



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC CASE NO. 336 OF 2013**

**NASHION WAMALWA NABIBIA.....PLAINTIFF(DECEASED)**

**VERSUS**

**BEN WANYAMA TABANI.....DEFENDANT/RESPONDENT**

**AND**

**EDWIN SIMIYU WAMALWA ..... APPLICANT**

**R U L I N G**

**NASHION WAMALWA NABIBIA** (the deceased herein) moved to this Court vide his plaint filed herein on 10<sup>th</sup> December 2013 seeking the main orders that **BEN WANYAMA TABANI** (the Respondent herein) holds two (2) acres out of the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/3182** (hereinafter the suit land) in trust for him and that he should transfer the said two (2) acres out of the title **NO EAST BUKUSU/NORTH SANG'ALO/3182** to the deceased.

The Respondent filed a defence denying that he holds any land in trust for the deceased.

After several mentions, the following consent order was recorded by Counsel before **MUKUNYA J** on 27<sup>th</sup> May 2015: -

***“By consent, this matter is referred to the Sub – County Commissioner of KANDUYI Sub – County. Each party will be entitled to have two elders. The D.O will sit with the area Chief. The parties shall be at liberty to call witnesses. An award shall be filed in this Court within 90 days. Mention of this case shall be on 22.9.2015.***

**S. N. MUKUNYA**

**JUDGE**

**27.5.2015.”**

When the matter came up for mention on 22<sup>nd</sup> September 2015, **MR SITUMA** Counsel for the defendant (the record wrongly captures him as appearing for the plaintiff) informed the Court that the report had not yet been filed. He therefore sought for more time which was granted and a further mention dated was fixed for 28<sup>th</sup> October 2015. The record shows however that the report had infact been filed on 14<sup>th</sup> September 2015 but for some reasons, had not been brought to the attention of the Court until 3<sup>rd</sup> November 2015 when the Judge allowed any party aggrieved with the award to file objections within thirty (30) days. On 6<sup>th</sup> March 2016, the award was read and the Court ordered that it would be adopted as an order of the Court within thirty (30) days unless any party moves the Court to set it aside.

The deceased was aggrieved by the award and by a Notice of Motion dated 3<sup>rd</sup> April 2017 sought to have it set aside. The Respondent opposed the application. By a ruling dated 21<sup>st</sup> February 2018, **MUKUNYA J** dismissed the deceased's application and entered Judgment in terms of the award. A decree followed.

At this point, it is important to point out infact that two Decrees were issued by the Court following the ruling of 21<sup>st</sup> February 2018. The first Decree was dated 21<sup>st</sup> February 2018 and in so far as is relevant for purposes of this ruling, it reads: -

*“Judgment be and is hereby entered in terms of the award in that both BEN and NASHION come into a peaceful agreement through give and take. BEN should at least agree to hive off ½ acre from his land and give it to NASHION. In the same respect, NASHION should accept the acreage unconditionally failure of that can result into long Court battle which will also increase enmity between them.*

*Given under my hand and seal of this Hon. Court this 21<sup>ST</sup> DAY OF FEBRUARY 2018.*

*S. MUKUNYA*

*JUDGE*

*Issued at Bungoma this day of 2019.”*

For some un – known reasons, this decree to – date remain un – signed by the Deputy Registrar.

There is then another decree also dated 21<sup>st</sup> February 2018 but issued on 8<sup>th</sup> June 2018. As far as is relevant for this ruling, it reads: -

*“Judgment is hereby entered in terms of the award.*

*Given under my hand and seal of this Honourable Court of Bungoma this 21<sup>st</sup> day of February 2018.*

*S. MUKUNYA*

*JUDGE.*

*Issued at Bungoma this 8<sup>th</sup> day of June 2018.*

*DEPUTY REGISTRAR*

*ENVIRONMENT AND LAND COURT BUNGOMA”*

The import of these two decrees will become evident shortly.

Although the deceased filed a Notice of Appeal on 27<sup>th</sup> February 2018 signifying his intention to appeal, no such appeal was filed.

I now have before me for my determination the Notice of Motion by **EDWIN SIMIYU WAMALWA** (the Applicant herein) dated 2<sup>nd</sup> June 2021 and premised under **Sections 1A, 1B, 3, 3A and 98** of the **Civil Procedure Rules** seeking the following orders: -

**(a) Spent**

**(b) That this Honourable Court be pleased to substitute the deceased NASHION WAMALWA NABIBIA with the Applicant EDWIN SIMIYU WAMALWA.**

**(c) That the Honourable Court do rectify the decree issued on 8<sup>th</sup> June 2018 to include the terms of the award for its enforcement.**

**(d) That the Honourable Court be pleased to order the Deputy Registrar of this Court to execute the transfer forms and mutation forms and carve out a portion of land measuring 0.2 Ha from the land parcel EAST BUKUSU/NORTH SANG’ALO/5013 measuring 1.27 Ha. Which land was created after the original suit land comprised in the land parcel NO EAST BUKUSU/NORTH SANG’ALO/3181 was sub – divided by the Defendant/Respondent creating several numbers including the land parcel NO EAST BUKUSU/NORTH SANG’ALO/5013 measuring 1.27 Ha.**

**(e) That costs of this application be provided for.**

The application is predicated on the grounds set out therein and is also supported by the Applicant’s affidavit to which are annexed the following documents: -

**1. A Certificate of Death showing that the deceased died on 1<sup>st</sup> January 2020.**

**2. A limited Grant of Letters of Administration issued to the Applicant on 26<sup>th</sup> May 2021.**

**3. Ruling delivered on 21<sup>st</sup> February 2018.**

4. Award dated 11<sup>th</sup> September 2015 and filed in Court on 14<sup>th</sup> September 2015.

5. Mutation Forms and Certificate of Searches.

6. Decree issued on 8<sup>th</sup> June 2018.

The gravamen of the application is that by a decree issued on 21<sup>st</sup> February 2018 the Court ordered that the deceased be awarded 0.2 Ha to be hived from the land parcel **NO EAST BUKUSU/NORTH SANG'ALO/3182**. However, the Respondent went ahead and sub – divided that parcel of land to create several other portions including land parcel **NO EAST BUKUSU/NORTH SANG'ALO/5013** measuring 1.27 Ha. Since the original plaintiff is now deceased, the Applicant who is his son has now been granted a Limited Grant for purposes of continuing with this suit. That the Applicant has approached the Respondent on various occasions for purposes of transferring ½ an acre (0.2 Ha) to him but the Respondent has refused. That since the decree did not include the terms of the award, there is need for it to be rectified so that it can be enforced.

The application is opposed and the Respondent has filed a replying affidavit dated 31<sup>st</sup> August 2021 in which he has deponed, inter alia, that the Applicant can only be substituted on behalf of the deceased but that does not mean that he is entitled to the land parcel measuring 0.2 Ha. That the Applicant ought to have taken out full Grant of Letters of Administration to enable him be awarded the land. That the Deputy Registrar cannot execute mutation and transfer forms when the beneficiary is now deceased. That the deceased's Estate has other beneficiaries other than the Applicant and this application is pre – mature.

The application has been canvassed by way of written submissions. These have been filed both by **MR JUMA** instructed by the firm of **PAUL JUMA & COMPANY ADVOCATES** on behalf of the Applicant and by **MR KUNDU** instructed by the firm of **SITUMA & COMPANY ADVOCATES** for the Respondent.

I have considered the application, the rival affidavit and the submissions by Counsel.

In my view, two issues call for my determination in this matter. These are: -

1. Is there any suit in which the Applicant can be substituted in place of the deceased?
2. If so, is there infact a decree that can be rectified and executed by the Deputy Registrar?
3. Who meets the costs of the application?

It is clear from the Death Certificate annexed to the Applicant's supporting affidavit that the deceased passed away on 1<sup>st</sup> January 2020. This application was filed on 10<sup>th</sup> June 2021 which is one (1) year and five (5) months from the time when the deceased passed away. **Order 24 Rule 3(1) and (2)** of the **Civil Procedure Rules** provides as follows: -

*3(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 sub rule (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.*

*Provided the Court may, for good reason on application, extended the time.*" Emphasis added.

The deceased passed away on 1<sup>st</sup> January 2020 and therefore this suit abated on 2<sup>nd</sup> January 2021 by effluxion of time and operation of the law. There is therefore no suit upon which the Applicant can be made to substitute the deceased and he lacks the capacity to bring this application.

What the Applicant was required to do after he obtained the Limited Grant was to apply first for the revival of the abated suit. That window is provided for under **Order 24 Rule 7(2)** of the **Civil Procedure Rules** as follows: -

*7(2) "The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order for dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit."*

The above provisions were considered by the Court of Appeal in the case of **SAID SWEILEM GHEITHAN SAANUM .V. COMMISSIONER OF LANDS** (being sued through Attorney General and others) **CIVIL APPEAL No 16 of 2015 [2015 eKLR]** where it said: -

*"There are three stages according to these provisions. 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. The “good reason” therefore relates to application for extension of time to join the plaintiff’s legal representative to the suit.*

*Secondly, if no such application is made within one year or within the time extended by leave of the Court, the suit shall abate, where a suit abates no fresh suit can be brought on the same cause of action.*

*Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the Court he was prevented by “sufficient cause” from continuing the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. 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.” Emphasis added.*

See also **REBECCA MIJIDE MUNGOLE & ANOTHER .V. KENYA POWER AND LIGHTING COMPANY LTD 2017 eKLR** where the Court expressed a similar opinion.

It follows from the above that this suit having abated and no application made to revive it, there is no suit upon which the Applicant can move the Court for an order that he be substituted in place of the deceased plaintiff. On that ground alone, this application is for dismissal.

The Applicant has also sought orders that the decree issued on 8<sup>th</sup> June 2018 be rectified to include the terms of the award to enable it’s enforcement by the Deputy Registrar executing the necessary mutation and transfer forms to carve a portion of land measuring 0.2 Ha from the land parcel **NO EAST BUKUSU/ NORTH SANG’ALO/5013**.

Earlier in this ruling, I have reproduced the two Decrees that were issued by this Court following the adoption of the award of the **KANDUYI** Sub – County Commissioner as a Judgment of the Court. The first award dated 28<sup>th</sup> February 2018 but issued on an un – known date in 2019 remains un – signed to – date. The second Decree also dated on 21<sup>st</sup> February 2018 and issued on 8<sup>th</sup> June 2018 is however signed by the Deputy Registrar. As stated earlier, the deceased filed a Notice of Appeal on 27<sup>th</sup> February 2018 notifying the Court of his intention to appeal the Decree but no appeal appears to have been filed. What is important however is that the final paragraph of the Arbitrators award and which formed the basis of the said Decrees provides that: -

*“The way forward should be for both **BEN** and **NASHION** coming into a peaceful agreement through give and take. **BEN** should at least agree to hive off ½ acre from his land and give it to **NASHION**. In the same respect, **NASHION** should accept the acreage unconditionally for failure of that can result into long Court battles which will also increase enmity between them.” Emphasis added.*

That was the disposal order that the Arbitrators made with respect to the dispute between the deceased and the Respondent with regard to the suit land. It is obvious that the Arbitrators, rather than making a final determination in the dispute, appear to have referred it back to the parties themselves to see if they could **agree** on how to share the suit land. And as is now clear, the Respondent did not **agree** to give the deceased ½ acre and the initial reaction of the deceased was that he did not **accept** the ½ acre. That explains why the deceased’s first point of call was to challenge this award by filing a Notice of Appeal.

On my part, I am doubtful if any of the Decrees issued herein are capable of execution. **Section 2** of the **Civil Procedure Act** defines a Decree as: -

*“..... the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within Section 34 or Section 91 but does not include .....” Emphasis added.*

Neither of the two Decrees issued herein can be said to have **conclusively determined** the rights of the parties herein. No order was made against any of the parties to the dispute which is capable of execution. The award which I have reproduced above is not a positive order which required either the deceased or the Respondent to do or refrain from doing anything with regard to the suit land. It did not confer any benefit or relief to any of the parties and is therefore incapable of any enforcement. Specifically, it did not award the deceased a portion measuring 0.2 Ha, or indeed any portion of land to be carved out of the land parcel **NO EAST BUKUSU/NORTH SANG’ALO/5013** which is the remedy sought in prayer No (d) of the application. Perhaps that explains why the Deputy Registrar of this Court has found it difficult to sign the Decree issued in 2019. And with regard to the Decree issued on 8<sup>th</sup> June 2018 and signed by **HON J. KING’ORI – DEPUTY REGISTRAR**, the relevant parts read: -

**“DECREE**

**CLAIM FOR:**

**(a) A declaration that the defendant is holding two (2) acres of land on Land Title NO EAST BUKUSU/NORTH SANG’ALO/3182 in trust for the plaintiff.**

**(b) An order that the defendant do transfer two (2) acres of land to be excised from Land Title NO EAST BUKUSU/NORTH SANG’ALO/3182 to the plaintiff.**

*(c) Costs of the suit.*

***This suit coming up for ruling on the 21<sup>st</sup> February 2018 before MR JUSTICE S. MUKUNYA in the presence of MR TSIMONJERO for MR KRAIDO ADVOCATE for the Applicant and MR KUNDU ADVOCATE for the Respondent;***

***IT IS HEREBY DECREED AND ORDERED THAT: -***

***1. –***

***2. –***

***3. Judgment is hereby entered in terms of the award.”***

The dispute before the Arbitrators had nothing to do with any trust and even if it did, the Arbitrators would not have had the requisite jurisdiction to determine such a dispute. And as is now clear, the award never ordered the ***“transfer of two (2) acres of land to be excised from Land Title NO EAST BUKUSU/NORTH SANG’ALO/3182 to the plaintiff.”*** In the circumstances, to grant prayer No (d) would be to grant an order which has no substratum. An order founded in a vacuum. Courts do not act in vain. Although the Applicant has deponed in paragraph 9 of his supporting affidavit that the Decree herein be rectified to ***“include the terms of the award”*** to enable ***“it’s enforcement,”*** the said award did not give the deceased the remedies which he now seeks.

That prayer must also be dismissed.

Costs follow the event. However, in the circumstances of this case, part of the problem lies with the Court for drawing a Decree that is not founded on the award and also on the Arbitrators for not determining **conclusively** the dispute that was before them.

The up – shot of all the above is that the Notice of Motion dated 2<sup>nd</sup> June 2021 is devoid of merit. It is dismissed with an order that each party meets their own costs.

**Boaz N. Olao.**

**J U D G E**

**8<sup>th</sup> December 2021.**

Ruling dated, signed and delivered at **BUNGOMA** this 8<sup>th</sup> day of December 2021 by way of electronic mail in keeping with the **COVID–19** pandemic guidelines.

**Boaz N. Olao.**

**J U D G E**

**8<sup>th</sup> December 2021.**

**Explanatory Note: -**

This ruling was due on 28<sup>th</sup> October 2021 but I was un – well. The delay is regretted.

**Boaz N. Olao.**

**J U D G E**

**8<sup>th</sup> December 2021.**