



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND AT MURANGA

ELC NO. 270 OF 2017

KURIA MWANGI.....PLAINTIFF

VS

SAMUEL KIRUMBA KARIUKI.....1ST DEFENDANT

MARGARET WAITHERA KARIUKI.....2ND DEFENDANT

TERESIA WAMBUI KARIUKI.....3RD DEFENDANT

FRANCIS GACHEHA KARIUKI.....4TH DEFENDANT

MARY WANJIKU KARIUKI.....5TH DEFENDANT

PETER KIMANI KARIUKI.....6TH DEFENDANT

JOSEPH KURIA MWANGI.....7TH DEFENDANT

RULING

1. The 1st to 6th Defendants filed a Preliminary Objection to the Plaintiff 's suit dated 4/2/18 on the following grounds:-

a. The Plaintiffs suit was filed against the 1st to 6th Defendant's as representatives of the estate of Kariuki Manuthu alias Kariuki Kimani offends Order 24 rule 7 of the Civil Procedure Rules, 2012 (Civil Procedure Rules) in view of a previous suit Murang'a CMCC No. 324 of 2014 (correct case number is 342 of 2014) involving the Plaintiff and the deceased who died on 23/11/14.

b. The plaint as filed offends the mandatory provision of Order 4 rule 1(1) of the Civil Procedure Rules.

c. The Plaintiff can only apply to revive the abated suit CMCC No.324 of 2014 other than filing a fresh suit based on the same facts.

2. On the 11/2/2019 the parties with the concurrence of the Court elected to prosecute the Preliminary Objection through Written Submissions.

3. The Applicant submitted that the Plaintiff in the instant suit had sued the father of the 1st to 6th Defendants herein before his demise vide Murang'a CMCC No 342 of 2014 in respect to the same suit property seeking the same relief as the instant suit. The Plaintiff has admitted under paragraph 15 of the plaint the existence of the CMCC 342 of 2014 before the Murang'a Chief Magistrate's which was unconcluded because the Defendant therein died before its finalization. That the filing of the fresh suit in respect to the same subject matter after the demise of either of the parties to a suit contravenes the provisions of Order 24 rule 7(1) which provides

“where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action”.

4. That the Plaintiff herein had the opportunity to proceed with the lower Court suit by making an application under Order 24 rule 4 for the legal representative of the Defendant therein to be made a party to the suit and proceed with the suit. There is no such application on record.

5. That according to the death certificate on record the Defendant in Murang'a CMCC 342 of 2014 died on 23/11/14 and therefore the suit against him abated by operation of the law on 23/11/15 in line with the provisions of Order 24 rule 4(3) which stipulates as follows;

“where within one year no application is made under sub rule (1), the suit shall abate as against deceased Defendant’s”.

6. They proceeded to submit that the only opportunity the Plaintiff now has is to revive the CMCC No. 342 of 2014.

7. The Applicants have enjoined the Court to allow the Preliminary Objection and proceed to strike out the Plaintiff’s case filed against the 1st to 6th Defendants. They urged the Court to be guided by various decisions listed hereunder; **Said Sweilem Gheithan Saanum Vs AG & 5 others CA No 16 of 2015; Leonard Mutua Mutevu Vs Benson Katela Ole Kantai & Another Misc Application (2014) ECLR; Jimna Minai Wangonya Vs Julius Macharia Mwangi ELC No 493 of 2017-Muranga.**

8. The 7th Defendant in support of the Preliminary Objection dated 4/12/18 submitted that the present suit offends the provisions of Order 24 rule 7 of the Civil Procedure Rules for attempting to file a fresh suit whilst the previous suit abated. He submits that the Plaintiff does not have a prima facie case against his purchaser’s interest over the suit land. That the wording of Order 24 rule 7(1) is couched in mandatory terms therefore no fresh suit can be entertained in respect to the same subject matter on an abated suit. That the Plaintiff’s instant suit also does not contain a paragraph that states that there is no other suit pending before another Court in respect to the same subject matter thus it offends the provisions of Order 4 rule 1(1) (f) which provides;

“The plaint shall contain the following particulars:

(f) averment that there is no other suit pending and that there has been no previous proceedings in any Court between the Plaintiff and the Defendant over the said subject matter and that the cause of action relates to the Plaintiff named in the plaint”.

9. He is convinced that the Plaintiff’s instant suit is a candidate for dismissal in line with the provisions of Order 2 rule 15 for being vexatious and abuse of the process of the Court. He contends that the Plaintiff is seeking equitable remedies and has approached the Court with unclean hands and prays for dismissal of the Plaintiff’s claim with costs to the Defendants. He relied on the case of **Jimna Minai Wangonya Vs Julius Macharia Mwangi ELC No 493 of 2017-Muranga** in support of the Applicant’s motion.

10. The Plaintiff /Respondent submitted that after the death of the original Defendant KARIUKI MANUTHU, a Succession cause was filed in respect to his estate. According to the certificate of confirmation of grant the subject land was shared equally amongst the 1st -6th Defendants. The Plaintiff /Respondent blames the 1st -6th Defendants who were appointed legal representatives on the 3/7/15 for failing to move the Court for substitution of KARIUKI MANUTHU within 12 months as stipulated in law.

11. In reply to the 7th Defendant/Respondent’s plea that the Plaintiff did not contain an averment as provided for under Order 4(1) (f), the Plaintiff submitted that the same was disclosed on para 16 and 17 of the amended plaint filed on the 18/5/17 and duly served on the said 7th Defendant.

12. Contending that ground c). of the Preliminary Objection cannot apply as the suit has CMCC No. 342/2014 has abated, the 7th Defendant placed reliance on the **Vamos & Partners Vs Hassan No 412 of 1962 ECLR** at page 644 to support his position and urged the Court to dismiss the Preliminary Objection with costs.

13. Having evaluated the motion, the submissions filed by the parties and the relevant law the only issue for determination is whether the objection raised is a point of law capable of disposing the suit.

14. I have read and considered the cases cited by the parties in this application.

15. Abatement of suits is governed by Order 24 of the Civil Procedure Rules which I have taken the liberty to reproduce here for purpose of emphasis.

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

2. Where there are more Plaintiff s or Defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving Plaintiff or Plaintiff s alone or against the or Defendants dies surviving Defendant or Defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving Plaintiff or Plaintiff s, or against the surviving Defendant or Defendants.

3. (1) Where one of two or more Plaintiff s dies and the cause of action does not survive or continue to the surviving Plaintiff or Plaintiff s 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:

Provided the Court may, for good reason on application, extend the time.

4. (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.

5. Where a question arises as to whether any person is or is not the legal representative of a deceased Plaintiff, or a deceased Defendant, such question shall be determined by the Court.

[Order 24, rule 7]. Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action”.

16. In the instant suit the Plaintiff vide an amended Plaint filed on the 18/5/17 sued the 1st to 6th Defendants who are the administrators of the estate of the original Defendant JAMES KARIUKI MANUTHU alias KARIUKI KIMANI and the 7th Defendant claiming the following reliefs:

a. The 7th Defendant do transfer to the Plaintiff land parcel No.Loc.18/MARUMI/213 or alternatively refund of Ksh.41,000/= plus interest at Court rates from the date of receipt till payment in full.

b. Costs of the suit.

c. Any other relief as the Court may deem fit to so grant.

17. I have perused the suit as filed in the lower Court file - CMCC 342 of 2014 and note that the said Plaintiff had sued the Defendant James Kariuki Manuthu alias Kariuki Kimani vide a Plaintiff dated and amended on 6/2/15 for the following reliefs:

a. Transfer of parcel No. Loc.8/MARUMI/213 to the Plaintiff free from any encumbrances or alternatively refund of Kshs. 41,000/= plus interest at Court rates from the date of receipt till payment in full.

b. Costs of the suit

c. Interest on (a) and (b) at Court rates

18. In this case according to the certificate of death on record the original Defendant died on the 23/11/14. The subject matter in the case is land and therefore the cause of action survived the death of the Defendant. There is no evidence in the lower Court file that substitution was done within 12 months as provided for under Order 24 rule 3(1). The suit therefore abated as at 24/11/15. The procedural steps one must take is to move the Court for revival of the suit after satisfying the Court that he was prevented by sufficient reasons from continuing the suit.

19. It is evident that both the instant suit and the lower Court suit relate to the same subject matter, seeking the same remedies against the same parties. The Plaintiff has admitted that the lower Court matter was left unconcluded because the Defendant therein died before its finalization. The Plaintiff then though represented by Counsel decided to abandon that case and proceeded to file the instant suit that clearly violated the provisions of Order 24 rules 7 as stated above.

20. I have held before in the case of **Jimna Minai Wangonya Vs Julius Macharia Mwangi ELC No 493 of 2017-Muranga** that the wording of Order 24 rule 7 is expressed in a mandatory command. It leaves no room for discretion. Nonetheless nothing prevents the Plaintiff for applying for the revival of the suit in the lower Court subject to the provisions of Order 24 rule (2). Meanwhile this arena is not available for him.

21. The Defendant’s Preliminary Objection fits the definition of a preliminary objection per the leading case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A 696** where the Court stated;

“so far as I am aware a preliminary point of law which has been pleaded r which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

22. The Preliminary Objection is upheld.

23. Consequently, the suit is struck out for being in contravention of the provisions of Order 24 rule 7 with costs to the 1st – 6th Defendants.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 28TH DAY OF MARCH , 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Muthii HB for Gaceru for the Plaintiff

Kirubi for the 1st – 6th Defendants

Malenya HB for Nganga for the 7th Defendant

Njeri & Kuyiki, Court Assistants