



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 2482 of 1996

1. MAAMI NDUNGI

2. MARARO NDUNGI

2A. BERNARD KUNGU MARARO (LEGAL REPRESENTATIVE OF THE ESTATE OF MARARO NDUNGI)

3. KUNGU

MUNJI.....PLAINTIFFS

(LEGAL REPRESENTATIVE OF THE ESTATE OF MUNJI NDUNGI)

VERSUS

1. BERNARD KIONGO NJAU

2. JOSEPHAT IKONYA NJAU

(AS LEGAL REPRESENTATIVES OF THE ESTATE OF NJAU NDUNGI).....DEFENDANTS

RULING ON PRELIMINARY OBJECTION

The Defendant, Benard Kiongo Njau, filed a Notice of Intention to raise a Preliminary Objection dated

17th February 2012 on the following grounds:-

- 1) THAT the 1st Plaintiff's suit has abated in that he died in about 2005 and so far nobody has ever appeared in the suit as his legal representative.
- 2) THAT the 2nd and 3rd Plaintiffs have no capacity to sue and prosecute and even though they have been appearing in this suit as legal representatives, they do not possess full grant of letters of administration in respect of the estates of their deceased fathers.

For these reasons, the Objector/Defendant prayed for the dismissal of the suit and judgment be entered in favour of the defendant's counterclaim.

The issue being contested in this Preliminary Objection is whether the 3 Plaintiffs are properly before the court owing to their demise and the substitution by their sons as their legal representatives. Hence, in a nutshell, the Preliminary Objection revolves around the representation of the original plaintiffs in this suit after their demise.

The Objector submitted that the suit concerned two parcels of land namely Ndumberi/Ndumberi/1458 which was jointly owned by the 3 Plaintiffs and Ndumberi/Ndumberi/1459 which was owned by his late father. He submitted that he obtained full grant of letters of administration over the estate of his late father to enable him to conduct this case on behalf of his deceased father. He stated that up to the stage where judgment was entered in this case, the 1st and 2nd Plaintiffs were still alive and conducted this case on their own behalf. He further explained that the 3rd Plaintiff came into the suit by way of limited grant of letters of administration. He further stated that soon after judgment was entered, the 1st and 2nd Defendants died and that Benard Kungu Mararo came into the suit as legal representative of the 2nd Plaintiff who was his later father. The Objector states that he was not served with a copy of the Letters of Administration authorizing this. He further stated that the 1st Plaintiff is not represented in this suit since his demise. He then submitted that in 2012, the "so called" Plaintiffs applied to reinstate this case and he consented to this application to enable him to pursue a counterclaim against the Plaintiffs whom he alleges are guilty of fraud.

He submitted that he subsequently discovered that none of the Plaintiffs have proper capacity to conduct the case because the Letters of Administration they were relying on were insufficient hence leading to his filing this Preliminary Objection. He contended that the court should check and see if the so called legal representatives had full grant of Letters of Administration.

Counsel for the plaintiffs also made his submissions stating that in fact, apart for the 1st Plaintiff whose family had not yet taken out Letters of Administration, the 2nd and 3rd plaintiffs were properly represented before the court as their legal representatives. He submitted that an application was brought in court to substitute the 2nd Plaintiff and the Objector did not object thereto. Counsel for the Plaintiffs further submitted that as regards the 3rd Plaintiff by the time of filing suit, his father was already deceased so he filed the suit as the legal representative of his father on production of a limited grant of Letters of Administration specifically obtained for the purpose of this suit.

Upon perusal of this file, I have indeed seen a copy of the Grant of Letters of Administration Intestate in favour of Bernard Kungu Mararo who is the legal representative of the 2nd Plaintiff.

I have also seen a copy of the Limited Grant of Letters of Administration in favour of Joseph Kungu Munyi, the legal representative of the 3rd Plaintiff. I did not see any document in respect of the 1st Plaintiff which corresponds with what counsel for the Plaintiffs stated.

The next question that begs to be answered is what does the law state in scenarios such as this one?

Order 24 rule 1 provides as follows:

“The death of a Plaintiff or Defendant shall not cause the suit to abate if the cause of action survives or continues.”

In this present case, the cause of action is the ownership of the suit properties being Ndumberi/Ndumberi/1458 and 1459. This cause of action definitely survives the death of the Plaintiffs as the beneficiaries thereto remain keen on asserting their beneficial interest thereon.

Rule 2 of the same order authorizes surviving Plaintiffs to proceed with prosecution of a suit where, like in this instance, the cause of action survives.

Clause 14 of the fifth schedule of the Law of Succession Act authorizes the issue of a Limited Grant of Letters of Administration when it is necessary that the representative of a deceased person be made a party to a pending suit. This appears to be the case in respect of the 3rd Plaintiff.

Further Order 24 rule 3(2) provides that where within one year, no application is made under Subrule (1), the suit shall abate so far as the deceased Plaintiff is concerned. This appears to apply to the 1st Plaintiff who died in 2005 and in respect of whom 8 years later, no Letters of Administration have been taken out.

CONCLUSION

In light of the foregoing, I make the following findings:

- i) Prayer No. 1 of the Preliminary Objection is hereby granted on the ground that since the death of the 1st Plaintiff 8 years ago, no one has stepped in to represent him upon application for Letters of Administration over his estate.**
- ii) Prayer No. 2 of the Preliminary Objection is declined because both the 2nd and 3rd Plaintiff are properly acting as the legal representatives of their late fathers.**

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI ON THE 3RD DAY OF MAY 2013

MARY M. GITUMBI

JUDGE