



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 529 OF 2013

ALEXANDER MWANGI MAINA (suing as the administrator of the estate of the late

JOSEPHAT MAINA MUTHEE.....PLAINTIFF

VERSUS

JACKSON THUO GICHIRIRI.....1ST DEFENDANT

JOHN MBURU MUNIU & DANSON KAMAU KANYIRI (Sued as the officials of

NJUGUINI WATER PROJECT.....2ND DEFENDANT

RULING

(Application for substitution and revival of abated suit; Order 24 Rules 4 and 7 of the Civil Procedure Rules; application allowed).

1. The application before me is the amended motion dated 4 June 2018 filed by the plaintiff. The application is brought pursuant inter alia to the provisions of Order 24 Rule 4 of the Civil Procedure Rules, and seeks orders to have the deceased 1st defendant substituted with Grace Wairimu Thuo and Paul Maina Thuo. The 2nd defendant has opposed the application through Grounds of Opposition.

2. By way of background, this suit was commenced through a plaint which was filed on 13 September 2013 and which was later amended on 25 October 2013. In his amended plaint, the plaintiff has pleaded that Josephat Maina Muthee (deceased), whose estate the plaintiff represents, was a member of Njoro Mutukanio Farmers Company Limited and that he became registered as proprietor of the land parcel Rare/Teret Block 1/233. He contended that Jackson Thuo Gichiriri, who was sued as 1st defendant and the registered proprietor of the land parcel Rare/Teret Block 1/234, had fraudulently and unlawfully subdivided his land causing a resultant subdivision to encroach into the plaintiff's land. He also contended that the Plot No. 234 and the Plot No. 2049, owned by Njuguini Water Project (sued through its officials as the 2nd defendant) had encroached and occupied the entire space meant for the land parcel No. 233. He thus sought the defendants to be permanently restrained from the land.

3. The case was listed for hearing on 24 September 2015, but it emerged that the 1st defendant had died and the matter could not therefore proceed.

4. In this application, the plaintiff wants a revival of the abated suit and enlargement of time for the substitution of the deceased 1st defendant by his legal representatives. 5. In the supporting affidavit, the plaintiff has averred that the delay in filing this application was brought about because the family of the deceased 1st defendant refused to take out letters of administration and he had to file a citation before letters of administration were eventually granted to the widow of the deceased, Grace Wairimu and her son Paul Maina Thuo, on 16 October 2017.

6. The 2nd defendant in her grounds of opposition, has argued that the application has been brought after inordinate delay which is not explained; that this is not a proper case for the exercise of the court's discretion in favour of the applicant; and that there is no provision for extension of time, where the suit against a defendant has abated.

7. Apart from Ms. Njoroge, learned counsel for the applicant, other counsel did not make any submissions. I have taken note of these submissions by counsel.

8. The issues herein are well covered by the provisions of Order 24 of the Civil Procedure Rules, 2010 and specifically, Rule 4 which addresses the situation when there is death of a defendant.

Order 24 Rule 4 : Procedure in case of death of one of several defendants or of sole defendant.

(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.

9. It will be seen from the above and especially sub-rule 3, that an application for substitution of a deceased defendant needs to be made within one year of his death, and if not so made, the suit shall abate as against the deceased defendant.

10. There is however provision under Rule 7(2) of Order 24, for the revival of an abated suit. The said provision is drawn as follows :-

The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.

11. From the above, it will be noted that the court does have discretion to revive an abated suit, if “sufficient cause” is shown for the delay in not filing the application for substitution within the one year provided by law. It is not therefore correct as argued by the 2nd defendant, that there is no provision for the revival of an abated suit.

12. In this application, the applicant has averred that he was prevented from filing the application for substitution within one year, because none of the family members of the deceased 1st defendant, had applied for letters of administration on behalf of his estate and he had to file a citation. He has exhibited the said citation. He has also exhibited the grant of letters of administration eventually issued to Grace Wairimu Thuo and Paul Maina Thuo, to represent the estate of the deceased 1st defendant and I do note that the said grant was issued on 16 October 2017. I am therefore satisfied that there was indeed good reason which prevented the plaintiff from filing this application within the one year provided by law for substitution of a deceased defendant.

13. On the substance of the application, I can see that the two persons, Grace Wairimu Thuo and Paul Maina Thuo, are now the legal representatives of the estate of the deceased 1st defendant. Having been satisfied that there was good reason for the delay in filing this application, I really have no reason not to allow the said application.

14. I therefore allow the application and order Grace Wairimu Thuo and Paul Maina Thuo, jointly to be enjoined to this suit as representatives of the estate of the deceased 1st defendant, and henceforth they be deemed as joint 1st defendants. The plaintiff is at liberty to amend the plaint to reflect this position.

15. I make no orders as to costs.

16. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 20th day of February 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

No appearance on the part of M/s Nancy Njoroge & Co. for the applicant .

No appearance on the part of M/s Ikua Mwangi & Co for the respondent.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU