



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC LAND CASE NO. 30 OF 2020

ZIPPY KAVERE JUMBA.....1ST PLAINTIFF

GEORGE JUMBA.....-2ND PLAINTIFF

VERSUS

JOSEPH KIPKURGAT METTO.....-DEFENDANT

RULING

(On an Application for Amendment of Plaintiff)

THE APPLICATION

1. This is a ruling in respect to a Notice of Motion dated **04/08/2021**. The Motion was brought by the Plaintiffs, under **Order 8 Rule 3** of the **Civil Procedure Rules**. The Applicants sought the following orders:

1. That the Plaintiffs/Applicants be granted leave to amend the Plaintiff in terms of the annexed draft of the Amended Plaintiff.
2. That costs be provided for.

2. The Application was based only one ground on the face of it. The ground was that the Plaintiff's title had since been subdivided and transferred hence an amendment was necessary. It was supported by the Affidavit of one Zippy Kavere Jumba sworn on **4/08/2021**. The Affidavit basically reiterated the contents of the ground except that at paragraph 4 thereof it listed five parcel numbers which she alleged arose from the subdivision of the mother title. Although she stated in paragraph 5 that she annexed copies of the new titles and marked them as **ZKJ a, b, c, d & f (sic)** none was annexed. Further, she did not mark the copy of the draft memorandum of appeal or refer to it in the Affidavit yet she annexed thereto a copy titled "Draft Amended Plaintiff."

THE RESPONSE

3. The Respondent did not file a Replying Affidavit although through his learned counsel, he informed the Court on **21/09/2021** that he had filed a Replying Affidavit sworn by Timothy Cheruiyot on an unspecified date.

SUBMISSIONS

4. On **21/9/2021**, this Court directed the parties to dispose the Application by way of written submissions. On **2/12/2021** when the Application came up for confirmation of compliance, learned counsel holding brief for Mrs. Arunga, learned counsel for the Applicants, informed the Court that the Applicants would not be filing any submissions but rely on the contents of the Application. By the time of determining the Application, the Respondents had not filed theirs.

ANALYSIS, ISSUES AND DETERMINATION

5. Having carefully considered the Application, the grounds in support thereto together with the affidavit both in support and opposition as well as the law, and having carefully studied the record, I form the opinion that the following issues commend to me to determine:

- a) *Whether the Application is competent before the Court;*
- b) *What orders to issue, including payment of costs.*

6. On the first issue which is whether or not the Application is competent before the Court, I analyze it based on both the Court record and the facts of the case which, in my view, the parties are much aware of. This flows from the history of the suit.
7. The history of the suit is an interesting one: it shows that the file has been doing rounds in Courts by way of transfer. The suit was first filed in Eldoret High Court on **1/07/1997** by the current Applicants' learned counsel's law firm. It was registered as **Eldoret HCC No. 238 of 1997**. The parties were Zippy Kavere and George Jumba as the Plaintiffs and Joseph Metto as the Defendant. The current Respondent's learned counsel's law firm entered appearance and filed defence in it. Somehow, it was transferred to and registered as **Kitale High Court Civil Case No. 22 of 1999**. Later, on **26/07/2000** it was transferred to the High Court of Kenya at Kakamega and registered as **Kakamega HCC. 158 of 2000**.
8. Of importance and relevance to the instant issue is that on **23/03/2000**, the Court ordered by consent of the parties three more parties as Plaintiffs. What is not clear was whether or not the three parties were served and or another counsel appeared for them. But on **26/03/2015** the Plaintiffs' counsel filed a Notice of Withdrawal of Suit by which the suit was to be marked as wholly withdrawn. It was noted on the file the same date but adopted as the order of the Court on **25/06/2015** and an order thereto extracted.
9. The record shows that no step was taken between the time of 'withdrawal' of the suit up to **11/04/2019** when an agent of the firm acting for the Defendant filed and fixed for hearing of an Application dated **11/03/2019**. I have put quotes to the word withdrawal because by the date the order was made there was no suit to be withdrawn, as discussed at paragraphs **13** and **14** below. The Application was to be heard on **28/05/2019**. Of its five prayers the pertinent ones were, **(b)** an order to revive the suit and counterclaim **(c)** that the Court appoints Applicants as legal representatives of the deceased Defendant and grants them leave to assume the position of the deceased as Defendants/Plaintiffs in the Counter-claim **(d)** an order for transfer of the Suit to Kitale Environment and Land Court (ELC) for hearing and disposal.
10. It appears that the Application was not heard on the material date. It was fixed for hearing on **18/09/2019** when it was adjourned to **21/11/2019**. However, in between the two dates, parties decided to compromise the Application in part in writing by a letter dated **11/06/2019** but filed on **16/10/2019**, that the Suit be transferred to Kitale ELC and the other limbs were to be canvassed before the ELC at Kitale. When the date for the hearing of the Application came, the Judge adopted the consent as the orders of the Court and directed that the matter to be mentioned before the Judge in Kitale on **3/12/2019**.
11. Upon the transfer of the file to this Court, it lay in the Registry until **24/5/2021** when the Registry decided to fix the suit for hearing on its own motion for **14/06/2021**. On that date and the subsequent ones of **30/06/2021** and **01/07/2021** there were no appearances. On the latter date the Court again fixed the matter for **13/10/2021** and before then, the instant Application was filed.
12. Going back to the genesis of the Application dated **11/03/2019**, the Applicants deponed that the Defendant died on **6/04/2009** and the Applicants therein issued with a Certificate of Confirmation of Grant on **25/06/2015** which was annexed to the supporting Affidavit and marked as **TC 1**.
13. Two important facts emerge from the above history. One, since the Defendant died on **06/04/2009**, then in terms of Order **24 Rule 4(3)** of the **Civil Procedure Rules**, the suit against the Defendant abated exactly one year after his death since no substitution was made. It is equally important to note that where a Defendant who passes away and is not substituted within a year as contemplated by law and had a Counter-claim in the suit it too abates automatically in terms of **Order 24 Rule 3** of the **Rules** since it is viewed generally as a Plaint is in terms of procedure and status. It does not matter whether the demise of the party was brought to the attention of the Court or even the Court marked the suit at any time as abated or not. Where a suit survives a party, his death whose substitution is not made within a year or an extension of the period sought and substitution made within that extended period automatically causes the suit to abate.
14. The fact of abatement of a suit is a legal event which sets in by virtue of effluxion of time of the step to substitute the deceased. Once the death of a party whose or against whom a cause of action which survives him occurs, the clock starts ticking towards the end of the life of the suit. It stops at exactly when two things occur: one, is when substitution of the deceased is done before one year is over or the period extended by the Court comes to an end in which case the suit remains alive, or two, when one year or such period as extended by the Court elapses before substitution is made in which case the suit abates. It is an automatic occurrence that may pass unnoticed if it is not brought to the attention of the Court. If the Court is not informed of the death and time elapses, it does mean that the Suit shall not have abated. It abates irrespective of whether the Court marks it so or not. Anything done afterwards is null unless and until the Suit is revived by an order of Court.
15. In the persuasive case of *Wallace Kinuthia v Anthony Nd'ung'u Muongi & 3 others [2013] eKLR* her Ladyship Nyamweya P. J. stated "The effect of a suit that has abated is that it ceases to exist in law." She then cited the definition of abatement in the Black's Law Dictionary as being "the suspension or defeat of a pending action for a reason unrelated to the merits of the claim".
16. Similarly, in *Kenya Farmers Cooperative Union Limited vs Charles Murgor (Deceased) T/A Kaptabei Coffee Estate, (2005) e KLR* his Lordship Waweru J held:

"If a suit has abated it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time."

17. The Court of Appeal has been explicit in explaining the point in the case of *Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 Others Civil Appeal No.16 of 2015 [2015] eKLR* where it stated as follows:-

"The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff."

18. Also, while sitting in Malindi the same Court (of Appeal) in *Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 others Civil Appeal No.283 of 2015 [2017] eKLR*, stated that:

“The sequence of the application under this procedure of what should happen in case of the death of a plaintiff and the cause of action survives or continues, is plain. Speaking generally, by operation of the law, a suit will automatically abate where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within one year following his death...”

19. I am prepared to agree with the decisions of my Sisters and their Lordships of the Court of Appeal to the simple conclusion that once a suit abates, it ceases to exist and the Court need not make a specific order that that has happened. In the instant case, the Defendant died on **06/04/2009**. No substitution of him as a party was made within a year from the time of his death. Therefore, by **06/04/2010** the suit against him, and the Counterclaim he had made, if any by that time, abated. Thus, the entire suit ceased to exist. Additionally, as at the time of filing the instant Application, the Plaintiffs were aware and knew well that the suit had abated and that is why the Application dated **11/03/2019** was filed and transferred from Kakamega High Court by consent of the parties to this Court for hearing and determination. Therefore, in so far as the Application had not been finalized the suit and counterclaim stood abated and the suit non-existent. For the reasons above, the Application is filed in a non-existent suit and is incompetent.

20. The second point is that even assuming that substitution could have been made in time, which was not, the fact that the Plaintiff's Suit was marked as withdrawn on **25/06/2015**, there was no Plaint to be amended which would have necessitated the filing of the instant Application. The Plaintiff's themselves withdrew the suit and they have never applied for the variation of those orders. However, my observation and line of thought in the two preceding sentences immediate does not mean that I have by them implied that I am in agreement with the order of the Court that there was a suit to be withdrawn on **25/06/2015** when the order was made. There was none since the suit had abated six **(6)** years and two **(2)** months before then.

21. The point that becomes clear from the two paragraphs above, and which is the finding of this Court, is that the instant Application was brought in ignorance or deliberate lack of consideration of (the effect of death of a party hence) the fact that the suit had long abated before the Motion was filed. It is therefore incompetent because the Suit and by extension the Plaint it sought to amend, was non-existent by then.

b) What orders to issue, including the payment of costs

22. Given the totality of the circumstances and facts of the present Application, and the Court record, this court holds that the Applicant brought a totally incompetent Application whose merits the Court does not have to take time to discuss. In the end, the Application dated **04/08/2021** is hereby struck out with no order as to costs for the reason that the Respondent did not meaningfully participate in it.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 1ST DAY OF FEBRUARY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.