



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 32 OF 2003

JOHN MUSYOKA MUSEMBI.....PLAINTIFF

VERSUS

JOSEPH KYANYA KYENGO.....DEFENDANT

AND

PRISCILLA MUSYOKA MUSEMBI.....APPLICANT

RULING

1. In the Notice of Motion dated 29th November, 2019, the Applicant has sought for the following reliefs:

a. That the Plaintiff herein, John Musyoka Musembi, who died on 8th March, 2019, be substituted with Priscilla Musyoka Musembi.

b. That costs of this Application be in the cause.

2. The Application is supported by the Affidavit of the Applicant who has deponed that the Plaintiff, who was her husband died on 8th March, 2019; that she is in the process of petitioning the High Court for a grant of Letters of Administration; that the subject matter in the suit is land, and that the cause of action survives the Plaintiff.

3. The Applicant finally deponed that she is desirous of continuing with the suit; that the law requires that an application for substitution of a deceased Plaintiff be made before the lapse of one (1) year and that the Application should be allowed.

4. The Defendant filed a Notice of Preliminary Objection in which he stated that the Application is incompetent and an abuse of the court process and that the Applicant does not have the requisite legal capacity to bring the Application or substitute the Plaintiff.

5. In her submission, the Applicant's advocate submitted that this court has jurisdiction to hear and determine the Application and that under Section 3A of the Civil Procedure Act, this court has the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.

6. The Defendant's advocate submitted that the Application was filed prematurely; that the Applicant does not have Grant of Letters of Administration Intestate of the deceased's estate to entitle her to represent the estate of the deceased and that the Application should be dismissed with costs.

7. The Applicant is seeking for an order to substitute the Plaintiff who died on 8th March, 2019 with her name. According to the Applicant, the deceased Plaintiff was her husband. The Application has been filed pursuant to the provision of Order 24 Rules 1 and 3(2) of the Civil Procedure Rules which provides as follows:

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

(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:

Provided the court may, for good reason on application, extend the time.”

8. Order 24 Rule 3(1) on the other hand provides as follows:

“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.”

9. The person who can substitute a deceased party in a suit must be his/her legal representative as at the time of making the Application for substitution. Section 2 of the Civil Procedure Act defines a legal representative as follows:

“a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”

10. In the case of ***Sarah Kobilu Chebii and Another vs. David K. Chesang (2019) eKLR***, the court held as follow:

“There is no conflict between the position of the Law of Succession Act as regards to personal representative and the provision of the procedure for substitution of the Legal Representative upon the death of a party to a suit. It only means that the person appointed to substitute the deceased Plaintiff or Defendant must be legally appointed Legal Representative of the deceased, who can only be so legally appointed when appointed in accordance with the law enacted for that purpose under the Law of Succession Act.”

11. The Applicant herein had not been appointed a legal representative of the deceased Plaintiff as at the time of filing the Application. Indeed, in the Further Affidavit, the Applicant conceded to this fact when she annexed a copy of the Limited Grant of Letters of Administration Ad Litem which was issued by the High Court in Machakos Succession Cause No. 46 of 2020 on 22nd July, 2020.

12. That being the case, and considering that the Letters of Administration Ad Litem dated 22nd July, 2020 cannot apply retrospectively, I find the Application dated 29th November, 2019 to be incompetent.

13. For those reasons, the Application dated 29th November, 2019 is struck out with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF FEBRUARY, 2021.

O.A. ANGOTE

JUDGE