



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO 18 OF 2017

KENYA AFRICAN NATIONAL TRADERS &

FARMERS UNION (Suing through its Office Bearers

KIMANI WANYOIKE (Chairman)

PETER MUGEKA MAINA (Secretary General) and

IBRAHIM WANENE (Treasurer).....PLAINTIFF

=VERSUS=

ZEPHANIA KILUNGU KILONZO..... 1ST DEFENDANT

JOPHICK NJUGUNA KIBUNJA 2ND DEFENDANT

MOSES NGOTHO MWATHA 3RD DEFENDANT

BETH WANGUI KANJA4TH DEFENDANT

KWANZA GROUP LIMITED 5TH DEFENDANT

JOSEPH MWAURA KANYUGI 6TH DEFENDANT

MICHAEL GICHUHI NGARI7TH DEFENDANT

BENARD WANJOHI MURIUKI..... 8TH DEFENDANT

HARMAR VENTURES COMPANY LIMITED..... 9TH DEFENDANT

RULING

1. This suit was initiated on 25/10/2012, through an originating summons dated 25/10/2012. On 5/8/2016, the plaintiff filed an amended originating summons dated 4/8/2016. Through the amended originating summons, the plaintiff sought the following verbatim orders:

a) That Kenya African National Traders & Farmers Union be declared to have acquired title by adverse possession to the suit premises previously known as Plots Nos 1969, 1970 and 1971 in Mavololoni Company Limited and now known as LR Nos Kakuzi/Ithanga/Gituamba Block 1/862 and any of the sub-divisions to the original parcel now subdivided into 40 titles being Kakuzi/Ithanga/Gituamba/Blocks 1/1562 -1601 inclusive now registered in the name of Harmar Ventures Company Limited – the 9th defendant, 863 and 864.

b) That the registration of Zephania Kilungu Kilonzo as proprietor of LR Nos Kakuzi/Ithanga Gituamba/Blocks 1/862, and any of the subdivisions to the original parcel now subdivided into 40 titles being Kakuzi/Ithanga Gituamba/blocks 1/1562-1601 inclusive now registered in the name of Harmar Ventures Company Limited – the 9th defendant, 863 and 864 and any person deriving title from Zephania Kilungu Kilonzo based on the land previous known as Plots Nos 1969, 1970 and 1971 at Mavololoni Company Limited and now known as LR Nos Kakuzi/Ithanga Gituamba/Blocks 1/1562 -1601 inclusive now registered in the name of Hamar venture company limited – the 9th defendant, 863 and 864 be cancelled and the Land Registrar Thika do rectify the register to enter the name of the plaintiff as registered proprietor of the said parcels of land and any titles issued out of the subdivision or any of the original parcels -862, 863 and 864 do revert to the name of the plaintiff.

2. On 12/3/2019, Wangai, counsel for the plaintiff, informed the court that she had been informed that the 1st defendant had died. Subsequently, on or about 15/2/2021, the plaintiff brought a notice of motion dated 8/2/2021, seeking the following verbatim orders:

a) That the time for applying for the substitution of the deceased 1st defendant, Zephania Kilungu Kilonzo, in this suit be extended and this suit be reinstated as against the said defendant.

b) That the legal representatives of Zephania Kilungu Kilonzo, be substituted for the said 1st defendant, Zephania Kilungu Kilonzo for the purposes of this suit;

c) That the costs of this application be in the cause.

3. The said notice of motion dated 8/2/2021 (**the application**) is the subject of this ruling. The application was supported by an affidavit sworn on 8/2/2021 by Ibrahim Wanene. He deponed that he was the Treasurer/Director of the plaintiff, duly authorized to swear the affidavit on behalf of the plaintiff. He added that vide a letter dated 12/11/2018, the 1st defendant's advocates confirmed to the plaintiff's advocates that the 1st defendant had died. He stated that efforts to obtain a copy of the death certificate from the 1st defendant's advocates had been in vain. He further stated that the plaintiff had decided to lodge the present application for substitution and revival while they awaited to establish the identity of the personal representatives of the estate of the 1st defendant. Lastly, he deponed that at some point, the courts were closed, hence the Court Registry was inaccessible.

4. The application was canvassed through written submissions dated 3/8/2021, filed by the firm of *King'ara & co advocates*. **Counsel urged the court to find that the applicant had shown sufficient cause why there was delay in making the application for substitution and revival. Counsel further urged the court to find that the 2nd – 9th defendants will not suffer any prejudice by the substitution of the 1st defendant and reinstatement of the suit. Further, counsel cited the provisions of Order 24 rule 7(2) of the Civil Procedure Rules and the Court of Appeal decision in CA No. 199 of 2010 Kishor Kumar Dhanji Varsani v Amolak Singh and another and urged the court to grant the application.**

5. The 2nd defendant opposed the application through grounds of opposition dated 23/2/2021 and a replying affidavit of even date. The 2nd defendant contended that there was inordinate delay in bringing the application and no justifiable or plausible explanation had been tendered to explain the delay. The 2nd defendant urged the court to reject the application.

6. The 5th defendant opposed the application through a replying affidavit sworn on 31/5/2021 by its director, Elijah Kiragu Kihanya. He deponed that the application and the supporting affidavit were fatally defective, frivolous, vexatious, misconceived and an abuse of the court process. He added that the plaintiff had not tendered any satisfactory reason why there was inordinate delay in bringing the application. He further deponed that the plaintiff had not "tabled" evidence to show the identity of the personal representative to be substituted in place of the deceased defendant. He faulted the plaintiff for failing to initiate citation proceedings under the Law of Succession Act. He urged the court to reject the application.

7. **The 5th defendant filed written submissions dated 27/8/2021. Counsel for the 5th defendant identified the following as the two key issues falling for determination in the application: (i) Whether the application has merit; and (ii) Who should bear the costs of the application. On the first issue, counsel submitted that the cause of action against the 1st defendant abated on or around 13/11/2019. Counsel added that the plaintiff did not present evidence to show who ought to be the personal representative of the estate of the 1st defendant and that the rules required substitution of the 1st defendant with duly appointed personal representatives. Counsel further submitted that the plaintiff's application was unmerited, bad in law, and ought to be dismissed with costs. Counsel further relied on the Court of Appeal decision in the case of Joseph Gachuhi Muthanji v Mary Wambui Njuguna(2014) eKLR. Counsel urged the court to dismiss the application and award the defendant costs of the application.**

8. The 1st, 2nd, 3rd, 4th, 6th, 7th, 8th, and 9th defendants did not file any response to the application. Similarly, they did not file any submissions.

9. The court has considered the application together with the supporting affidavit; the responses thereto; and the parties' respective submissions. Further, the court has considered the relevant legal framework and jurisprudence. Although the application was expressed as seeking to reinstate the "suit" what I understand the application to be seeking is, among other things, a revival of the claim against the 1st defendant which abated in 2019.

10. Two key questions fall for determination in the application. The first question is whether the orders sought in the application can be issued in the absence of a duly appointed personal representative of the deceased defendant. The second question is whether the plaintiff has satisfied the criteria upon which our courts exercise jurisdiction to enlarge time for effecting substitution of a deceased defendant. I will make brief sequential analysis and pronouncements on the two issues in the above order.

11. Administration of estates and management of the affairs of deceased persons is regulated by the framework in the Law of Succession Act and any other relevant statute. Unless and until a personal representative is duly appointed by a succession court in accordance with the relevant provisions of the law, no one can be held legally accountable on behalf of the deceased. Indeed, **Section 79 of the Law of Succession Act** provides as follows:

"79. The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."

12. Secondly, jurisdiction to grant an order of substitution in respect of a deceased defendant is exercised within the framework of **Order 24 rule 4(1)** of the **Civil Procedure Rules** which provides as follows:

“4. (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.”

13. My understanding of **Section 79** of the **Law of Succession Act** and **Order 24 rule 4(1)** of the **Civil Procedure Rules** is that the person to be substituted in place of the deceased defendant is the duly appointed personal representative of the deceased defendant. Secondly, the revival order contemplated under Order 24 rule 7(2) cannot issue in the absence of a duly appointed personal representative.

14. In the application under consideration, no personal representative has been identified. The applicant has urged the court to grant orders of substitution and revival as they wait for the identity of the personal representative. In my view, that is not the correct position in law. Identification and appointment of the personal representative ought to precede the plea for revival and substitution. It is therefore my finding that the orders sought in the notice of motion dated 8/2/2021 cannot be issued in the absence of a duly appointed personal representative of the deceased defendant. Put differently, in the absence of a duly appointed personal representative, the plea for revival and substitution of the deceased defendant is premature.

15. I have reflected on the appropriateness of this court pronouncing itself on merits on the second question at this stage. The view I take is that, it would be inappropriate for this court to pronounce itself on the second question, having established that the application for revival and substitution ought to come after the appointment of a personal representative. Because there is a probability that the application may subsequently come, it is in the interest of justice that the judge seized of the question at that point be the one to make the pronouncement.

16. In the end, the court makes the following disposal orders relating to the plaintiff's notice of motion dated 8/2/2021.

a) The application is rejected on the ground that the revival and substitution orders sought cannot be made in the absence of a duly appointed and identifiable personal representative of the deceased defendant.

b) The plaintiff shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON

THIS 9TH DAY OF DECEMBER 2021

B M EBOSO

JUDGE

In the presence of: -

Mr Kingara for the Plaintiff/Applicant

Ms Muritu for the 5th Defendant

Mrs Omutimba for the 2nd Defendant

Court Assistant: Lucy Muthoni