



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 38 OF 2016

(Formerly Nyeri HCC NO. 28 OF 1977)

PETER MBUTHIA KAMORE.....PLAINTIFF

-VERSUS-

MACHARIA KAMORE1ST DEFENDANT/DECEASED

MACHARIA KARIUKI.....2ND DEFENDANT/DECEASED

**PAUL MAINA MBUTHIA (Administrator of the
estate of PETER MBUTHIA KAMORE alias**

MBUTHIA KAMORE (deceased).....1ST INTERESTED PARTY

**GEORGE PETER MAINA KINYUGO (Administrator of the
estate of JOSEPH MACHARIA KAMORE).....2ND INTERESTED PARTY**

**GEOFFREY MACHARIA KIHORO (Administrator of the
estate of KIHORO GACHUHI (deceased).....3RD INTERESTED PARTY**

RULING

1. Before me for determination is the Notice of Motion dated 27th March 2019 brought under Order 1 Rules 10 and 11 of the Civil Procedure Rules, and Sections 3A, 63 (e) of the Civil Procedure Act and where the Applicants/Interested parties seek for **an order for substitution of the 1st interested party in place of the original Plaintiff herein, the 2nd interested party in place of the original 1st Defendant while the 3rd interested party be enjoined as an interested party and one Andrew Mwangi Chui be enjoined to the suit as a Defendant.**

2. **The Application was opposed by the Respondents herein to the effect that it offended the provisions of Orders 9 and 19 Rule 5 and 6 of the Civil Procedure Rules. That the suit had otherwise abated as against the deceased persons and therefore the application was frivolous and an abuse of Court process.**

3. On the 21st November 2019, by consent parties agreed to have both applications disposed of by way of written submissions to which only the Applicant complied and filed their written submissions to the effect that they sought to have the deceased Plaintiff and Defendant be substituted by their children the 1st, 2nd, and 3rd Applicant/interested parties respectively.

4. That whereas the Plaintiff's case abated on 5th August 2008, the 1st Defendant's case abated on the 3rd August 1992 while the 2nd Defendant's case abated on the 27th August 2002 but strangely the matter has continued to be active despite the suit having abated against the respective parties.

5. That parties to the preliminary objection herein who were the Defendants were also deceased persons and unknown to the Applicants: Stephen Ndegwa Muchunu having died on the 9th August 2007 while John Waikunu Chui passed away in the year 2003, and therefore the

Applicants were at a loss as to how and when the deceased persons had issued instructions to the firm of Nga'nga Munene Advocates. That the suit having abated, the same ought not be taken over by persons who were not parties to it. That the same should be reopened so that parties are substituted to enable them address their substantive issues therein.

6. That the orders issued by the Deputy Registrar on the 1st September 2004, when the matter had abated, against some parties and which orders saw properties change hands without the deceased's' legal representatives, was in illegal, irregular and a nullity in law.

7. That the Applicants therefore seek to be enjoined in the suit so as to prosecute/conduct the same with a view to reclaim their heritage in the land that was irregularly taken by strangers.

8. Since the Respondents did not file any written submissions, the Court shall rely on the points raised in their Preliminary Objection as herein above stated.

Determination.

9. I have anxiously considered this matter as a whole, I note that the names of the parties appearing on the Application dated the 27th March 2019 are different from the names of the parties appearing on the Applicant's submissions filed on the 15th July 2020, and the Respondent's Preliminary Objection dated the 15th May 2019 and the pleadings of the year 1977-2004 to which I have taken the liberty to go through the court proceedings to satisfy myself as to whom the correct parties are.

10. I note that this matter commenced in 1977 vide a plaint by the Plaintiff Peter Mbuthia Kamore, against the four (4) Defendants being **Macharia Kamore, Macharia Kariuki, Kihoro Gachuhi** and **Kamore Gachuhi**, Defendants herein who entered their appearance and defence on the 15th March 1977.

11. On the 20th November 1978, the court had been informed that the 3rd Defendant **Kihoro Gachuhi** had passed away wherein on the 29th May 1979, **Wambui Kihoro** had been appointed as his legal representative for the purposes of this case and matters arising thereupon pursuant to an application for substitution dated the 4th April 1978.

12. That via an application dated the 21st April 1982, the 4th Defendant **Kamore Gachuhi** who died on 3rd September, 1981 was substituted by his legal representative and wife **Waithira Kamore** by an order of the Court on the 21st June 1982.

13. On the 9th June 1983, by consent the matter was referred to the District Officer, Othaya for arbitration wherein the award was read in Court on the 2nd October 1986 and parties given leave of 30 days to object to the same.

14. The Plaintiff then filed an application dated the 11th February, 1987 seeking that the award be set aside and the matter be heard *de novo* wherein a ruling was delivered on the 19th February, 1991 dismissing the application and confirming the terms of the award to the effect that the since suit land was a clan land and not an individual holding that it should be sub-divided among the households of the clan. That the award was therefore capable of execution.

15. A Notice of Appeal dated 21st February 1991 was thereafter filed by the Plaintiff seeking to Appeal against the said ruling. The record is silent on whether or not the said Appeal was filed and prosecuted.

16. Vide an application dated the 16th July, 1998, one Stephen Ndegwa herein, a 3rd party/Applicant (and an elder of Mbari ya Muiru clan) sought to have the register in relation to land parcels No. Chinga/Gathera/S.47 and Chinga/Gathera/S.48 consolidated so as to have the resultant parcel of land subdivided and distributed in accordance with the award and subsequent ruling by the Court.

17. Pending the hearing of this application, the said Stephen Ndegwa filed another Chamber Summons dated 16th July, 2003 seeking interim orders against the Plaintiff.

18. On 1st September 2004, the matter came up for hearing before the Deputy Registrar J. N. Muniu, on the application dated the 16th July, 1998 wherein the same was allowed ex-parte and the orders granted as prayed.

19. A Notice of motion dated 7th January, 2005 was then filed by the 1st Defendant and Stephen Ndegwa (as Applicants) herein who sought to have the Deputy Registrar to sign the transfer documents relating to land parcels No. Chinga/Gathera/S.47 and Chinga/Gathera/S.48 so that the orders of 1st September 2004 to take effect. On the 9th May 2005 her ladyship Judge as she was then, allowed the application and granted the said orders.

20. An application dated 22nd July 2011 was again filed by 1st Defendant and Stephen Ndegwa (as Applicants) seeking the Deputy Registrar to sign the transfer documents relating to land parcels No. Chinga/Gathera/S.47 and Chinga/Gathera/S.48 from **Mbuthia Kamore, Peterson Muraya Chui, James Gichanga Chui, Gathimu Gachibi**, and **Stephen Ndegwa Muchunu** to **Andrew Mwangi Chui**, which application was allowed ex parte on the 9th of October 2013

21. At this point it must be remembered that the parties appearing on the pleadings were the Plaintiff, the 1st Defendant and Stephen Ndegwa, as Applicants. It must also not be lost, from the documents herein filed in support of the Application, that the 1st Defendant Macharia Kamore passed away on the 30th August 1992, the Plaintiff passed away on the 5th August 2007, while Stephen Ndegwa passed

away on the 9th August 2008 and no substitution had been made.

22. The proceedings further depict that vide an application dated the 25th November 2013 the Plaintiff sought to enjoin Joseph Maina Kihoro and Harrison Maina Kihoro as interested parties to the suit, and also to stay the execution, review, vary and/or set aside the order of 13th of October 2013. The said application had also listed **Stephen Ndegwa Muchunu, Peterson Muraya Chui, James Gichanga Chui and Gathimu Gachibi** as the Respondents. A ruling dated the 5th of October 2015 was delivered on 28th October, 2015 dismissing the said application.

23. Another application dated 3rd March, 2016 by Joseph Maina Kihoro and Harrison Maina Kihoro had been filed seeking to be enjoined as an interested parties to the suit and/or be substituted for the 3rd deceased Defendant, **Kihoro Gachuhi** herein. The said application also sought to review, rescind, vary and/or set aside the ruling of 5th of October 2015 which had been delivered on 28th October, 2015. A ruling was delivered on the 19th October 2016 dismissing the said application as being Res Judicata the application dated the 25th November 2013 wherein Counsel then sought for leave to appeal the said ruling. The record is silent again as whether or not the said Appeal had been filed and/or its outcome.

24. The matter was subsequently taxed, an objection raised and the ruling delivered on the 5th May 2017 where the Bill of Costs was taxed at Ksh. 66,129/=. Thereafter on the 19th September 2017 the matter was fixed for a Notice to Show Cause but the Judgment Debtor was not traced. Subsequently the present Application dated 27th March 2019 was filed.

25. Having painstakingly perused this matter from its inception, as my duty to ensure that the Court maintains the integrity of the system of administration of justice and to ensure that justice is not only done but is seen to be done by, amongst other measures, stopping litigations brought for ulterior and extraneous considerations, I find that the litigants and Counsel who are enjoined by both the Constitution and the law to assist the Court to further the overriding objective for the just determination of the proceedings failed in their duty with the result that there were various errors committed on the face of the Court record, for example allowing a joinder of parties to an already abated suit, joinder of parties to the suit, without an application, who then sought for and were granted orders. The abatement of suit and the propriety of the parties' joinder to the suit however, being issues of law, can only be raised in an Appeal.

26. I also find that there is sufficient evidence to hold that all the initial parties properly enjoined to this suit (See paragraph 10 to 12 of the ruling) are now deceased thus the suit had abated.

27. Order 24 Rule 3 of the Civil Procedure Rules provides:

(1) Where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving Plaintiff or Plaintiffs alone, or a sole Plaintiff or sole surviving Plaintiff 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 Plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased Plaintiff is concerned, and, on the application of the Defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased Plaintiff.

28. On the other hand, Order 24, Rule 4 of the Civil Procedure Rules provides ;

(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.

29. It is apparent from **subsection (1)** above that the application to substitute the legal representative in place of a deceased Defendant may be made by any party to the proceedings. It may very well even be made by the deceased's legal representative. The substitution of the legal representative in place of a deceased Defendant means that the legal representative comes in to replace the deceased party. The rule does not limit the duty to move Court in this regard to the Plaintiff alone.

30. On the other hand, as a general rule, the death of a Plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the Plaintiff or within such time as the Court may in its discretion for *good reason* determine, an application must be made for the legal representative of the deceased Plaintiff to be made a party to the proceedings.

31. Thus if no such application is made within one year or within the time extended by leave of the court, the suit shall abate and no fresh suit can be brought on the same cause of action.

32. In this case, the Plaintiff passed away on the 5th August 2007, the suit against him therefore abated after one year hence on the 5th August 2008. It is trite law that where a suit has abated, the legal representative of the deceased Plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "*sufficient cause*" from continuing with the suit.

33. The law, as I understand it, is to the effect that upon death of a sole Plaintiff or the only surviving Plaintiff, **the suit shall abate so far as the deceased Plaintiff is concerned** if substitution is not effected within a period of one year after the said death. The effect of an abated suit is that it ceases to exist in the eye of the law

34. The court of Appeal in the case of **Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others** [2015] eKLR held:

*The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased Plaintiff. There have been arguments, as to whether or not a formal order is necessary to confirm the fact of abatement. See M'mboroki M'arangacha v Land Adjudication Officer, Nyambene and 2 others, Meru H.C.C. Application No.45 of 1997 where the High Court held that an order to record the abatement of a suit was not necessary. See a similar holding in KFC Union v Charles Murgor (Deceased) NBI HCCC No.1671 of 1994. From the language of **Order 24 Rule 3(2)** aforesaid, earlier reproduced and highlighted, the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the Defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience an order of the court is necessary for a final and effectual disposal of the suit. We borrow the statement of Lord Denning in MacFoy vs United Africa Co. Limited (1961) 3 All ER 1169, that:*

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so....”

35. An abated suit is thus non-existent prior to it being revived. In this matter it cannot be denied that the suit has abated and as such, there is no suit before this court.

Dated and delivered at Nakuru this 30th day of November 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE