



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 439 OF 2017

(FORMERLY MILIMANI ELC No. 772 OF 2015)

EUNICE NDUTA KURIA.....PLAINTIFF/RESPONDENT

VERSUS

JAMES MAINA KURIA.....1st DEFENDANT/APPLICANT

PETER KURIA WAIHAKA.....2nd DEFENDANT/APPLICANT

JOSEPHAT KURIA MAINA.....3rd DEFENDANT/APPLICANT

JANET WANGECHI KAMAU.....4th DEFENDANT/APPLICANT

RULING

1. Coming up before me for determination is a Notice of Motion, which was filed at the Land and Environment Division-Nairobi, dated the 16th March 2016 filed pursuant to the provisions of Order 2 Rule 15(b) (c) (d) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act as well as all the enabling provisions of the Law where the Applicants seek for the striking out of both the Plaintiff's Application dated the 5th August 2015 as well as the Plaintiff for being statutorily time barred by dint of Section 7 of the Limitation of Actions Act and secondly, for the reasons that the Plaintiff herein has no locus standi as he has not taken out letters of Administration Ad litem so as to represent the Estate of the deceased Josphat Kuria. The Applicants therefore state that for the above reasons, the court has no jurisdiction to hear the matter.

2. I have since looked at the court record. I note that on the 16th November 2016, counsel for the Defendants informed the court that the Plaintiff herein had passed away. The court thus granted the deceased Plaintiff's Counsel Leave to file the necessary application for substitution within 30 days failure to which the Defendant was to move the court.

3. The matter lay dormant and none of the above directives was adhered to. Subsequently, the matter was transferred to this court wherein Counsel for the Defendant sought to dispose of their application dated 16th March 2016 by way of written submission and proceeded to file their written submissions on the 22nd March 2016.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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

9. 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....”

10. An abated suit is 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 Nyahururu this 28th day of March 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE