



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 422 of 2001**

1. Land and Environmental Law Division

2. Civil Practice and Procedure

3. Subject of main suit: Trespass

Defendant closure of road of access

4. Application dated Chamber Summons 24 September 2007.

Marked No.1

a) Suit by plaintiff No.2 abated

b) Costs by estate of deceased No.2 plaintiff

5. In reply:

a) Plaintiffs No.2 estate was not aware of this suit

6. Held:

i) Order XXIII r 1 Civil Procedure Rules states where there are several plaintiff – cause of action to proceed under surviving plaintiff.

ii) Where the plaintiff or defendant are sole litigants, the estate of deceased's and legal representation should enjoined

ii) No enjoinder required as several plaintiff.

7. Case law - Nil

8. Statute order XXXIII r 1 Civil Procedure Rules

9. Advocates:

Burugu G. of Gichigi Burugu & Co. Advocates for the plaintiff/applicant - present

N. Njoroge of Njoroge Musyoka & Co. Advocates for the defendant/respondent- present

**SAMUEL KIMANI MACHARIA ..... 1<sup>ST</sup> PLAINTIFF**

SIMON KIMANI MWANIKI ..... 2<sup>ND</sup> PLAINTIFF

JANE WANJIRU KIMANI ..... 3<sup>RD</sup> PLAINTIFF

VERSUS

JOSEPH GITHIGA MACHAU .....DEFENDANT

RULING

I: Application Chamber Summons

24 September 2007 to declare that the suit by the plaintiff No.2 has abated due to his death 4 years earlier.

A: **Procedure**

1. The three original plaintiffs:-

Samuel Kimani Macharia

Simon Kimani Mwaniki

Jane Wanjiru Kimani

Are registered land proprietors of

LR Nyandarua/South Kinangop/1142

LR. Nyandarua/South Kinangop/1143

LR Nyandarua/South Kinangop/0185

LR Nyandarua/South Kinangop/0186

respectively.

2. It is alleged that since 1964 there had been a road of access transgressing their respective land. The defendant one Joseph Githiga Macharia is alleged to have closed the said road thus rendering access to their land impossible on the 14 March 2001.

3. The three plaintiff filed suit on 16 March 2001 and sought for an injunction. The court declined to issue an injunction (Aganyanya J) (4 April 2001) on grounds that damages would be adequate. A review of these orders was also dismissed. There had been a suggestion that parties pursue the matters of boundaries with the Land Disputes Tribunal.

4. The parties appear to have proceeded to the Land Disputes Tribunal.

5. By an application dated 24 September 2007 that I mark No. I, the defendant applicant notified this court that the 2<sup>nd</sup> plaintiff had passed away four years earlier. He prayed that the suit against the defendant by the 2<sup>nd</sup> plaintiff having abated be dismissed.

6. By another application dated 24 September 2007 that I mark No. II the defendant applicant prayed for the whole suit to be dismissed.

7. By a third application of 12 November 2007 under certificate of urgency but filed by the plaintiff

new advocate (which application is not on my court file but which the Duty Judge directed be placed before this court) is still pending.

8. This court gave direction that the application would be heard separately and in the order that they were filed. Thus the application of 24 September 2007 was heard by this court on the issue of abatement of the suit concerning the plaintiff No.2 and marked No. I.

II: Application Chamber Summons dated 24 September 2007 marked No.1.

9. The arguments put forward by the advocate for the applicant original defendant was that the plaintiff No.2 passed away on 24 October 2004. There had been no action taken for the last three years by his estate to substitute him. The rules under order XXIII r 3 (2) Civil Procedure Rules is that where no application has been made to substitute the deceased plaintiff then the suit abates as against the deceased plaintiff. The defendant therefore requested that any claim by the 2<sup>nd</sup> plaintiff be dismissed.

10. In reply, the widow and legal representatives claim she was not aware of this suit. Originally the suit that she was aware of was the Land Disputes Tribunal case. There it appears that the matter had been filed by the defendant/applicant. This suit before the court she indeed had not been aware of.

III: Should the plaintiff No.2 be declared to have had the suit abated?

11. I wish to bring to the attention of the applicant/ defendant the provisions of order XXIII r 1.

“The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.”

Nonetheless under rule 2

“Where there are more plaintiffs or defendants than one and any one of them dies and where the cause of action survives or continues to the surviving - plaintiff or plaintiffs alone or against the summary defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants”

12. Thus the procedure where one or several plaintiffs or defendants dies and the right to sue survives, the court makes a note and records the same and the suit continues against the surviving defendants or proceeds at the instance of the surviving plaintiffs.

13. Where the cause of action does not survive or continues to survive upon the death of either the plaintiff or defendant then an application to substitute the deceased plaintiff to be party to the suit is made by a legal representation (rules 3). This applies to the defendant who dies (rule 4).

14. Where such a cause arises in which as in this case the plaintiffs passes away, the legal representative is to apply within one year to substitute the said plaintiff. If a year has passed by, the rules have now changed and in its place a party may seek the leave of the court to file the said application out of time. This rule was changed by Parliament in a court case where a similar issues was raised.

15. The subject matter of this suit is that of Trespass/road access closure by the defendant. It is a suit that involved a road through the three plaintiff's land. You cannot now say that the issue of the access road should not be dealt with concerning the plaintiff No.2 or not? The cause of action does survive. The widow and legal representative stated upon her husband's demise she was not aware of this suit. The original advocate acting in this matter was one P.S. Gatimu who has since passed away and this court can understand why the widow would not be able to know this matter.

16. The application herein should have enquired considering the circumstances of this case whether the plaintiff No.2's estate was interested in proceeding with this matter. Nonetheless, the court is

permitted to proceed with this matter as the cause of action does survive to the surviving plaintiffs. I am permitted by order XXIII r 2 Civil Procedure Rules to make such entry and I accordingly do so.

17. Order – The cause of action by the plaintiff No.2 surviving and continues to do so in the surviving plaintiffs in this case. I hereby make an entry and record this in this file and order that this instant suit shall proceed at the instance of the surviving plaintiffs against the defendant.

18. There will be costs to the plaintiff/respondents.

Dated this 5<sup>th</sup> day of December 2007 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**

G. Burugu instructed by Gichigi Burugu & Co. Advocates for the plaintiff/applicant - present

N. Njoroge instructed by Njoroge Musyoka & Co. Advocates for the defendant/respondent- present