



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC (O.S.) 119 OF 2016

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTION ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 28 (h) OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF A CLAIM FOR TITLE BY ADVERSE POSSESSION OVER L.R. ITHIMA/NTUNENE/596

BY PENINA MWARANIA GICHUNGE (Suing as the administrator of the estate of the late

JACOB GICHUNGE MUCHEKA (Deceased)

PENINA MWARANIA GICHUNGE (Suing as the administrator of the estate of the late

JACOB GICHUNGE MUCHEKE (Dcd).....APPLICANT

VERSUS

STANLEY MWAA M'ALUMA.....RESPONDENT

RULING

1. The court is urged to enlarge time for the appointment of **Janet Nkatha** and **Jane Kathoni** in place of **Stanley Mwaa M'Aluma** as defendants who passed on **7.2.2019**.
2. It is averred the proposed parties are wives of the deceased, who stay apart, and elders had to be involved to bring them together and agree to petition for letters of grant ad litem which took time until 16.9.2021. The applicant has not filed any response to this application.
3. **Order 24 rule 4** of the **Civil Procedure Rules** provides where a defendant passes on and a cause of action survives or continues, the court on an application shall cause a legal representative of the deceased defendant to be made a party and if the application is not made within a year, the suit shall abate as against the deceased defendant with implications as provided under **Order 24 rule 6**.
4. Unlike **Order 24 rule 3**, **Order 24 rule 4** has no provision for extension of time as regards a deceased defendant. The substitution has to be made within one year and not after one year.
5. In construing this provisions the Court of Appeal in **Rebecca Mijide Mungola & Another –vs- Kenya Power & Lighting Co. Ltd & 2 Others [2017] eKLR** held that once a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished.
6. The suit has abated as against the deceased defendant. The plaintiff had the duty to seek to cite the legal representatives of the deceased: There is no application by the plaintiff as to whom the suit belongs to revive the it, it has already abated as against the deceased defendant. It would therefore be premature for the applicants to seek for an extension of time to be substituted when no suit exists against them in the first instance.
7. The application is brought under **Order 24 rule 3 (1)** yet the applicants are acting for the deceased defendant and not the plaintiffs. They cannot purport to make the application on behalf of the plaintiff. The deceased defendant did not file a counterclaim against the originating

summons.

8. Even if there was a counterclaim in *Charles Mutambi Gacheri –vs- Attorney General & Another [2015] eKLR* the court dismissed such a request for inordinate delay. The defendant herein passed on over two years ago. The plaintiff has taken no action at all to bring on board the deceased defendant legal representatives.

9. In sum I find the application lacking merits. The same is dismissed with no order as to costs. This suit has abated and the file is marked closed.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 24TH DAY OF NOVEMBER, 2021

In presence of:

No appearance for parties

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE