



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC NO. 68 OF 2018

KALONDU KYAMBO (Suing in her capacity as the legal representative of the estate of

Kyambo Ngata (deceased).....PLAINTIFF

-VERSUS-

PETER WANJOHI KAMAU (SUED AS THE LIQUIDATOR OF DRUMVILE FARMERS

CO-OPERATIVE SOCIETY LIMITED.....1ST DEFENDANT

TIMOTHY MATHEKA KIVOLA ALIAS TIMOTHY MATHEKA KIVULA....2ND DEFENDANT

-AND-

ALBERT ATHANAS MAKAU KYAMBO.....INTERESTED PARTY

-AND-

BERNARD MUTINDA MATHEKA.....APPLICANT

RULING

INTRODUCTION

1. Vide the Notice of Motion dated 7th June 2021, the Applicant is seeking for the following orders;

1. That the suit herein be marked as abated as against the 2nd Defendant.

2. That in the alternative to prayer 1 above, this Honourable court be pleased to substitute the deceased 2nd Defendant with his administrator/applicant BERNARD MUTINDA MATHEKA.

3. That the costs of this application be in the cause.

2. The application is premised on grounds that the 2nd Defendant died on 18/12/2018 and the Applicant has obtained letters of administration *ad litem* for the estate of the 2nd Defendant, and therefore, it is only fair that in the interests of justice, the application be allowed. The application is supported by the Affidavit of the Applicant sworn on 7th June 2021.

3. The Applicant deponed that he is the administrator of the estate of the 2nd Defendant Timothy Matheka Kivula, now deceased; that the 2nd Defendant died way back in 18/12/2018 and prayed that this suit be marked as abated against the 2nd Defendant.

4. It is the Applicants prayer and disposition that in the event the honourable court does not grant his prayer to have the suit as against the 2nd Defendant marked as abated, he sought to substitute the Defendant with himself being his administrator.

5. In response, the Plaintiff filed a Replying Affidavit sworn on 20/09/2021 and stated that he had been in the process of identifying the

rightful beneficiaries of the 2nd Defendant's estate for purposes of substitution to no avail; that the subject matter in the suit herein is land and the cause of action herein survives the 2nd Defendant.

6. He deponed that he was desirous with continuing with the suit herein as against the Deceased 2nd Defendant; He deponed that the Application dated 7/06/2021 can be allowed in terms of prayer No. 2.

ANALYSIS AND FINDINGS:

7. I have considered the Application and response by counsel. In my considered opinion the only issue that arises for determination is whether the court should substitute the deceased 2nd Defendant with the Applicant/Administrator BENARD MUTINDA MATHEKA.

8. Order 24 rule 4 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.

(2)

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

9. On whether this court can substitute the deceased 2nd Defendant with the Applicant, legally one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. Section 2 of the Civil Procedure Act defines a legal representative as follows;

“means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”

10. The Applicant has duly attached herein the Grant of Letters of Administration *Ad Litem* which were issued to him on 22nd October 2020. I am therefore convinced that the Applicant has the requisite capacity to represent the estate of the 2nd Defendant, as the legal representative thereof.

11. The 2nd Defendant died on 18th December 2018, therefore, by dint of order 24 Rule 3, the suit as against his estate abated a year later. In **Kenya Farmers' Cooperative Union Ltd. Vs. Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) e KLR**, the Court held that a Court of law has no jurisdiction to order for substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of the law. However, under Order 24 Rule 3 (2), this Court has jurisdiction to extend that period if there is good reason. In the case of **Rebecca Mijide Mungole & Ano. v Kenya Power & Lighting Company Ltd & 2 Others [2017] e KLR**, the court of Appeal held that where a suit has abated, it is only after time has been extended that a substitution can be granted, and that orders for extension of time and substitution can be made simultaneously.

12. The Plaintiff has deponed that his attempts to identify the rightful beneficiaries of the 2nd Defendant's estate for purposes of substitution have been unsuccessful. This position, coupled with the fact that obtaining grant of representation involves a court process, I find that substitution could not have been done immediately. In the interest of justice, I therefore extend the period for substitution of the deceased 2nd Defendant.

13. I have also noted that the Plaintiff's Counsel has not objected to the substitution and both parties are in agreement that it is in the interest of justice that substitution be done.

14. The upshot is that the application dated 7th June, 2021 is allowed as follows; -

a. The deceased 2nd Defendant is substituted with the Applicant BERNARD MUTINDA MATHEKA

b. Both Parties to file and serve amended pleadings within 45 days of this ruling.

c. Costs of this application shall be in the cause.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 25TH OCTOBER, 2021

A. NYUKURI

JUDGE