



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT THIKA**

**ELC NO. 144 OF 2018**

**MICHAEL GICHUHI MUIRU.....APPLICANT**

**VS**

**SACHE FARM LIMITED.....1<sup>ST</sup> DEFENDANT**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. On the 9/5/2018 the Plaintiff filed suit against the Defendants seeking inter alia, an order of permanent injunction restraining the 1<sup>st</sup> Defendant from trespassing on parcels **NDEIYA/NDIUNI/T. 983 and 984 (suit lands)**, a declaration that the Plaintiff is the rightful owner of the suit lands and a sum of Kshs 312,000/ against the 1<sup>st</sup> Defendant.
2. The prosecution of the suit seemed to have gone cold until it was dismissed on the 15/4/2021 for want of prosecution.
3. According to the evidence on record the Plaintiff passed away on the 4/1/2019 and from the record no substitution was undertaken within 12 months despite the cause of action surviving the deceased.
4. On the 6/7/18 the legal administrator of the estate of the Plaintiff filed this application seeking orders to; set aside the order dismissing the suit on the 15/4/2021; substitute the legal representative Godfrey Kihuha Gichuhi with the deceased. The application is supported by the grounds annexed and the supporting affidavit of Godfrey Kihuha Gichuhi. The Applicant deponed that he is the legal administrator of the estate of the deceased having been appointed as such on the 16/12/2020 in **Succession Cause No 4 of 2019**. That he discovered the existence of the suit while going through the documents of the deceased in June 2021 or thereabouts. He urged the Court to reinstate the suit, substitute the Applicant in the interest of justice.
5. In opposing the application, the 1<sup>st</sup> Respondent filed grounds of opposition dated the 13/10/2021 on grounds that the application is incompetent and does not lie under order 24 rule 4(3) of the CPR, 2010. That the suit abated on the 5/1/2020 by operation of law and the dismissal of the suit on the 15/4/2021 was not necessary.
6. On the 9/11/2021 the Applicant and the 1<sup>st</sup> Defendant through their learned counsels on record argued the matter orally in open Court. I have considered the arguments together with the precedent cases filed in support of each party's case.
7. Order 24 rule 1 Civil Procedure Rules provides that the death of a Plaintiff or Defendant shall not cause the suit to abate if the cause of action survives or continues. In this case the cause of action is trespass or a claim in land and therefore survived the deceased Plaintiff. Substitution of a deceased Plaintiff is permissible on application within one year, in default the suit abates.
8. In this case the deceased Plaintiff died on the 4/1/2019 and from the record, no substitution was undertaken. The suit therefore abated on the 5/1/2020 so much so that by the time the Court was dismissing the suit on the 15/4/2021, the same had abated. The dismissal therefore in my view is of no legal effect.
9. In the case of **Phillips, Harrison & Crosfield Ltd –Vs- Kassam [1982] E.A. 458, Hancox J** (as he then was) stated that where there is undue delay, an application for extension of time to revive an abated suit may be refused.
10. The Applicant must satisfy the Court that there was a sufficient cause that prevented him from continuing with the suit. In the case of **Rukwaro Waweru Vs Kinyutho Ritho & Anor (2015) eKLR** the Court held that;-

**“... it is clear that the Court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. This notwithstanding, precedent seems to suggest that this Court may not extend time once the suit against a deceased Defendant has abated.”**

11. In the case of **Soni –Versus- Mohan Dairy [1958] E. A. 58**, the Court held that for an Applicant to succeed in having the suit revived, he has to prove that there was a sufficient cause that prevented him from seeking the substitution of a deceased litigant within the requisite period.

12. The Applicant has satisfied the Court that the delay of about 2 years was not deliberate or intended to delay the cause of justice.

13. In the end I allow the application by enlarging time, revive the suit and substitute the deceased Plaintiff with Godfrey Kihuha Gichuhi.

14. The Applicant is directed to amend, file and serve the Complaint within 30 days and thereafter fix the matter for pretrial at the earliest.

15. I make no orders as to costs.

16. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2022 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Bariki holding brief for Kirimi for Plaintiff

Ms. Auma holding brief for Mr. Mungla for 1<sup>st</sup> Defendant

2<sup>nd</sup> Defendant - absent

Ms. Phyllis – Court Assistant