



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO.2191 OF 1998

DOROTHY MARGRET WAMBUI GILL

SAID MARLO MUNGAIPLAINTIFFS

SUSAN OESTERRECHER

V E R S U S

JANE RICHTER

CLIFORD KURT RACHERDEFENDANTS

R U L I N G

An application was filed here on 18th April 2002 under Order 23 Rule 3 11 and 12 and Section 3A of Civil Procedure Rules and Act respectively asking for orders that the plaintiff be granted leave to substitute the 3rd plaintiff (since deceased) with her personal representatives namely:-

(i) Walter Michael Osterreicher and

(ii) Anthony James Osterreicher

The deceased third plaintiff herein according to the joint affidavit sworn on 21st March 2002 by the applicants was wife to the first applicant Walter Michael Osterreicher and mother to the second applicant Anthony James Osterreicher. She died on 8th August 1999 and the two were appointed legal representatives and joint administrators of her estate on 5th April 2001. Therefore they seek to be joined in this suit. The suit is by Originating Summons filed on 2nd October 1998 by two other plaintiffs asking for orders that the second defendant is or is not a joint owner together with the plaintiffs and the 1st defendant of property known as LR.NO.36/11/47 Eastleigh Section II Nairobi and whether 2nd defendant is entitled to any proceeds or income from the suit premises and that the 2nd defendant is not a joint owner thereof together with the plaintiffs and the 1st defendant. It also prays a restraining order and direction that rent from the property be deposited in court pending finalisation of the suit.

At the hearing of the motion Mr. Kamau for the defendants argued a preliminary point of law that the application for substitution is time barred and the suit has abated as far as the third plaintiffs' suit is concerned and that the application is delayed without good reason.

He says if death was on 8th August 1999 and application filed on 13th April 2002 suit abated on 8th August 2000 and cannot be revived, but Mr. Manyonge for applicants submits that the suit has not abated because the suit survives. Secondly, he says that there is tenancy in common as opposed to Joint Ownership so the deceased's interest goes to the estate of the heir. That the application is saved under Order 23 Rule 1 but Mr. Kamau says Under Order 23(3) it has abated.

Order 23 rule 1 says:-

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

Order 23 Rule (3) (1) says:-

1. “Where one or two or more plaintiff dies and the cause of action does not survive or continue to the surviving 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 Sub- Rule 1 the suit shall abate so far as the deceased plaintiff is concerned.

Looking at this application and interpreting the provisions of the order and rules relevant to this application and whether the suit survives or that there is tenancy in common. One would ask oneself what survives means. The term “survives” in Order 23 Rule (1) has been said to include not only cases or survivorship in a strict technical sense but also cases of devolution by succession and inheritance.

The test is whether a right to sue survives in this surviving plaintiffs or against the surviving defendant is whether the surviving plaintiffs can alone sue or the defendants can alone be sued in the absence of the plaintiff or defendant respectively. If I accept and apply this test, I find that the suit survives and therefore the same does not abate. Preliminary point is therefore dismissed with costs.

Dated this 27th Day of May 2002

A. I. HAYANGA

J U D G E

Read to – Mr. Kamere

Mr. Kimani