



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HC.SUIT MISC. 309 OF 2005

TABITHA KAVENGE MATOLO.....PLAINTIFF

VERSUS

GIBSON SENGETE MATOLO.....DEFENDANT

RULING

(1) On the 1st December, 2005 Tabitha Kavenge Matolo (the Plaintiff) filed this suit by way of an Originating Summons of even date therewith against Gibson Sengete Matolo (the Defendant). The Plaintiff brought the application on her own behalf and also on behalf of two other beneficiaries and as the legal representative of the estate of her late husband Joshua Matolo Nyonga claiming an interest in the piece or parcel of land known as plot Title No.Makueni/Konza South Block I (Marva) 46 which the Plaintiff and the other two beneficiaries contend was fraudulently registered in the name of the Defendant. She served a declaration that the registration of the said field or parcel of land in the name of the Defendant was effected through fraud and misrepresentation and further that the said field or parcel of land forms part of the estate of her deceased husband.

(2) The suit is part heard before Lenaola J, who recorded the testimonies of the Plaintiff's first three (3) witnesses. When the suit came up for further hearing on the 6th October, 2009, A. M. Mbindyo, Esq. Advocate, learned counsel for the Plaintiff, informed the court that the Defendant was dead. The case would appear to have been fixed for mention on several occasions thereafter for directions and on the 9th June, 2010, when the matter came up before Waweru J., Mutinda Kimeu, Esq. Advocate, holding brief for learned counsel on record for the Defendant, informed the court that no application for substitution of the deceased Defendant had been made but it was expected that the same would be filed on that very morning. The learned Judge noted that the suit had abated under the provision in Order 23 rule 4(3) of the Civil Procedure Rules and marked it accordingly.

(3) The Defendant's Advocates did not file the application for substitution as indicated to the court and the plaintiff therefore took out a Chamber Summons on the 21st Jul, 2010 under Order 23 rule 8(2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act (being the application now before me). The plaintiff seeks an order to serve the suit on the following main grounds, namely that the Defendant died on the 12th April, 2009 after the Plaintiff had adduced her evidence in the suit; that on the 22nd June, 2009 the Plaintiff took out a citation to one Rhoda Gibson Sengete, the wife of the Defendant, and that she and one Daniel Kasimu Gibson subsequently applied for and were granted Letters of Administration of the estate of the Defendant on the 12th March, 2010 in Machakos High Court Succession Cause No.823 of 2009 and further that such Administrators have failed to file an application for substitution in this suit notwithstanding their undertaking to do so.

(4) The Defendant has not filed any grounds and or replying affidavit in opposition to the application but at the hearing thereof, it was contended for the Defendant that the Plaintiff has no capacity to revive the suit as only the legal representative of the Defendant can do so. In any event the suit cannot be revived until there be an application for substitution.

(5) As I have already said, this suit abated by reason of the Defendant's death. The Plaintiff took the initiative of taking out a citation on the wife of the deceased but even after a grant of Letters of Administration to her and one Daniel Kasimu Gibson, they have failed and or neglected to file an application for substitution notwithstanding their very clear indication to the court that they would do so. In these circumstances, I find that it would be in the interests of justice to grant the Plaintiff the relief sought and it would neither be fair nor just for the Administrators of the estate of the Defendant to continue preventing the Plaintiff in the pursuit of her rights without just cause.

(6) In the result, the application in the Chamber Summons filed on the 21st July, 2010 is allowed and orders in terms of prayer No.2 therein be and are hereby granted. It is further ordered that Rhoda Gibson Sengete and Daniel Kasimu Gibson as the personal representatives of Gibson Sengete Matolo (deceased) shall file and serve an application for substitution within the next fourteen (14) days of the date of service of this order and in default the Plaintiff be at liberty to file such application accordingly.

Orders accordingly.

Dated and delivered at Machakos this 29th day of June, 2011.

P. Kihara Kariuki
Judge