



Wambaya (in his own behalf and on behalf of the Estate of Esperance Perside Wambaya) v Awuor & 3 others (Environment & Land Case 698 of 2015) [2023] KEELC 15830 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEELC 15830 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 698 OF 2015
E ASATI, J
MARCH 2, 2023
(FOMERLY CIVIL SUIT NO.110 OF 2020(OS))
IN THE MATTER OF: LIMITATION OF ACTION OF ACTION ACT
IN THE MATTER OF: PARCEL NANDI/KAPSENGERE NUMBER 149, 150 AND 62

BETWEEN

JACOB JOSEPH WAMBAYA (IN HIS OWN BEHALF AND ON BEHALF OF THE ESTATE OF ESPERANCE PERSIDE WAMBAYA) PLAINTIFF

AND

FRANCISCA AWUOR 1ST DEFENDANT

RODA JEBIAMA KARAN 2ND DEFENDANT

KIPKENY ARAP ABWAO 3RD DEFENDANT

ESTHER ACHIENG MUSUMBA 4TH DEFENDANT

RULING

1. Jacob Joseph Wambaya, the applicant herein sought, vide the Notice of Motion application dated 26th July, 2021, for orders that the 2nd Defendant /Respondent, Roda Jebiama Karan deceased, be substituted with James Kosgei and for amendment of the names the 2nd Defendant/Respondent Roda Jebiama Karan to read James Kosgei. The grounds upon which the application was brought were that the 2nd Respondent died in the pendency of the suit and Letters of Administration Ad litem were granted to James Kosgei of all the estate of Roda Jebiama Karan on the 18th day 2019 vide Succession Cause (Citation) No.13 of 2019 Kisumu CM's Court. That the substitution is necessary so as to finalize the suit.



2. The application was opposed by James Kosgei who raised a Preliminary Objection vide the Notice of preliminary objection dated 2nd November, 2022 arguing that;
 - a. the present application contravenes the provisions of Order 24 Rule 4(3) of the Civil Procedure Rules, 2010 as the Plaintiff has brought this application close to three years after citation was completed and James Kosgei issued with Letters Ad litem on 18th July 2019 in relation to the estate of the 2nd Defendant who passed on.
 - b. the suit against the 2nd Defendant has already abated as per the provisions of the law thus the present Application cannot stand.
 - c. The Plaintiff's Application filed on 11th April, 2022 is fatally and irredeemably defective and should be struck out.
3. Directions were taken that the preliminary objection and the application be argued together by way of written submissions. The Plaintiff filed written submissions on 6th February, 2023. He submitted that the Preliminary objection is res judicata as the orders being sought have already been heard and determined by Hon Justice A. Ombwayo.
4. He submitted that James Kosgei having not disputed the fact that he is the legal administrator of the estate of his mother the late Roda Jebiama Karan it is only prudent for the application to be allowed in the best interest of justice so as to speed up the matter.
5. The intended 2nd Defendant James Kosgei filed written submissions on 31st January, 2023. He submitted that the present Application contravenes the provisions of order 24 rule 4(3) of the Civil Procedure Rules, the Applicant having brought this application close to three years after citation was completed. He stated that the suit against the 2nd Defendant has already abated and the present application cannot stand hence it should be struck out with costs. He relied on *Mukisa Biscuit Manufacturing Co. v West End Distributors Ltd* [1969] EA 696
6. He submitted that a grant of Letters of Administration Ad Litem was made to him on 18th July, 2019 and the matter is yet to be determined. He submitted that the Application should be struck out with costs because the substitution was not done before the suit abated. That as at the time of making the instant application there is no suit subsisting as against the 2nd Defendant in which substitution can be made. That the honourable court has no jurisdiction to issue orders for substitution where the suit has already abated. He relied on [*Kenya Farmers Cooperative Union Ltd v Charles Murgor \(deceased\) t/a Kiptabei Coffee Estate*](#) [2005] eKLR. He submitted that the Preliminary objection is merited and should be allowed with costs to him.
7. Jurisdiction of the court to order for substitution of a deceased defendant is donated by Order 24 Rule 4 (1) [*Civil Procedure Rules*](#). It empowers the court, on an application made in that behalf, to cause the legal representative of the deceased defendant to be made a party and to proceed with the suit. Subrule 3 requires that such application be made within one (1) year from the date of death and provides that where within one year no application is made for substitution the suit shall abate against the deceased Defendant. This provision is couched in mandatory terms. A suit that has abated is a non-existent suit. No orders can be made in it unless it is revived. Although sub rule 7(2) provides for revival of the suit, the revival will only be done on an application by a party who desires the revival wherein the party will have to prove that that he/she was prevented by sufficient cause from continuing the suit.
8. From the Letters of Administration Ad Litem attached to the application and marked JJW1, it is clear that the 2nd Defendant Roda Jebiama Karan died in the year 2018. The current application for substitution dated 26th July 2021 was filed in court on 11th April 2022 which was obviously beyond



one year from the date of death. There is no application for revival of the suit. This is the main point of the Preliminary objection raised by the intended 2nd Defendant. The applicant referred to an order by Ombwayo J allowing the applicant to file the application for substitution. I do not see any order in the court record reviving the suit. In the circumstances, allowing the application for substitution will be futile. I find that the preliminary objection has merit. I uphold the preliminary objection and strike out the application dated 26th July 2021. Costs to the intended 2nd Defendant, James Koskei.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 2ND DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

.....

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Isiji Advocate for the Plaintiff/Applicant

Odah advocate h/b for Ngala Awino Advocate for the proposed 2nd Defendants/Respondent

No appearance for the 1st, 3rd and 4th Defendants.

