



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 155 OF 2017 (O.S)

(CONSOLIDATED WITH ELC 65 OF 2018)

IN THE MATTER OF THE REGISTERED LAND ACT,

CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT

CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT,

CAP 21 LAWS OF KENYA

MARY NJERI KABUNDI.....PLAINTIFF/APPLICANT

VERSUS

CHRISTINE MITHIRI MBUGUA.....1ST DEFENDANT/RESPONDENT

SAMUEL NAGRA KABUNDI.....2ND DEFENDANT/RESPONDENT

MABIA BENARD MBAI.....INTERESTED PARTY

RULING

The matter for determination is the Notice of Motion Application dated 29th June 2020, by the Plaintiff/Applicant seeking orders that;

- 1. That this suit be revived against the 1st Defendant herein and that the time for substitution be extended or leave for substitution be granted by the Court for such periods as this Honourable Court deems fit to grant.***
- 2. That Daniel Mwangi Mbugua, be substituted in place of the late Christine Mithiri Mbugua, the 1st Defendant herein so as to act as the Legal Representative of the late Christine Mithiri Mbugua (Deceased).***
- 3. That the third party directions be issued.***
- 4. That the Honorable Court be pleased to issue further or better orders as shall meet the ends of justice.***
- 5. That the costs be in the cause.***

The Application is premised on the grounds that **Daniel Mwangi Mbugua**, has been appointed as an **Administrator** of the Estate of the 1st Defendant and the Applicant desires that he be substituted in her place. That the 1st Defendant has since passed on and the law demands that since she has outlived the cause of action, she be substituted with Court's appointed Legal Representative. That she is a necessary party in

this cause and for the effective justice and proper administration, her **legal representative** ought to be made parties to this suit.

In her Supporting Affidavit **Mary Njeri Kabundi**, averred that the cause of action herein is still alive as it involves land ownership and proprietary interests. That it was not easy to make a substitution as the 1st Defendant's/ Respondent's Advocate was not forthcoming with information nor was he disclosing the status of the Estate, despite her endeavour to substitute. That she learnt that the 1st Defendant's Legal Representative is one **Daniel Mwangi Mbugua**, in Succession Cause No. **1439 of 2019**. That no prejudice will be suffered by the Defendants if the 1st Defendant is substituted and enjoined in the suit. That she was unable to file a **Substitution Application** in the past as parties were engaged in litigation in several Courts and the instant file had gone missing and she was unable to get the relevant documents in support of the Application.

The Application is opposed and the 1st Defendant filed grounds of Opposition dated **27th October 2020**, on the grounds that no grant of Letters of Administration has been issued as a Virtual Court Order by **Hon. Justice Ali Aroni** stopped the process in Nairobi High Court Succession Cause No. **1493 of 2019**. That the deceased having dispossessed off the suit property legally in her life time as confirmed by **Justice Nyamweya** vide a Ruling delivered on **26th May 2014**, has no residual Interest in the litigation as the cause of action is determined. That **Order 24(3) of the Civil Procedure Rules** is categorical that if no Application for substitution is made within one year after death of a Defendant, the suit is abated and there is no provision for extension of time or revival in the event of death of a Defendant. Further that **Daniel Mbugua** is not a legal Representative of the Deceased **Christine Mithiri Mbugua**.

The Interested party filed grounds of Opposition dated **10th August 2020**, and sought for the dismissal of the Application on the grounds that the **Civil Procedure Rules** do not have a provision for extension of time or revival of a suit in case of a Deceased Defendant. That the Application has been brought under irrelevant provisions of the law. Further that there is no proof that **Daniel Mwangi Mbugua**, holds a grant of letters of Administration in respect of the 1st Defendant's Estate. That the Plaintiff/ Applicant took no steps after learning of the 1st Defendant's death to ensure that the suit did not abate. Further that the Law Firm of **Andrew Loketo Kariu Advocates** is not properly on record for the Plaintiff/ Applicant.

Issac Gichia filed an Affidavit sworn on **27th October 2020**, and averred that he a son of the 1st Defendant (Deceased). That he is an Objector in Nairobi **Succession Cause No. 1493 of 2019**. That an Application dated **4th May 2020**, by Objectors in the said Succession Cause against **Daniel Mwangi Mbugua** as a Respondent and the Court issued a Ruling stopping the grant of letters of Administration until further orders of the Court. He further averred that his late mother had already sold **L.R Ndumberi/ Riabai/1705**, in a legal and proper way in her lifetime and the Application is therefore unfounded as the cause of actions against his mother is extinguished and the case abated.

The Application was canvassed with by way of written submissions which the Court has carefully read and considered and finds that the issues for determination are;

1. Whether the Court can extend time within which a Defendant can be substituted.

2. Whether the Application is merited

1. Whether the Court can extend time within which a Defendant can be substituted.

It is the Respondents contention that the time within which the 1st Defendant ought to have been substituted had already lapsed and since the Plaintiff/ Applicant had not substituted the Deceased, then the suit against the 1st Defendant had already abated and the same cannot be revived. **Order 24, Rule 4** Of the **Civil Procedure Rules** provides ;

(1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant 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 Defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased Defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased Defendant.

Further in the case of **Rebecca Mijide Mungole & another ...Vs... Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR** the Court of Appeal held that;

“Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the Plaintiff no application is made to cause the legal representative of the deceased Plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased Plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the Court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must,

first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted. The learned Judge, supported by the authority of Joseph Gachuhi Muthanji (supra) was therefore right in dealing with that aspect of the application in the manner he did.”

In this case, there is no doubt that the Plaintiff/ Applicant has sought for the extension of time within which the 1st Defendant can be substituted. It is thus the Court's considered view that the Court can extend time and for the Court to exercise the said discretion vested in it in favour of a person seeking to revive a suit that has abated, the Court must be satisfied that the applicant was prevented by a sufficient cause from continuing the suit. See the case of Rukwaro Waweru...Vs... Kinyutho Ritho & another (2015) eKLR Where 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. See H. J. Shah – versus- Ladhi Nanji w/o Haridas Vasanji & 2 others [1960] E. A. 262, Dhanesvar –versus- Manilal M Shah [1965] E. A. 321), Soni –versus- Mohan Dairy [1968] E. A. 58, and Phillips, Harrison & Crosfield Ltd – versus- Kassam [1982] K.L.R. 458.”

The Court therefore finds and holds that the Court can extend time within which a Deceased Defendant can be substituted, if a prayer for the extension of time is first sought and if sufficient cause has been shown to warrant the Court exercise its discretion and extend time.

2. Whether the Application is merited

The Plaintiff/ Applicant has sought for leave to substitute the 1st Defendant with her personal representative. It is not in doubt that the 1st Defendant died in 2017, and the suit has abated, against her. The Court must then be satisfied that the Plaintiff/ Applicant has given sufficient reason to warrant extension of time.

It is the Plaintiff/ Applicant's contention that she was unable to substitute the 1st Defendant on time as she did not have the proper documentations to file the Application. Further that her efforts to get the Deceased's personal representative from her Advocates have not borne any fruits and that she only filed the instant Application after getting information that one **Daniel Mwangi Mbugua**, had been appointed the personal representative.

The Court has seen the letter dated 29th March 2019, from the Plaintiff's/ Applicant's Advocate seeking information from the 1st Defendant's Advocate on the issue of the Deceased's representation. The Court has further seen the letter dated 3rd April 2019, from the Deceased's Advocate indicating that they did not have the necessary information as to who was the personal representative of the Deceased's Estate. The Court is thus satisfied that without the information on who is the personal representative, there is no way that the Plaintiff/ Applicant could substitute the 1st Defendant. Therefore this Court finds that sufficient cause has been given to warrant the extension of time within which to allow for the substitution of the 1st Defendant.

The Court further notes that the 1st Defendant's (Deceased's) Estate 'Advocates have filed grounds of opposition. The said Advocates have indicated that the person the Plaintiff/ Applicant is seeking to substitute the 1st Defendant with is not a personal representative to the said Estate as the Gazette Notice was only an intention to grant representation and that the Court has also stopped the granting of the said Grant. The Court concurs with the Plaintiff/ Applicant that the said Firm of Advocates would then have no instructions to file the grounds of opposition and or appear in the instant suit as there would be no instructing client as a Deceased's Estate can only be represented by their personal representative.

Be it as it may, the Plaintiff/ Applicant has sought for the substitution of the 1st Defendant's with her alleged personal representative one **Daniel Mwangi Mbugua**. The Court has seen the Ruling by Hon. Justice Ali Aroni in which the Court stopped the grant of letters to the said Personal Representative. Further the Gazette Notice produced in evidence only states that there are Applications for grant of letters and not grant itself. It is not in doubt that it is within the jurisdiction of the Succession Court to grant Letters of Administration, as this Court is not vested with the said jurisdiction. The Court clothed with the said jurisdiction having stayed the granting of such Letters of Administration and there being no evidence that the said **Daniel Mwangi Mbugua** was granted the said Letters of Administration, this Court can therefore not ignore the said information and allow the substitution. In as much as this Court is satisfied that the Plaintiff/ Applicant has shown sufficient cause within which the Court ought to extend the time for substitution, the person the Plaintiff/ Applicant is seeking to substitute the 1st Defendant with at this time cannot be substituted.

Consequently, the Court finds and holds that the Application is partially merited in so far as it seek for the extension of time to substitute the 1st Defendant. However in so far as the same is to substitute the 1st Defendant with **Daniel Mwangi Mbugua**, the same has no merit. The Court further recognizes that there are various steps that the Plaintiff/ Applicant would need to take to substitute the 1st Defendant with a bonafide personal representative.

The Court therefore makes the following orders;

1. That the Court allows the extension of time to substitute the 1st Defendant.

2. The Plaintiff/ Applicant to take the necessary steps that would lawfully allow her to substitute the 1st Defendant within 8 months.

3. Costs of this Application will be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 10TH DAY OF JUNE 2021.

L. GACHERU

JUDGE

10/6/2021

Court Assistant - Dominic

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Kariu for the Plaintiff/Applicant

M/s Wanjiru holding brief for Mr. Njuguna for the 1st Defendant/ Respondent

M/s Njue holding brief for Mr. Njeru for the 2nd Defendant/Respondent

L. GACHERU

JUDGE

10/6/2021