



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 793 OF 2017**

**(Formerly NAIROBI ELC CASE NO. 524 OF 2014)**

**DANIEL MILAKEN NDILAI.....1<sup>ST</sup> PLAINTIFF**

**JEREMIAH NTIMASAS OLE OLOKUNYINYI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SHENIA ENE NKIRRRUMU.....1<sup>ST</sup> DEFENDANT**

**NAISENKE ENE NTILAI.....2<sup>ND</sup> DEFENDANT**

**RULING**

What is before Court for determination is a Notice of Motion application dated the 4<sup>th</sup> March, 2019 and the Plaintiff's Notice of Preliminary Objection dated the 18<sup>th</sup> March, 2019. The application is brought pursuant to Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicant LOSHE SETEK seeks to substitute one NAISENKE ENE NTILAI (deceased). The application is supported by the grounds on the face of it and the affidavit of LOSHE SETEK where she deposes she is the daughter of the deceased who was the 2<sup>nd</sup> Defendant herein. She confirms petitioning the court on 7<sup>th</sup> November, 2018 for Grant of Letters of Administration Ad Litem and the same was issued on 22<sup>nd</sup> November, 2018. She avers that no prejudice will be occasioned to the parties if the application is allowed.

The application is opposed by the Plaintiffs who filed a Notice of Preliminary Objection dated the 18<sup>th</sup> March, 2019 where they contend that under Order 24 Rule 4(3) of the Civil Procedure Rules, the suit herein abated against the 2<sup>nd</sup> Defendant as no application for substitution was made within one year.

The Applicant and the Plaintiffs filed their respective submissions to canvass the instant application as well as the Notice of Preliminary Objection.

**Analysis and Determination**

Upon consideration of the Notice of Motion dated the 4<sup>th</sup> March, 2019 including the supporting affidavit, Notice of Preliminary Objection and the parties' submissions, the only issue for determination is whether the suit as against the 2<sup>nd</sup> Defendant has abated.

The Applicant sought for leave to substitute the 2<sup>nd</sup> Defendant who passed away in February, 2018. The Applicant filed the instant application in March, 2019. The Plaintiffs opposed the application contending that the suit has abated as the Applicant failed to file the application within one year.

Order 24, rule 4 of the Civil Procedure Rules provides that: **' (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) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.**

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

In the case of **KENYA FARMERS CO-OPERATIVE UNION LIMITED V CHARLES MURGOR (DECEASED) t/a KAPTABELI**

**COFFEE ESTATE [2005] it was held that: ‘ Does the court have jurisdiction to hear and determine a suit that has already abated by operation of the law? Certainly not. If a suit has abated it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction.’**

In associating myself with the above cited decision, I find that since the suit herein has abated and the Applicant has not sought for extension of time to substitute the 2<sup>nd</sup> Defendant, the claim cannot stand. I however opine that the Applicant has a remedy under Order 24 Rule 7(2) of the Civil Procedure Rules which allows a party to apply to reinstate an abated suit so long as sufficient cause is demonstrated.

In the circumstance, I will uphold the Preliminary Objection and proceed to dismiss the application. On the issue of costs, I note this is a dispute involving family members and will direct each party to bear its own costs.

**Dated and delivered at Kajiado this 3<sup>rd</sup> Day of March, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**

**IN THE PRESENCE OF:**

M/S. Kegoi holding brief for Solonka for plaintiff/respondent

M/S. Mulei holding brief for Yambo for the defendants

Court assistant- Mpoye