



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**MISC. ELC SUIT 138 OF 2019(O.S)**

**JANE NJERI NJOROGE.....APPLICANT**

**VERSUS**

**THE LAND REGISTRAR KIAMBU.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

By an Amended Originating Summons dated **18th December 2019**, the Applicant sought for the following orders against the Respondents;

***1. THAT the property known as Kiambaa/ Ruaka /2556 which has a restriction registered under it through an order of the Court in Thika ELC 462 of 2017, be removed.***

The Application is premised on the grounds that the Applicant holds the suit property in trust for **Muhura Kimani, James Njoroje Kimani** who are her children and that **Joseph Kimani Muhuru** has since passed away. That **Joseph Kimani Muhuru**, put the restriction in **Thika ELC 462 OF 2017**, and that on **31<sup>st</sup> July 2018**, the suit was marked as abated and the position was confirmed via order dated **11<sup>th</sup> July 2019** . Further that the said **Joseph Kimani Muhuru** passed away on **17<sup>th</sup> September 2017**, and therefore the restriction has been overtaken by events.

In her supporting Affidavit sworn on **18<sup>th</sup> December 2019**, **Jane Njeri Njoroje** the Applicant reiterated the contents of the grounds in the support of the Application. She further contended that it was only just that the Court grants the orders as sought.

On **29<sup>th</sup> January 2020**, the Court directed the Applicant to file brief written submissions and in compliance with the said directives, the Applicant through the **Law Firm of Nyareru & Associates** filed her submissions on **6<sup>th</sup> February 2020**, and submitted that only the Court has the authority to lift the restriction as the restrictor has since passed away. She relied on **Section 73 (1) of the Land Registration Act** which provides;

***“A caution any be withdrawn by the cautioner or removed by an order of the Court or subject to subsection 2 by order of the Registrar.”***

It was further submitted that the Registrar cannot withdraw a restriction that was registered through a Court order. Further that the restrictor is survived by two adult sons, who are also beneficiaries of the suit property and they have no oppositions to the removal of the restrictions. The Court was urged to withdraw the restriction as the Respondents having not entered appearance could only mean that they are not opposed to the Application.

The Court has carefully read and considered the written submissions, the Application in general and the annexures thereto and the affidavit in support. The Court finds the issue for determination is **whether the Applicant is entitled to the orders sought**.

It is not in doubt that **Thika ELC 462 of 2017** abated on **31<sup>st</sup> July 2018**, by operation of the law as the deceased was never substituted in the said suit . Further it is not in doubt that the restriction was entered pursuant to a Court order dated **11<sup>th</sup> January 2017**, pending the hearing of the Application. Further on the **9<sup>th</sup> October 2017**, the Court dismissed the Notice of Motion Application by the Plaintiff in **ELC 462 of 2017** and eventually the suit abated.

Therefore, there is no doubt that the order that brought about the restriction was granted pending the hearing of the Application in **ELC No. 462 of 2017**. However, the said Application was dismissed and the suit eventually collapsed when it was marked as abated. The Black’s Law Dictionary defines abatement as **putting an end to a suit**. Further in the case of **Musha Chengo Kenga & another ...Vs... Lenox**

**Kahindi Fakuro (On Behalf of the Fakuro Randu) [2019] eKLR** the Court held that;-

*“As was held by the Court of Appeal in the case of Said Sweilen Gheitan Saanum –v- Commissioner of Lands & 5 Others (supra), the effect of an abated suit is that it ceases to exist in the eye of the law. The Applicants could not purport to have been amending what had ceased to exist in the eye of the law.”*

Further in the case of **Rebecca Mijide Mungole & another ...Vs...Kenya Power & Lighting Company Ltd & 2 others [2017] Eklr** the Court held that;-

*“Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented.’*

It is therefore evident that given that the earlier suit does not exist, the order of restriction does not have any anchor to hold on to as such the Application herein seeking to remove the said restriction is therefore found to be merited.

Consequently, the Court finds and holds that the Originating Summons Application by the Applicant dated **10<sup>th</sup> December 2019**, is merited and the same is allowed entirely.

It is so ordered.

**Dated, signed and Delivered at Thika this 23<sup>rd</sup> Day of July 2020**

**L. GACHERU**

**JUDGE**

**23/7/2020**

..... **Court Assistant**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With consent and virtual appearance of:-**

..... **for the Applicant**

..... **for the 1<sup>st</sup> Respondent**

..... **for the 2<sup>nd</sup> Respondent**

**L. GACHERU**

**JUDGE**

**23/7/2020**