



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

E.L.C. NO 151 OF 2014

FORMERLY KERUGOYA 647 OF 2013

SIMEON NJERU DIFATHA.....PLAINTIFF/RESPONDENT

VERSUS

FLORENCE WANJA MWANIKI.....1st DEFENDANT

VIRGINIA RWAMBE NJOKA.....2nd DEFENDANT

JOYCE WAMBIRO..... 3rd DEFENDANT

AND

LAURENCIA WANJUKI.....INTERESTED PARTY

RULING

Introduction

This is an application by the interested part to substitute Elias Mugendi Njeru and Catherine Marigu Mwaniki as the defendants in place of their late father who died on 3rd March, 2010.

The application is opposed for being bad in law. Additionally, it is also opposed on the ground that the suit has abated.

The Case for the First Plaintiff/Applicant

The applicant has filed this application dated 23rd January, 2015 to which he has annexed the supporting affidavit. According to her affidavit, the defendant Simon Njeru Difatha died on 3rd March, 2010. The children of the deceased namely Elias Mugendi Njeru and Catheline, petitioned and obtained letters of administration of the deceased estate in High Court succession cause number 104 of 2011. she has therefore requested that his children be substituted as the defendants in this case.

She says that it is necessary for the speedy disposal of this suit. The subject matter of the suit is land being land reference number Kagaari/Kanja/397. In that suit, the first applicant on behalf of the co-applicants as seeking that they be declared as the owners of the suit land.

The Case for the Defendants/Respondents:

I have already stated the application is opposed by counsel for the respondents. Counsel of the respondents has filed two grounds of opposition.

Firstly, he submits that the application is bad in law. Secondly he states that the suit has abated. He submitted that in terms of Order 24 rule 4, an application for substitution should be filed within one year of the death of the defendant.

According to him, it is now well over four years since the death of the defendant. On this basis, he submits that substitution is not possible unless an extension of time has been applied for and obtained. He finally urges the court to dismiss the application.

The Applicable Law:

The applicable law in this application is found in **Section 2 of the Law Reform Act, Chapter 26 Laws of Kenya**. In terms of section 2 of that Act all causes of action that subsist against or vested in a person who has died shall survive against him for the benefit of his estate.

However, there are exceptions to this rule which are set out in the proviso to that section. Causes of action that do not survive the death of a person include defamation, seduction and inducing ones spouse to leave or remain apart from the other spouse. Additionally, claims for damages on the ground of adultery do not survive the death of a person.

Furthermore, according to **Order 24 rule 1**, the death of a defendant or plaintiff shall not cause the suit to abate if the cause of action survives or continues. **Order 50 rule 6** empowers the court to enlarge the time where the time allowed under the rule has expired.

Issues of Determination:

In the light of the foregoing, the following are the issues for determination:

1. Whether or not the cause of action has survived the death of the deceased.
2. Whether or not the death of the deceased has led to the abatement of the suit.
3. Whether or not the court has power to enlarge the time where the time has expired.
4. Who should pay for the costs of this application.

Evaluation of the Affidavit Evidence Findings and the Law:

I have carefully considered the affidavit evidence and the grounds of opposition by counsel for the respondent. I find from the evidence that the defendant died in 2010. I also find that the cause of action survived his death.

Furthermore, I also find that it is necessary to enlarge the time notwithstanding that the application for enlargement was brought after one which is contrary to **Order 24 rule 4**. **Order 24 rule 4** requires that an application for substitution should have been brought within one year of the death of the deceased defendant.

After considering the affidavit evidence, the applicable law and submissions of counsel, I find that the first applicant has made out a case for the grant of order of substitution.

Verdict and Disposal Order:

In the light of the foregoing, I hereby make the following orders:

1. Elias Mugendi and Catherine Marigu Mwaniki are hereby substituted as the defendants in place of their deceased father Simon Njeru Difatha.
2. Costs of this application shall be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this.. **10th** ... day of **March,..2015**

In the presence of Mrs Laurenzia and Mr. Mogusu holding brief for Mr. Kathungu

Court clerk Mr Muriithi

J.M. BWONWONGA

JUDGE