REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT KERICHO

ELC NO. 2 OF 2018

ELIJAH CHEPKWONY CHIRCHIR

(Suing Administrator on behalf of the estate of

KIPCHIRCHIR ARAP MAINA (Deceased).....PLAINTIFF

VERSUS

JOEL KIPRONO ROP & OTHERS.....DEFENDANTS/RESPONDENTS

RULING

1. The Plaintiff Applicant in his application dated the 18th February 2021 brought under the provisions of Order 24 rule 3 and Order 51(sic), Section 3A of the Civil Procedure Act and all other enabling provisions of the law sought a myriad of orders to wit;

i. That he be enjoined (sic) as the legal representative of the Plaintiff in the suit.

ii. That the suit be revived for purpose of being heard on merits.

iii. That the annexed amended plaint be treated as his statement of claim and that the same be deemed as having been duly filed and served.

iv. He also sought that the Defendant/Respondent be at liberty to file a defence if he so wished and that the cost of the application to be in cause.

2. The said application was supported by the grounds therein as well as by a supporting affidavit of Evans Kiprotich Cheruiyot dated the 18th February 2021.

3. The Defendant/Respondent objected to the Plaintiff/Applicant's application via his notice of Preliminary Objection dated 23rd February 2021 for reasons that it was defective, bad in law, incompetent and misconceived. Further, that it offended the provisions of Section 82 of the Law of Succession Act in that it had been brought by a person with no authority to act for the estate of Kipchirchir Arap Maina (deceased). The Respondent thus sought that the application be dismissed in the first instance with costs for being an abuse of the court process.

4. The Court directed that both the applications be heard through written submission to which both parties complied.

The Applicant's submissions

5. The Applicant submitted that the Defendant/Respondent's Preliminary Objection was geared towards an attempt to bring the matter to an immature completion other than have it heard on merit. That the Respondents were relying on a void transaction/agreement having bought the suit land from the sons of the deceased who had died several years ago and for which no succession proceedings had been filed as contemplated by Sections 45 and 55 of the Law of Succession Act. That the Respondents were bound to fail in whichever forum and therefore were bent to misuse the court powers to sanction that which was not salvageable in law.

6. The Applicants framed their issues for determination as follows:

i. Whether or not the Applicant can be joined to substitute the late Elijah Chepkwony Chirchir.

ii. Whether or not the matter can be revived.

7. On the first issue for determination, it was the Applicant's submission that he had sought to be joined in place of the deceased after seeking letters of administration ad litem to represent the interests of the deceased Plaintiff as per the provisions of the law. That it was trite law that where a suit abated, the legal representative of the deceased Plaintiff would apply for the abated suit to be revived after satisfying the court that he was prevented by a sufficient cause from continuing with the suit. That he had the necessary legal capacity as contemplated by the law to substitute the deceased in this matter. He relied on the decided case of **Peter Mbuthia Kamore vs Macharia Kamore & Another Nyeri ELC No. 38 of 2016** to buttress his submission.

8. The Applicant also relied on the provisions of Section 1A and 1B of the Civil Procedure Act to submit that the court should consider the overriding objective of those provisions which was to facilitate the just, expeditious, proportionate and affordable solution of civil disputes. That the overriding objective of this court therefore ought to be the revival of the suit so as to allow parties to ventilate their case for the court to determine the same on its own merit. That the court should not allow technical applications, geared towards deriving the determination of the matter, to stand.

9. That indeed the Plaintiff herein died on the 20th June 2019 wherein pursuant to the provisions of Order 24 Rule 7(2) (sic), he being the legal representative of the deceased applied for an order to revive the suit which had abated or to set aside the order of dismissal, and thereafter, the court to make orders it deemed fit.

10. That the provisions of Order 45(sic) also allowed any person, being aggrieved by the orders of the court or Decree, to apply to the court to review the said order/or decree, upon demonstrating that he had discovered new and important matter or evidence, after the exercise of due diligence, which was not within his knowledge or could not be produced by him at the time the Decree was passed or the order made. That the court's main concern was to do justice to parties and not to impose conditions on itself or fetter the wide discretion given by the rules.

11. On the second issue of determination as to whether or not the court should revive the suit, the Applicant submitted that the Plaintiff died on 20th June 2019 a few days after the ruling which had underlying conditions to be fulfilled by the Plaintiff had been delivered. These conditions included throw away costs of Ksh. 30,000/- which could not be fulfilled during the Plaintiff's lifetime. The application to substitute the deceased Plaintiff therefore was thus geared to getting a person with the mandate to fulfill the said conditions and thereafter prosecute this matter to its logical conclusion.

12. The Applicant's submission was that the Preliminary Objection raised by the Respondent at this junction was dishonest, tainted with guilt and calculated to delay the hearing and determination of the matter on its merits.

13. That the delay in substituting the deceased Plaintiff was excusable the same having come at the time when the corona pandemic had hit the country and courts had to downscaled their operations. That after the court had resumed its operation the Applicant had endeavored to file the necessary application since the Respondents had not filed any application to dismiss the suit as required.

14. The Applicant asked the court to allow its application on substitution and revival of the suit and thereafter set the matter down for hearing.

The Respondents' the submissions.

15. In support of their a preliminary objection, the Respondents' submission whilst giving a brief history of the matter in question was that the deceased Plaintiff's suit initially brought vide a plaint dated the 5th January 2018 was struck out with cost vide a ruling delivered on the 14th March 2019 for having been brought by a person who had no locus standi.

16. The deceased Plaintiff then filed an application dated 26th March 2019 seeking for a review of the court's order wherein the honorable court reluctantly allowed the application on condition that the deceased Plaintiff pays throw away costs of Ksh. 30,000/= shillings as well as the costs of the application. The deceased Plaintiff never complied with these orders.

17. On 1st July 2019, the court was informed of the Plaintiff's passing away wherein it directed that he be substituted forthwith. The deceased Plaintiff's Counsel went to slumber until the 18th February 2021 when the Applicant filed the instant application seeking to resuscitate the suit, which had abated more than 18 months prior. The Respondents' submission is that the instant application has been filed by one Evans Kiprotich Cheruiyot who does not have a grant to represent the estate of the deceased Kipcirchir Arap Maina and whose relationship with the deceased was never disclosed.

18. Their Preliminary Objection is that the Applicant, Evans Kiprotich Cheruiyot does not have the capacity to act on behalf of the estate of the deceased Kipcirchir Arap Maina as he has not obtained the letters of grant of representation as provided for under Section 82 and Section 3(sic).

19. The Defendants/Respondents further submitted that their Preliminary Objection had met the threshold set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** in that the same did not require any further interrogation of the facts. That the suit parcel of land in contention L.R No. Kericho/Kabartegan/438 is registered in the name of the deceased Kipcirchir Arap Maina. That after the suit had been revived and upon the death of the Plaintiff Elijah Chepkwony Chirchir, it was upon the estate of the said deceased, Kipcirchir Arap Maina to elect a person to represent the estate. That the letters of administration held by the Applicant and annexed to the present application was limited to the estate of Elijah Chepkwony Chirchir and not Kipcirchir Arap Maina in whose name the suit land is registered and therefore the Applicant cannot purport to have the authority to act on behalf of the estate of the late Kipcirchir Arap Maina as he has no locus standi. The Respondents relied on several decided cases to buttress their submissions in support of the fact that the Applicant had no capacity to act on behalf of the deceased Kipcirchir Arap Maina and could not stand the test of law. They sought for their Preliminary Objection to be allowed.

20. In opposition to the Applicant's application dated 18th February 2021, the Respondents submitted that the Applicant's supporting affidavit did not contain any cogent reasons or grounds to persuade the court to exercise its discretion.

21. That for the said application, which was made under Order 24 rule 3 of the Civil Procedure Rules, to be allowed, there ought to have been three stages that must be satisfied as was held by the Court of Appeal in its decision in the case of **Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 Others [2015] eKLR**.

22. That it was not in dispute that the Plaintiff Elijah Chepkwony Chirchir passed away on 20th June 2019 wherein on 1st of July 2019, the court made an order for him to be substituted. By operation of the law, the suit abated on 20th June 2020 and therefore there is no suit before court.

23. In reliance with the provisions of Order 24 rule 3(2) (sic) no good reason had been advanced by the Applicant to warrant the court to exercise its discretion and extend time to file the application. And even if there was such good cause, the Applicant did not have the capacity to bring the present application. The letters of administration herein annexed (which do not relate to this matter) having been granted on 21st February 2020, no explanation had been given as to why the Applicant did not file the present application for substitution back then.

24. The Applicant was seeking to be joined as a legal representative to the suit that had abated a long time ago and for which he had no sufficient reasons to revive the same.

25. The Respondents' further submission was that the Applicant cannot seek to rely on the provisions of Section 3A of the Civil Procedure Act as justice ought not to be delayed. That the Applicant's application could not see the light of the day. There was no suit pending as the same abated, and there was no sufficient cause to resuscitate it. That the same should be marked as abated with costs to the Respondents.

Determination.

26. I have considered both the application dated the 18th February 2021 and the Preliminary Objection dated the 23rd February 2021. I have also examined the nature of the suit herein and find that the same revolves around parcel L.R No. Kericho/Kabartegan/438 which was registered to Mr. Kipchirchir Arap Maina who had been issued with a title on 29th December 1970. Mr. Kipchirchir Arap Maina passed away on the 6th May 1987 wherein Elijah Chepkwony Chirchir filed the present suit as his legal administrator. The Defendant/Respondents herein raised a Preliminary Objection to the effect that he had no locus standi to file the present suit. The court vide its ruling of **14th day of March, 2019** upheld the Preliminary Objection and struck out the Plaintiff's suit with costs.

27. Subsequently via a ruling d**ated the 1st day July, 2019,** the Plaintiff's suit was reinstated for hearing as there had been an error apparent on the face of the Limited Grant Ad Litem granted to the Plaintiff. Unfortunately the Plaintiff herein Elijah Chepkwony Chirchir also passed away on the 20th June 2019 wherein the court granted the deceased Plaintiff's Counsel Leave to file the necessary application for substitution.

28. The matter lay dormant until the 8th December 2020 when the same was fixed for mention for direction and further orders in the registry for the 24th February 2021 on which date parties sought for directions on the disposal of the present application and preliminary objection.

29. Order 24 Rule 3 of the Civil Procedure Rules provides:

> ***(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.***

30. As a general rule, the death of a Plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the Plaintiff or within such time as the court may in its discretion for ***good reason*** determine, an application must be made for the legal representative of the deceased Plaintiff to be made a party to the proceedings.

31. Thus if no such application is made within one year or within the time extended by leave of the court, the suit shall abate and no fresh suit can be brought on the same cause of action.

32. The law, as I understand it, is to the effect that upon death of a sole Plaintiff or the only surviving Plaintiff, **the suit shall abate so far as the deceased Plaintiff is concerned** if substitution is not effected within a period of one year after the said death. The effect of an abated suit is that it ceases to exist in the eye of the law

33. The Court of Appeal in the case of **Said Sweilem Gheithan Saanum** (supra) held:

> "*The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased Plaintiff. There have been arguments, as to whether or not a formal order is necessary to confirm the fact of abatement. See* ***M'mboroki M'arangacha*** *v* ***Land Adjudication***

Officer, Nyambene and 2 others, *Meru H.C.C. Application No.45 of 1997 where the High Court held that an order to record the abatement of a suit was not necessary. See a similar holding in* ***KFC Union*** *v* ***Charles Murgor (Deceased)*** *NBI HCCC No.1671 of 1994. From the language of* ***Order 24 Rule 3(2)*** *aforesaid, earlier reproduced and highlighted, 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. We borrow the statement of Lord Denning in* ***MacFoy vs United Africa Co. Limited*** *(1961) 3 All ER 1169, that:*

"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so…."

34. An abated suit is non-existent prior to it being revived. In this matter it cannot be denied that the suit herein abated on the 20th June 2020. It is trite law that where a suit has abated, the legal representative of the deceased Plaintiff may apply for it to be revived after satisfying the court he was prevented by "*sufficient cause*" from continuing with the suit.

35. The Application before me to revive the suit has been filed by one Evans Kiprotich Cheruiyot who according to the limited Grant of letters of administration ad litem dated the 21st February 2020, is the legal representative of the late Elijah Chepkwony Chirchir who was not the registered proprietor of the suit land. Could it then be said that Evans Kiprotich Cheruiyot has the locus standi to sue or be sued on behalf of the estate of Kipchirchir Arap Maina?

36. The issue of locus standi was defined in the case of **Alfred Njau & 5 Others vs. City Council of Nairobi [1983] eKLR** to mean- "the right to appear in Court."

37. The Court of Appeal has authoritatively delivered itself on the issue of locus standi in **Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1 KAR, Morjaria v Abdalla [1984] KLR 490** and in **Trouistik Union International & Another v Jane Mbeyu & Another Civil Appeal No. 145 of 1990 to the effect that** *Locus standi* is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.

38. In **Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229** the Court of Appeal gave meaning to the term locus-standi by stating:

"……to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to."

39. The Applicant has sought to be joined to the suit as the legal representative of the Plaintiff and further that the suit be revived for purpose of being heard on merit yet the subject matter in issue, being land parcel No L.R No. Kericho/Kabartegan/438, belongs to the estate of Kipchirchir Arap Maina (deceased) where no grant of representation has been applied for and/or obtained.

40. The issue of *locus standi* is a point of law which goes to the root of any suit and cannot be termed as a mere technicality as the Applicant wants us to belief. Its absence renders a suit fatally defective.

41. A Preliminary Objection as was held in all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

42. In **Avtar Singh Bhamra & Another vs. Oriental Commercial Bank, Kisumu High Court Civil Case NO. 53 of 2004**, the Court held that:

"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."

43. Having found that an abated suit is non-existent prior to it being revived and that in this case, there is no suit before this court, and further having found that the Applicant in this matter has no locus standi as a legal representative of the estate of Kipchirchir Arap Maina (deceased) who is the registered proprietor of the suit land, I uphold the Preliminary Objection raised by the Respondent, and proceed to dismiss the application dated 18th February 2021 with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 14TH DAY OF OCTOBER 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE