REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO. 201 OF 2017

JOSHUA CHEGENJOROGE.....PLAINTIFF

VERSUS

ANN WANJIRUMWAURA.....1ST DEFENDANT

VIRGINIA WAMBUIMWAURA .....2ND DEFENDANT

RULING

A. INTRODUCTION

1. By a plaint dated 6th May, 2015 the original Plaintiff, Joshua ChegeNjoroge*(the deceased)* sought the following reliefs against the Defendants:

> *(a) A permanent injunction restraining the Defendants, their servants and or agents from interfering with the Plaintiff's parcel of land known as Nyandarua/Ol'kalou South/1483.*
>
> *(b) An order to quash the orders issued in Nyahururu SPM Succession Cause Number 119 of 2010.*
>
> *(c) The title issued to the Defendants for parcel number Nyandarua/Ol'kalou South/1483 be cancelled and registered in the name of the Plaintiff.*
>
> *(d) Costs of this suit.*
>
> *(e) Any other relief that this honourable court shall deem fit and* just grant.

2. The deceased pleaded that he was the rightful owner of all that portion of land known as OlKalou South Scheme 33 by reason of being the administrator of the estate of the late Wilson NjorogeChege. It was further pleaded that the Defendants had through fraud and misrepresentation hived off a portion of 3 acres out of the said property which was then registered as Title No. Nyandarua/Olkalou South/1483 *(parcel 1483).* It was further pleaded that despite demand and notice of intention to sue, the Defendants had failed to make amends hence the suit.

3. The material on record indicates that the deceased died before the hearing and conclusion of the suit hence the current Applicant sought to be substituted as the Plaintiff. By orders dated 18th July, 2018 and 15th October, 2019 the court declared that the suit had abated since no application for substitution of the deceased was made within one year from the date of his demise. The court file was consequently closed.

B. THE APPLICANT'S INSTANT APPLICATION

4. By an application dated 10th February, 2021 which was not expressed to be based upon any particular provisions of the law, the Applicant sought to be substituted as the Plaintiff in place of the deceased since he had obtained a limited grant *ad litem*. The application was not supported by any affidavit even though a copy of the limited grant to the estate of Wilson NjorogeChege issued on 25th January, 2021 was attached thereto.

C. THE DEFENDANTS' RESPONSE

5. The Defendants filed a replying affidavit sworn by the 1st Defendant Ann WanjiruMwaura, on 23rd April, 2021 in opposition to the application. It was contended that the deceased died on 14th December, 2016 and that the suit had long abated as declared by the court on 15th October, 2019. It was contended that the instant application could not be validly entertained in an abated suit and closed file. The Defendants further contended that the application was incompetent, defective and bad in law as it was not supported by a supporting affidavit as required by law.

6. The Defendants also filed a notice of preliminary objection dated 18th May, 2021 challenging the propriety of the said application. It was contended that the application was incompetent and bad in law since it was not supported by an affidavit and that it did not specify the provisions of the law under which it was grounded. The court was consequently urged to strike out the application.

D. THE SUBMISSIONS OF THE PARTIES

7. The record shows that the said application was canvassed orally by the parties who were all acting in person. The Applicant submitted that he was entitled to be substituted as the Plaintiff in place of the deceased since he had been issued with a limited grant *ad litem* to enable him prosecute the suit. He conceded that the deceased died in 2016 during the pendency of the suit.

8. The Defendants, on the other hand, opposed the application on the basis of the grounds set out in their notice of preliminary objection dated 18th May, 2021 and their replying affidavit. They submitted that the application for substitution had no merit since the suit had already abated and a declaration to that effect made by the court on 15th October, 2019. It was their submission that in the absence of an application for revival of the suit the instant application was a non-starter which ought to be dismissed with costs.

E. THE ISSUES FOR DETERMINATION

9. The court has perused the Applicant's application for substitution, the Defendants' preliminary objection and replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:

(a) Whether the application for substitution is defective, incompetent and bad in law.

(b) Whether the suit has abated and, if so, what is the consequence thereof.

(c) Whether the Applicant is entitled to the order for substitution sought.

(d) Who shall bear costs of the application.

F. ANALYSIS AND DETERMINATION

(a) Whether the application for substitution is defective, incompetent and bad in law

10. The court has considered the material and submissions on record

on this issue. The Defendants submitted that the application was not supported by an affidavit and that it was not based upon any specific provisions of the law hence it was defective, incompetent and bad in law. Although the Defendants did not cite any specific provisions of the law in support of their submissions, it is evident that one of the relevant provisions on the form of an application is contained in **Order 51 rule 10(1) of the Civil Procedure Rules *(the Rules)*** which stipulates as follows:

> **"Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."**

11. The court is thus not satisfied that the failure by the Applicant to identify the specific provisions of the law upon which his application was based is fatal. The court is further of the opinion that such omission is curable by virtue of **Section 19(2) of the Environment and Land Court Act 2011 and Article 159(2)(d) of the Constitution of Kenya** which obligates the court to disperse justice without undue regard to procedural technicalities.

12. The court is, however, of a different opinion regarding the failure by the Applicant to file an affidavit in support of his application. The court is satisfied that an application for substitution requires to be supported by a statement of evidence to enable the court determine whether or not the Applicant has satisfied the requirements for substitution under **Order 24 of Rules**. The court consequently agrees with the Defendants' submissions that in the absence of a supporting affidavit, the application is not backed by any evidentiary basis.It is an application simply hanging in the air and without legs to stand on. It is a perfect candidate for striking out as incompetent and bad in law.

(b) Whether the suit has abated and, if so, what is the consequence thereof

13. The court has considered the material and submissions on record on this issue. There is no dispute that the deceased died in 2016. There is also no dispute that no application for substitution was made within one year from the date of his demise. Equally not in dispute is the fact that on 18th July, 2018 and 15th October, 2019 the court declared that the suit had already abated and ordered closure of the court file.

14. The issue of death, substitution of parties, and abatement of suits is governed by **Order 24of the Rules**.**Order 24 rule 3of the Rules** stipulates as follows:

> **"(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 subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, 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."**

15. The court is of the opinion that the suit herein abated on 14th December, 2017, that is, one year after the death of the deceased since no application for substitution was made within the prescribed period. The Applicant has also never applied for extension of time within which to file the application. The suit simply abated by operation of law and no application for revival of the suit has been made so far.

16. In the case of **Rebecca MijideMungole and Another v Kenya Power and Lighting Company Limited and 2 Others [2017] eKLR** the Court of Appeal dealt with a similar situation and held, *inter alia*, that:

> *"The sequence of the application under this procedure of what should happen in case of the death of aplaintiff 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. According to* **rule 3(2) the defendant is only required to apply for an award of costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff. But as was observed by this Court in Said Sweilam (supra) the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience, an order of the court is necessary for a final and effectual disposal of the suit.**
>
> *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 …"*

17. The court is thus of the opinion that the suit herein has long abated and that it only be revived in the manner prescribed by law and not otherwise. Accordingly, the court concurs with the Defendants' submissions that the suit having abated several years ago there is no pending suit in which the Applicant can be substituted as Plaintiff. The suit is basically as good as dead hence the application for substitution dated 10th February, 2021 has no legs to stand on.

It is incompetent and must inevitably fail.

(c) Whether the Applicant is entitled to the order for substitution sought

18. The court has already found that the application for substitution is defective, bad in law and incompetent. The court has also found that the suit has abated and that there is no application for enlargement of time and revival of the suit. It would, therefore, follow that the Plaintiff is not entitled to the order for substitution sought in the application.

(d) Who shall bear the costs of the application

19. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21).** A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed& Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court finds no good reason why the successful litigants should not be awarded costs of the application. Accordingly, the Defendants shall be awarded costs of the application.

20. The upshot of the foregoing is that the court finds no merit in the Applicant's application for substitution dated 10th February, 2021. Accordingly, the same is hereby dismissed with costs to the Defendants.

It is so ordered.

Ruling dated and **signed** in chambers at**Nyeri**and **delivered**via Microsoft Teams platformthis **29th**day of **July 2021.**

In the presence of:

No appearance for the Applicant

No appearance for the Defendants

Court assistant - Wario

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Y. M. ANGIMA

ELC JUDGE