



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CIVIL SUIT NO. 72 OF 2012 (O.S)

JOEL KIPRUTO PULUNY.....APPLICANT

RAPHAEL KIBULUNY RUGUT.....CLAIMANT (DECEASED)

VERSUS

BENTER ATIENO OLUOCH.....RESPONDENT

RULING

1. The application for determination before me is a Motion on notice dated 3rd July, 2019 filed here on the same date. The applicant – **JOEL KIPRUTO PULUNY** – is the son of the deceased Plaintiff – **RAPHAEL KIBULUNY RUGUT** – who passed away on 9th January, 2016. The deceased Plaintiff had sued the Defendant – **BENTER ATIENO OLUOCH** – who is the respondent in this application. The dispute relates to land parcel **NO KERICHO/KOITABUROT/409**, which the Plaintiff claimed to have been unlawfully transferred to the defendant's late husband and of which the defendant is now the registered owner by dint of being the legal representative of her late husband's estate. The defendant's late husband was **BARRACK ARCH OLUOCH**.

2. The application is expressed to be brought under Order 24 Rules 1&3 of Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act (cap 21) and all other enabling law. The following prayers are asked for:

1. That JOEL KIPRUTO PULUNY the applicant herein be allowed to cause the legal representation (sic) of the deceased claimant RAPHAEL KIBULUNY RUGUT and be made a party in this suit as the claimant and proceed with this suit in place of the said RAPHAEL KIBULUNY RUGUT (Deceased).

2. That such other and/or further direction be given by this honourable court to meet the ends of justice.

3. That the costs of this application be in the cause.

3. The cause of action was said to have survived the deceased plaintiff who died while his suit was still pending hearing and determination. It was averred that it is in the interest of justice to have the applicant enjoined in the suit as the living plaintiff in place of the deceased plaintiff.

4. The supporting affidavit that came with the application is clear that the applicant is the son of the deceased plaintiff; that he has obtained a grant Ad Litem for purposes of this suit; and that the applicant is fully conversant with the issues surrounding the case.

5. The respondent filed a response vide a replying affidavit dated 4th October, 2019. She deposed, inter alia, that the applicant was granted leave to substitute his deceased father on 12th July, 2018. The order to do that however was vacated on 12th June, 2019 when it turned out that the applicant had misrepresented to the court that he had the requisite capacity to take the place of his deceased father in the suit. The court directed that if the applicant so wished, he could file a fresh suit for consideration.

6. Even then however, the suit had already abated, one year having lapsed without the deceased plaintiff being substituted. This application itself is one for substitution and is brought close to three years since the applicant's father passed on. The attendant delay is said to be inordinate and the court was asked to dismiss the application.

7. The application was canvassed by way of written submissions. The applicant's submissions were filed on 31st January, 2020. I understood the applicant to be saying that the cause of action in the matter is one that survives the death of a party and substitution is therefore necessary to ensure that it continues. He submitted, inter alia, that it is in the interest of justice to allow substitution. He averred that the applicant has a grant ad litem and is therefore possessed of the requisite capacity to take the place of his deceased father.

8. The respondent's submissions were filed on 4th November, 2019. According to the respondent, the suit abated on 9th January, 2017 when a period of one year lapsed without the deceased plaintiff being substituted. The plaintiff, as stated earlier, died on 9th January, 2016. The respondent explicated the law as spelt out in Order 24 rule 3 (1) of Civil Procedure Rules, 2010, which, in a suit that survives the death of a plaintiff, requires the court, on application made in that regard, to allow the legal representative of the deceased plaintiff to be made a party in order to proceed with the suit. Sub-rule 2 of rule 3 of the same order clearly states that a suit abates after one year if no substitution of the deceased plaintiff is done. The decided case of **SAID SWEILEM GHEITHAN SAANUM VS COMMISSIONER OF LANDS (being sued through Attorney General) & 5 Others (2015)** eklr was cited to reinforce the position.

9. It was pointed out further that the applicant ought to have made an application for revival as would be necessary under Order 24 rule 7(2) of the Civil Procedure Rules. To drive the point home, the respondent cited the case of **MURIITHI NGWENYA VS GIKONYO MACHARIA MWANGI & 2 OTHERS (2018)** eklr.

10. The law is as stated by the respondent. I note that the applicant's submissions are largely silent on the issue of abatement. The delay in substituting the deceased plaintiff is not explained. The applicant focused more on the fact of the suit surviving the deceased and then went on to emphasize that he has capacity to take the deceased's place, having acquired a grant Ad Litem in order to proceed.

11. I don't think that anybody begrudges the applicant of the right to pursue the matter. But he messed himself up when he failed move the court to be substituted before expiry of the period allowed by law. He further blundered by making an application for substitution in an abated suit without first seeking to revive the suit.

12. As things stand, the suit remains abated. And without application to revive it, the law does not regard it as an existing suit. The predicament the applicant finds himself in is caused largely by his inability or refusal to appreciate the importance of procedure. The contextual placement of his application is wrong, even incompetent, for it should not have come before the issue of reviving the suit is addressed. I think the applicant should also have invoked Order 50 rule 6 of Civil Procedure Rules, 2010, which allows for enlargement or extension of time within which a time-specified process or action is given another opportunity or chance.

13. The upshot, when all is considered, is that the application herein is one for dismissal. And I hereby dismiss it with costs.

Dated, signed and delivered at Kericho this 29th day of April, 2020.

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A. K. KANIARU

JUDGE