REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU
MISC CIV APPLI 45 OF 1997

M'MBOROKI M'ARANGACHA ……...…….. APPLICANT

VERSUS

LAND ADJUDICATION OFFICER NYAMBENE ……...…..1ST RESPONDENT

M'ITHURA M'ARANGACHA ..……..…….. 2ND RESPONDENT

NGOLUA MUTIA ...…….. 3RD RESPONDENT

R U L I N G

The application before the court is dated 18.3.2004. It seeks an order appointing one Monica Nabiki M'Mboroki a Legal Representative of the exparte Applicant who was M'Mboroki M'Arangachia who died on 25.7.2002. The Ex parte applicant had filed an application by a Notice of Motion dated 26.3.1997 seeking the Superior Orders of Certiorari, Mandamus and Prohibition and in addition an order of injunction restraining the respondents therein from entering, developing, fencing or putting to waste land Parcel No.1676-Kitharene Adjudication Section until further orders of the court. The ex parte applicant had alter on 18.12.97 obtained the restraining orders exparte until further orders of this court or until final determination of this suit.

As earlier stated the ex parte applicant died on 25.7.2002 before he prosecuted his application for the superior Orders aforementioned. Thereafter the present this application appears to have applied for and obtained a limited Grant of Letters of Administration to the estate of the deceased – the original ex parte applicant, on 12.7.2004. And now in this application he applies to be joined in the original suit as the Legal Representative of the Ex parte applicant.

In his argument Mr. Kioga stated that the Attorney- General on whose behalf the original suit was brought was served with this application but the A.G neither filed any response or appeared in court although he was served. So the prosecution of the application went on in the Attorney- General's absence. But not for long. This is because Mr. A. Anampiu appearing for the respondents technically cut Mr. Kioga short. Mr. Anampiu argued that this application being brought and prosecuted under Order 23 rule 3(2) of the Civil Procedure Rules has been abated. In those circumstances, he argued, there is no suit before the court into which the applicant, as a Legal Representative of the Ex Parte applicant can be joined. He pointed out that between the date of death of the Ex Parte which was 25.7.2002 and the date of filing of this application which was 22.2.2005, is almost three years. To this Mr. Kioga unsteadily answered that abatement of such suits under Order 23 rule 3 (2) aforesaid, is not automatic and that such abatement must be by an order of court. He could not produce any legal authority to support his proposition and finally left it to the court to decide. Order 23 rule 3 (2) of the Civil Procedure Rules states thus:-

> *"3 (1) where one of two or more plaintiffs dies and the cause of action does not survive or continue to surviving plaintiff or plaintiffs alone, or a sole plaintiff or 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.*
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> *(2) Where within one year no application is made under sub rule (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."

My understanding of Order 23 rule 3 (1) & (2) quoted above is that where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on the application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party in the suit and the court shall then proceed with suit. But it is clear that such an application seeking that the legal representative be made a party in the place of the deceased plaintiff, must be made within one year. In default of bringing the said application as I understand the rule, the surviving suit shall abate so far as the deceased plaintiff is concerned. The language used by the legislature is mandatory as the words used are" *the suit shall abate"*. It is my understanding and view therefore that the abatement of the suit is automatic and does not, as Mr. Kioga argued, need an order of the court to abate the suit.

In this suit before me, the ex parte applicant died almost three years before this application was filed to replace him by a legal representative. It is my finding that by the time this application was filed which was 18.11.2004, the original suit which was the notice of motion seeking the superior orders of Certiorari, Mandamus and Prohibition dated 26.3.1997 and filed the same day, had abate under O.23 rule 3 (2) aforementioned. The application before me therefore was brought under a non-existent suit without which the application makes little sense. Accordingly this application to join the applicant Monica Nabiki M'Mboroki as party to the suit dated 26.3.97, must fail. It is dismissed with costs to the respondent herein, such costs to include costs awardable under O.23 rule 3 (2) of the C.P.R. It is declared also that any interim or temporary orders made under the original suit abated with the suit.

In conclusion, it is observed that this was a matter concerning land ,which at the relevant time, was under demarcation and adjudication. The suit was left unprosecuted by the applicant for such a long period. There is a likelihood that the process of adjudication and even of registration must have been completed a long time by now. It is not clear what disruptive effect of such fresh orders of court may arise.

DATED AND DELIVERED AT MERU THIS 15th DAY OF SEPTEMBER,2005

D. A. ONYANCHA

JUDGE