



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL CASE NO. 41 'A' OF 2010.

JUDITH WAHU GACHUKIA (Suing

As the Administratrix of the Estate of

The late GEORGE GACHUKA MUHUNGI).....PLAINTIFF

VERSUS

MONICA WARUGURU GACHUKIA.....DEFENDANT

R U L I N G

JUDITH WAHU GACHUKIA (the plaintiff herein and now deceased) filed this suit on 13th April 2010 in her capacity as the Administratrix of the Estate of **GEORGE GACHUKA MUHUNGI** and sought various orders against **MONICA WARUGURU GACHUKIA** (the defendant herein) in respect to the land parcels **NO BUNGOMA/KIMININI/1156, 1155, 1154, 1153 and 1152**. A defence was filed to the claim but when the suit came up for hearing on 19th October 2017, **MR SICHANGI** Counsel for the plaintiff informed the Court that the plaintiff had passed away sometime in September 2017. He sought time to have the deceased plaintiff substituted and the Court granted the application and listed the case for mention on 7th February 2018. However, the Court did not sit on that day.

On 19th March 2018 the Court was informed that the deceased plaintiff had not yet been substituted. **MUKUNYA J** then made the following order: -

“This case is now seven years old. It should not delay any further. The last time the case was in Court and an adjournment for substitution was allowed was on 19.10.2017. This is six months ago. The delay is inordinate. The plaintiff is granted 21 days to file his application for substitution failing which this suit shall be dismissed on application by the defendant.

It is so ordered.”

To – date, the deceased plaintiff has not yet been substituted.

By an application dated 9th March 2019 and which is the subject of this ruling, the defendant seeks the following orders: -

- 1. That the plaintiff’s suit be marked as having abated and the injunction order earlier granted be vacated.**
- 2. That the costs of this suit and the application be borne by the plaintiff’s Estate.**

The application is premised on the provisions of **Order 24 Rule 3** of the **Civil Procedure Rules** and on the grounds set out therein. It is also supported by the defendant’s affidavit dated 9th March 2019.

The gist of the application is that when the suit came up for hearing on 19th October 2017, the Court was informed that the plaintiff had died a month earlier and on 19th March 2018, the Court allowed 21 days for the deceased plaintiff to be substituted. However, the plaintiff’s Counsel has not taken any step towards substituting the deceased plaintiff. The pendency of this suit is prejudicial to the defendant and is causing her great anxiety.

When the application was placed before me on 15th April 2020, I directed that it be served upon the Counsel for the plaintiff together with written submissions within 10 days. I further directed that Counsel for the plaintiff would then have 10 days within which to file the response and submissions after which the matter would be mentioned on 6th July 2020 to confirm compliance and take a date for ruling. However, only Counsel for the defendant filed submissions. No reply was filed by Counsel for the plaintiff. The application is therefore not opposed.

I have considered the application and also perused the record herein. It is clear from the record that on 1st November 2011, **MUCHELULE J** granted the plaintiff an order of temporary injunction restraining the defendant by herself, her servants or agents from evicting the plaintiff from the land parcels **NO BUNGOMA/KIMININI/1156, 1155, 1154, 1153 and 1152** pending the hearing of the suit. That order was granted following the plaintiff's application dated 22nd September 2011 and brought pursuant to the provisions of **Order 40 Rules 1 and 4 of the Civil Procedure Rules**. That order for temporary injunction could only last for 12 months unless otherwise extended by the Court. It therefore lapsed on 1st November 2012 because this suit is yet to be heard and determined and the order for temporary injunction was never extended. This is because **Order 42 Rule 6** of the **Civil Procedure Rules** provides that: -

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the Court orders otherwise.”
Emphasis added.

Therefore, the order of temporary injunction issued by **MUCHELULE J** on 1st November 2011 automatically lapsed by operation of the law on 1st November 2012 since it was never extended and the suit has not been heard. There is therefore no order existing capable of being vacated. The term lapse is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as: -

“The termination of a right or privilege because of a failure to exercise it within some time limit or because a contingency has occurred or not occurred.”

Since the order of temporary injunction was terminated by law, there is nothing to vacate. That prayer is therefore superfluous.

The other prayer is for this suit to be marked as abated. **Order 24 Rule 3(1) and (2)** provides as follows: -

3(1) “Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or 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, and, on the application of the defendants, the Court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.

Provided the Court may, for good reason on application, extend the time.” Emphasis added.

When the matter was mentioned on 19th October 2017, **MR SICHANGI** for the plaintiff informed the Court that the plaintiff ***“passed on sometimes last month.”*** That means that the plaintiff passed on in September 2017 and therefore by September 2018, this suit had abated because no substitution had been made and even as at now, some four (4) years after the plaintiff's death, she has not been substituted. This suit has therefore abated.

With regard to costs, the record shows that when the parties appeared before **MUKUNYA J** on 23rd May 2016, he observed that ***“this is a family dispute and can be settled.”*** The Judge then gave the parties upto 27th June 2016 to try an out of Court settlement. In the circumstances, since the parties are family, there shall be no orders as to costs.

The up – shot of the above is that the Notice of Motion dated 9th March 2019 is allowed. There shall be no orders as to costs.

Boaz N. Olao.

J U D G E

3rd June 2021.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 3RD DAY OF JUNE 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

Boaz N. Olao.

J U D G E

3rd June 2021.