



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

PETITION NO. 7 OF 2019

JUSTIN BOSO1ST PETITIONER

MWADONGO BOSO MWADONGO2ND PETITIONER

JUMA KATANA MWASANZUWA3RD PETITIONER

VERSUS

MWAUCHI BEMBITO1ST RESPONDENT

THE LAND ADJUDICATION OFFICER, KINANGO 2ND RESPONDENT

REGISTRAR OF LANDS, KWALE.....3RD RESPONDENT

RULING

(Application for substitution of the deceased 1st respondent and for maintenance of injunctive orders issued against the 1st respondent; petition claiming interference by 1st respondent on suit land; pending hearing orders of injunction issued; 1st respondent passing on before the hearing date; no substitution undertaken by any of his beneficiaries; petitioners now wishing to have one of the sons of the 1st respondent substitute the deceased; whether this can be allowed; the rules providing that only a legal representative can substitute a deceased party; son of the deceased not equivalent to legal representative; difficulty of what to do when none of the beneficiaries or close relatives of a deceased litigant decline to take up letters of administration; court offering option of a citation in default the Public Trustee to be issued with a grant; injunctive orders in the circumstances of this suit being in personum and cannot be enforced against other persons; application dismissed)

1. The application before me is that dated 15 June 2020 filed by the petitioners. The application seeks two principal orders which are prayers (2) and (3) respectively of the application as follows :-

(i) That Janja Mwauchi be substituted as the 1st respondent in this suit in place of Mwauchi Bembito, being his legal representative.

(ii) That this Court be pleased to direct that the OCS Kinango Police Station to ensure that the court orders already issued be complied and to ensure no interference on the suit land.

2. Despite the application being served upon the 2nd and 3rd respondents in this suit and the said Janja Mwauchi, no response was filed to the application. Nonetheless, I need to be satisfied that the orders sought are justiciable to grant before I can allow the application.

3. To put matters into context, this suit was commenced through a constitutional petition alleging breach of various rights enshrined in the Constitution including the right to property under Article 40. The petitioners averred that they are sons of Sanzuwa Mwadongo (deceased) and are heirs and beneficiaries of his properties. They pleaded that among the properties that their late father left was the Plot No. 1040 Kinango, said to be under adjudication (the suit land). It was claimed that the suit land had been subjected to various adjudication disputes between the deceased father of the petitioners and the 1st respondent, Mwauchi Bembito, and that in all these disputes the 1st respondent lost with awards being made in favour of the petitioners. The petitioners pleaded that the law requires the 2nd respondent (the Land Adjudication Officer, Kwale) to grant consent before the filing of any case in Court and that despite the petitioners requesting for consent, the 2nd respondent had refused to grant the same. It is contended that the 2nd respondent with the involvement and aid of the 3rd respondent (the Land Registrar, Kwale), has subdivided the Plot No. 1040 into various plots and awarded them to strangers at the behest of the 1st respondent. It is pleaded that this action is unlawful and unconstitutional infringing into the property rights of the petitioners. In the petition,

the petitioners have asked for the following orders :-

(a) A declaration that the petitioners' constitutional rights to property have been breached.

(b) A constitutional order of injunction restraining the respondents by themselves, their servants or agent from forcefully taking the petitioners' property being Plot No. 1040 and subdividing it and giving out to persons who have no rights thereon.

(c) Any other relief the Court may deem fit and just to grant.

4. Together with the petition, the petitioners filed an application seeking orders of injunction, inter alia to stop the respondents from taking the suit land and subdividing it and giving it to persons who have no rights thereon, pending the hearing and determination of the petition.

5. The 1st respondent filed a replying affidavit. He contended that the matter is still subject to the land adjudication dispute resolution mechanism and the petition is thus incompetent.

6. The matter came before Court (Omollo J) on 25 April 2020 for the application for injunction. It turned out that counsel on record for the 1st respondent had filed an application to cease acting for the 1st respondent. The 1st respondent, who was in court, requested for time to sort out the issue of instructions to counsel. The court directed that the application to cease acting be heard on 2 July 2019. In the meanwhile, the court granted the petitioners interim orders on their application for injunction. The parties appeared before court on 2 July 2019 on which day, Mr. Mwawasi, counsel on record for the 1st respondent, withdrew the application to cease acting. The court then gave some time for the Attorney General, on behalf of the 2nd and 3rd respondents, to file a reply to the petition, and further directed the filing of written submissions to the petition, and extended interim orders to 5 November 2019, when the petition was to be heard.

7. On 5 November 2019, the parties appeared before me (as Omollo J had by then been transferred) and Mr. Mwawasi informed the court that his client, the 1st respondent, died on 11 October 2019. He had the Certificate of Death which he displayed. Given the demise of the 1st respondent, I held the case in abeyance, to await substitution or abatement, as the case would be. This application was then filed on 15 June 2020.

8. It will be seen that the first limb of the application, seeks the substitution of the deceased, with one Janja Mwauchi. In the supporting affidavit, the petitioner has deposed that the 1st respondent left five sons, one being Janja Mwauchi, who is said to be the eldest. He has further deposed that on 4 February 2020, the said Janja Mwauchi, led four other people into the land. Following this alleged invasion, the petitioner has averred that he reported to Kinango Police Station, but no action was taken, as the OCS requested for a court order. He has mentioned that an order had already been issued by this court. He has deposed that Janja Mwauchi is sufficiently capable of substituting the 1st respondent.

9. I already mentioned that none of the parties responded to the application and I will therefore make an assessment based solely on the material presented before me.

10. On the first limb of the application, that for substitution, the starting point has to be Order 24 Rule 4 which provides as follows :-

4. Procedure in case of death of one of several defendants or of soledefendant :-

(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.

11. I believe that it is Order 24 Rule 4, which applies to the situation at hand, for I do not see how the cause of action herein can be continued against the rest of the respondents without the presence of the 1st respondent in the suit. The cause of action does survive though, and can be continued against the legal representative of the deceased 1st respondent. It will however be noted that Order 24 Rule 4 is categorical that it is the legal representative of the deceased who can substitute the deceased. At the hearing of the application, I asked Mr. Magolo, learned counsel for the petitioners, his view on this provision of the law. Mr. Magolo submitted that though Order 24 Rule 4 states "legal representative" none of the beneficiaries has taken steps to be appointed and that they could deliberately have taken this option so as to make the suit abate.

12. I am afraid that I cannot circumvent the provisions of Order 24 Rule 4. It is only a legal representative who can be substituted for a deceased litigant. That indeed is the principle in the law of succession. It is only a person who legally represents the estate of a deceased person that has capacity to represent that estate in all matters including litigation. To ask the court to appoint a person who is not the legal representative to take charge of affairs relating to the estate of a deceased person would be misplaced. In as much as Janja Mwauchi is son of the deceased 1st respondent, that is not the equivalent of a legal representative. It also matters not that he is the first son of the deceased 1st respondent. That still does not give him mandate to represent the estate of the deceased and the fact of being the first born does not make him the legal representative of the estate of the deceased. For one to be a legal representative, the appointment needs to be formally made by court. It is not left for an individual to pick out any of the children of a deceased person and impose upon him/her the title of "legal

representative.”

13. I appreciate the difficulty that litigants may have when one party dies and none of the close relatives of the deceased, who would ordinarily be the beneficiaries, and thus the persons with interest to administer the estate of the deceased, apply to be granted letters of administration for the estate of the deceased. Indeed, litigation may get stuck, or the suit may abate solely because there is nobody to represent the estate of the deceased. I think in circumstances such as this, it is for the party to seek to cite a suitable person, generally in the succession order of priority, to take up letters of administration, with a default that if such person does not take up the grant of letters of administration, then The Public Trustee be appointed to so represent the estate, even if it be limited for purposes of the suit. I say so, because generally, it is The Public Trustee who takes charge of unadministered estates. And no, I do not think the solution lies in a citation with the alternative of the applicant litigant taking over the grant if the citee does not take up the letters of administration, which is what I see commonly been done. This path will lead to the undesirable result of one party being both plaintiff and defendant, which is an absurd result, due to conflict of interest. The solution, in my view, would be as I have proposed above, that is to cite the immediate beneficiaries, with the default of The Public Trustee being asked to take up the grant if the immediate persons, fail to do so. That is the path that I would advise the applicant herein to take and if such application is made, it will be decided on its merits. But as I have pronounced, I cannot order a person who has not been duly appointed by a competent court, to represent the estate of a deceased person. I am thus unable to grant the first limb of this application.

14. The second limb of the application seeks to direct the Officer Commanding Station (OCS) Kinango, to ensure compliance with orders earlier made. In my view, the orders made were orders *in personum*, against the person of the 1st respondent. If it is his sons or other persons invading the land, and such persons are not acting at the behest of the estate, for they can only so act if they represent the estate, then the earlier orders, cannot apply against them. Here, the applicants have to consider whether they have a new cause of action against the invaders or not. I wouldn't want to go any further than that, but it will be noted that I am not persuaded to grant the second limb of the application.

15. From the above discourse, it will be noted that I do not see any merit in the subject application. It is hereby dismissed but since no party thought it fit to oppose it, I make no orders as to costs.

16. Orders accordingly.

DATED AND DELIVERED THIS 30 DAY OF JULY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA