



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 114 OF 2016

ANNANCIATA MBITHE MUIA (*Suing as the personal representative of the Estate of*

LUCY NTHENYA MUIA (deceased).....**PLAINTIFF**

VERSUS

PETER NICHOLAS MUTUKU.....**1ST DEFENDANT**

STELLAMARIES NZILANI MUTUKU.....**2ND DEFENDANT**

KANGUNDO FARMING AND RANCHING COMPANY LIMITED....**3RD DEFENDANT**

VIRGINIA NGITA.....**4TH DEFENDANT**

PAUL M. MALU.....**5TH DEFENDANT**

RULING

1. This Ruling is in respect to a Notice of Preliminary Objection dated 17th October, 2019 in which the Defendants have averred that the court has no jurisdiction to hear and determine this suit; that the suit offends the provisions of Order 24 Rules 3 and 7 of the Civil Procedure Rules as the deceased Lucy Nthenya had filed Machakos Civil Suit No. 181 of 2010 as against the Defendants before her demise and that the suit should be dismissed with costs.
2. The Plaintiff filed a reply to the Preliminary Objection dated 7th February, 2020 in which she averred that the suit was proper as it was to determine ownership of the suit property being Ndithini/Mananja Block 5/55 and which could only be adequately and exhaustively determined by a court of law after giving each party a right to be heard.
3. The Plaintiff averred that this court has jurisdiction to hear and determine this matter as it has original jurisdiction to hear and determine all disputes relating to the environment and the use and occupation of and title to land and that the dispute pertains to a dispute relating to the title to land between the Plaintiff and the 1st, 2nd, 3rd, 4th and 5th Defendants.
4. It was averred that the Plaintiff herein could not have proceeded with Machakos Civil Suit No. 181 of 2010 as alleged because the circumstances of the dispute had changed since the deceased Plaintiff filed the previous suit and that the suit land had now been surveyed and Title Deeds issued to individual names contrary to the previous suit where the land had only been sub-divided and members given plot numbers by Kangundo Farming and Ranching Society Company.
5. The Plaintiff averred that the provisions of Order 24 Rules 3 and 7 of the Civil Procedure Rules relate to a suit which had the same parties as opposed to this suit where the Plaintiff had now sued different Defendants; that the Plaintiff in the earlier suit had specifically prayed to have the 4th Defendant and one Laban Kitale Maingi restrained from trespassing into the deceased Plaintiff's land and that in the present suit, the Plaintiff had brought in four (4) more Defendants who aided in the unlawful registration of the suit property.
6. The Preliminary Objection was canvassed by way of written submissions. Counsel for the Defendants submitted that when a Plaintiff dies, no fresh suit can be filed and one must make an Application for substitution within one (1) year and in default, the suit will abate as against the deceased Plaintiff
7. Counsel relied on the case of *Kenya Farmers' Cooperative Union Ltd. vs. Charles Murgor (deceased) t/a Kapsabet Coffee Estate*

(2005) eKLR where the court held that a court of law had no jurisdiction to order for substitution where the suit had already abated by operation of the law or hear or determine a suit that had already abated by operation of law.

8. It was submitted that under Order 24 Rule 3 of the Civil Procedure Rules, the suit having abated, the only remedy in law available to the Plaintiff herein was to apply for revival of the abated suit under Rule 7(2) of Order 24 of the Civil Procedure Rules and that the instant fresh suit was filed in 2016 in total disregard of Order 24 Rule 7 of the Civil Procedure Rules.

9. Counsel submitted that where a suit abates, no fresh suit could be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented and that the instant suit should be dismissed with costs for contravening Order 24 of the Civil Procedure Rules.

10. On the other hand, counsel for the Plaintiff submitted that under Section 82(a) of the Law of Succession Act, personal representatives shall, subject only to any limitation imposed by their grant, have the powers to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arise out of his death.

11. Counsel submitted that the Plaintiff herein had the power to file this instant suit to protect the Estate's property which the Defendants had jointly conspired to deprive the Estate by having it registered in the names of the 1st and 2nd Defendants and who purport to hold it in trust for the 4th and 5th Defendants.

12. It was submitted that the provisions of Order 24 Rule 3 of the Civil Procedure Rules only apply where the cause of action, facts and the parties sued were the same/similar as the previous suit filed by the deceased Plaintiff and that Machakos Civil Suit No. 181 of 2010, filed by the deceased Plaintiff, was specifically filed on the basis that the Defendants in that suit were trespassing onto her land.

13. This suit was commenced vide a Plaint dated 15th September, 2016. In the Plaint, the Plaintiff described himself as the personal representative of the Estate of Lucy Nthenya Muia. The Plaintiff has sought for the following orders:

a) A declaration order that the 1st Defendant made a false resolution to allocate himself the parcel of land known as Plot No. 44 thus, depriving the Plaintiff's deceased mother the portion of 10.177 acres on the parcel of land known as Plot No. 44 and the said resolution should be declared as null and void.

b) A declaration order that the subsequent transfer of Plot No. 44 to the 1st and 2nd Defendants and the further transfer that followed to the 4th and 5th Defendants are null and void since it was based on a fake resolution.

c) An order of injunction against the Defendants, their agents or servants from entering, trespassing, cultivating, selling or transferring or charging the parcel of land known as Ndithini/Majanja Block 5/44 originally property of Kangundo Farming and Ranching Company Ltd or any further sub-divisions of the said parcel of land be issued until the suit is heard and determined.

d) An order of permanent injunction be issued against the Defendants and their agents or servants from entering, trespassing or remaining or cultivating or damaging the crops of the Plaintiff or interfere with the portion of the Plaintiff's measuring 10.177 acres which the deceased was in possession and occupation.

e) An order declaring and directing the Defendants to cooperate to have the parcel of land known as Plot No. 44 be re-transferred back to the 3rd Defendant so that the plot can be returned to the Plaintiff and the other two beneficiaries and in default the Deputy Registrar of the court to sign all the necessary transfer including the consent of the Land Control Board or alternatively the District Land Registrar be ordered to cancel the transfers and revert the land to the 3rd Defendant.

f) The Defendants be ordered to pay the cost of the suit.

g) Any other relief that the Court deems fit and just to grant.

14. The Plaintiff has averred in the Plaint that there have been no previous or pending suits in court between the same parties in respect to the suit property. According to the Defendant, this court has no jurisdiction to hear and determine this suit; that the suit offends the provisions of Order 24 Rules 3 and 7 of the Civil Procedure Rules as the deceased Lucy Nthenya had filed Machakos Civil Suit No. 181 of 2010 as against the Defendants before her demise and that the suit should be dismissed with costs.

15. Order 24 Rule 3(1) of the Civil Procedure Rules provides as follows:

“(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.”

16. On the other hand, Order 24 Rule 4(2) and (3) provides as follows:

“(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 sub rule (1), the suit shall abate as against the deceased defendant.”

17. Where a suit has abated, the only remedy in law available to the Plaintiff is to apply for revival of the abated suit under Rule 7(2) of Order 24 of the Civil Procedure Rules and not to file a fresh suit. Although the Defendants’ advocate submitted that the deceased, Lucy Nthenya, had filed Machakos Civil Suit No. 181 of 2010 as against the Defendants before her demise and that the said suit raised the same issues as those that have been raised in the current suit, the said Plaintiff has not been exhibited by the Defendants.

18. Indeed, the claim by the Defendants should have been raised by way of an Application, which would have enabled the parties to annex the pleadings in Machakos Civil Suit No. 181 of 2010. Having not done so, this court is unable to determine if indeed the current suit is similar to the suit that has abated.

19. That being the case, it is my finding that the Notice of Preliminary Objection dated 17th October, 2019 is incompetent. The Notice of Preliminary Objection is struck out with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF JULY, 2021

O.A. ANGOTE

JUDGE