice, but they did not attend. There is no Certificate of Death annexed to the application but I take it that there is no dispute that the plaintiff has died, for if he were still alive, there would have been a Replying Affidavit to assert that he is still alive. I have also noted from the record that on 18 September 2009, the suit herein was adjourned indefinitely as counsel stated that the plaintiff has died.

This suit was commenced by way of Originating Summons filed by the plaintiff on 27 April 2009. Principally the plaintiff was seeking orders that he has acquired title to the land parcel NANDI/ SOI MINING/425 by way of adverse possession. Alongside the Originating Summons, the plaintiff filed a Chamber Summons application seeking orders of injunction to restrain the defendants from interfering with his possession of the suit land pending the hearing and determination of the suit. On 28 April 2009, interim orders were granted ex parte by my brother Ibrahim J (as he then was) and the application for injunction was listed for inter partes hearing on 12 May 2009. On the said date the matter was adjourned to 17 June 2009 for counsels to get more instructions from their clients. The matter was then listed for inter partes hearing of the application on 17 June 2009 with the interim orders being extended. There were attendances on 17 June 2009 and 22 July 2009 but the matter did not proceed inter partes for various reasons with the latter appearance resulting to an order that the matter be heard on 18 November 2009. It is on this day that counsel for the plaintiff offered that the plaintiff has died. The matter was stood over indefinitely and the interim orders of injunction extended nonetheless. Nothing else transpired until this application to have the suit marked as abated was filed on 27 June 2012.

I have perused the application and heard the submissions of Mr. M. Nyolei, learned counsel for the defendants. As earlier stated, this application is not opposed. It is not disputed that the plaintiff had died latest 18 November 2009. He was the only plaintiff in this suit.

The provisions of Order 24 set out what should transpire when any of the litigants die. Rule 3 provides for instances when a sole plaintiff dies. It 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.

The plaintiff having died latest 18 November 2009, it is discernable that more than one year has lapsed without any application for substitution being made. The suit has therefore abated. In fact, a careful reading of Order 40 Rule 3(2) reveals that the suit automatically abates by operation of law and it is not necessary to make an application to have the suit marked as abated. Rule 3(2) only makes provision for an application by the defendant for costs of an abated suit. Nevertheless, it is not uncommon, and neither is it out of place, for the defendant to seek an order to have a suit marked as abated.

This suit having abated, what then should happen to the interim orders? Order 24 is silent on what should happen. I note that the applicants herein have sought assistance from the provisions of Order 40 Rule 7. The same provides that :-

7. Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order.

I do not think Order 40 Rule 7 contemplates a setting aside of an injunction in situations where the beneficiary of the order has died. It is meant to be utilized for situations where a party is dissatisfied with such order. The issue here is not that the defendants are “dissatisfied” with the order of injunction but rather that the beneficiary of the order has died. I do not see how Order 40 Rule 7 is applicable to our circumstances herein.

I think the situation in our case is sufficiently addressed by the provisions of Order 40 Rule 6. The same provides for the lapse of an injunction. It states that :-

6. Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

The suit herein has not been determined yet and twelve months have lapsed since the interim orders of injunction were granted. By dint of the provisions of Order 40 Rule 6, the injunction has lapsed.

Even without the assistance of Order 40 Rule 6, I believe that an abated suit is as good as a dismissed suit. Once it abates, all orders granted therein are automatically vacated and I deem them as having been so vacated.

That leaves me with the issue of costs. The defendants have asked for the costs of this suit. Order 24 Rule 2(3) provides that the Court may award the defendant costs of an abated suit. The word “may” rather than “shall” are used which means that the court has discretion on the award of costs. I think the courts should be slow in awarding costs of an abated suit to the defendant unless it is apparent that the suit was frivolous or that the plaintiff had a wholly unmeritorious claim. The plaintiff herein appears to have had a fairly legitimate claim and I think it would not be just for me to order his estate to shoulder the costs of this suit. In the unfortunate circumstances of this suit, justice will best be done if each party bears its own costs.

Having considered this application, I order as follows :-

- (1) That this suit be marked as abated.
- (2) That all orders herein including the interim orders of injunction are hereby vacated.
- (3) That each party will bear its own costs.

DATED AND DELIVERED ON 20TH DECEMBER 2012.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of

Mr. M. Nyolei of M/s Keter & Co Advocates for the applicants/defendants.

No appearance for M/s Kraido & Co Advocates for the plaintiff.