



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 207 OF 2014

JULIUS GICHOBI GITHAIGA

JANET WANGECHI GICHOBI.....PLAINTIFFS

VERSUS

PHILLIS WANJIKU NJUKI (Sued as the Administrator of the Estate of

JONATHAN NJUKI GITHAIGA (Deceased).....RESPONDENT

RULING

The application before me is the one dated 17th December 2019 brought under *Order 24, Rule 4 CPR* seeking the following orders:

(1) That PHILLIS WANJIKU NJUKI be substituted as the defendant in this matter in place of JONATHAN NJUKI GITHAIGA (deceased).

(2) That the costs of this application be provided for in any event.

The application is supported by the affidavit of Janet Wangechi Gichobi sworn on 17th December 2019. The application is opposed by the defendant/respondent with grounds of opposition dated 20th January 2020.

APPLICANTS CASE

According to the applicants, the original defendant Jonathan Njuki Githaiga (deceased) died on 3rd July 2017 and thereafter his widow Phillis Wanjiku Njuki applied for Grant of Letters of Administration intestate and the same was issued on 3rd December 2018. She annexed a copy of death certificate No. 0736155 and Grant of Letters of Administration intestate in Succession Cause No. 33 of 2018. The applicant requests that the defendant Phillis Wanjiku Njuki be substituted as the defendant in place of her late husband JONATHAN NJUKI GITHAIGA (deceased) since she is administrator of his estate.

DEFENDANT'S/RESPONDENT'S CASE

The respondent through the firm of Maina Kagio & Co. Advocates opposed the said application on the following grounds:

(1) As per paragraph 2 of the supporting affidavit, the deceased defendant died on 3rd July 2017. The letters of administration were issued to the proposed substitute on 3rd December 2018, more than one year after his death. The application was filed on 17th December 2019. As per Order 24 Rule 4 (3), the suit abated as against the deceased defendant one year after his death.

(2) The application is defective, bad in law and without merits.

(3) The application should be dismissed with costs.

SUBMISSIONS BY THE APPLICANTS

The applicants who are acting in person, submitted that this dispute had been instituted before the Land Disputes in LDT No. 31 of 2009 where they almost struck a compromise before the demise of the original defendant. However, upon the death of the original defendant, she promptly filed letters of citation before the Principal Magistrate's Court in Gichugu being Succession Cause No. 16 of 2018 but the Estate of the deceased defendant failed and/or refused to file a succession cause presumably to have the suit abate. The applicants cited Order 24 Rule

4 CPR which states that the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues. She submitted that she has sufficiently demonstrated that the delay in failure to substitute the defendant was wholly occasioned by the immediate family of the late Jonathan Njuki Githaiga.

DEFENDANT'S/RESPONDENT'S SUBMISSIONS

The defendant through the firm of Maina Kagio & Co. Advocates submitted that according to paragraph 2 of the supporting affidavit, the deceased defendant (Jonathan Njuki Githaiga) died on 3rd July 2017 and the letters of administration issued to the proposed substitute on 3rd December 2018 which is more than one year after the death of the deceased. She also submitted that in addition, the applicants filed this application on 17th December 2018. The defendant also cited Order 24 Rule 4 (1) and (3) and stated that this suit abated and no leave has been sought by the applicants under Order 24 Rule 7 (2) CPR to revive the abated suit. The defendant also cited the case of **Kenya Farmers Co-operative Union Limited Vs Charles Murgor (deceased) t/a Kaptabei Coffee Estate (2005) e K.L.R.**

ANALYSIS AND DECISION

I have considered the application, the supporting affidavit and the grounds of opposition. I have also taken into consideration the submissions by the parties. The applicants who are acting in person have filed this application under **Order 24 Rule 4 CPR** 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.

“4 (3) Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

“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 of 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 record will bear me witness that in a Notice of Motion dated 2nd August 2017, the plaintiffs/applicants had sought to substitute the deceased defendant with his wife who is the respondent in this case. However, that application was opposed on grounds that no person had been appointed as a legal representative of the deceased defendant at the time. It was not until 3rd December 2018 that the respondent who is the proposed substitute was issued with Letters of Administration Intestate of the Estate of the original defendant in this case. From the death certificate annexed to the supporting affidavit, the deceased defendant died on 3rd July 2017 and the proposed substitute was granted letters of administration of the Estate of her late husband on 3rd December 2018 and the applicant filed the present application on 17th December 2019. There is no dispute that it is more than one year since the deceased defendant died. **Order 24 Rule 4 (3) CPR** provides that where no application for substitution is made within one (1) year, the suit shall abate.

Order 24 Rule 7 (2) CPR provides for the revival of a suit which has abated. Unless an application for revival of this suit is sought and obtained, it will be highly impossible to substitute the proposed defendant in a suit that is non-existent. I find the application for substitution without first reviving the abated suit frivolous. With a heavy heart, the said application dated 17th December 2019 is hereby struck out with costs in the cause.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 22nd day of May, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. M/S Wambui holding brief for Maina Kagio for Defendant/Respondent
2. Julius Gichobi Githaiga – present
3. Janet Wangechi – present
4. Okatch – Court clerk