



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 602 OF 2015

SARAH GATHONI MUIRURI &

JEDIDAH WANJIRU NJOROGE.....PLAINTIFFS/RESPONDENTS

VERSUS

WANJIKU KIGURU.....DEFENDANT/APPLICANT

RULING

1. This is the Notice of Motion dated 13th September 2017, brought under Order 24 Rule 4(3) of the Civil Procedure Rules.

2. It seeks orders:-

(1) That the suit herein has abated as against the defendant.

(2) That costs of this application be provided for.

3. The grounds are on the face of the application and are:-

(i) The defendant herein passed away on 12th April 2015.

(ii) No instructions and/or application for substitution was made within the required one year as provided under the law and hence this suit has abated as against the defendant.

4. The application is supported by the affidavit of Wambui Ndegwa, Advocate for the defendant sworn on the 13th September 2017.

5. Upon being served with the application, the plaintiffs filed a notice of preliminary objection dated 19th September 2017. There is also a replying affidavit sworn by Joseph Njoroge Mbugua Advocate for the plaintiff sworn on the 16th October 2017.

6. On the 14th November 2017, the court directed that the preliminary objection and the notice of motion dated 13th March 2017 be heard together. The court further directed that written submissions be filed in respect thereof.

The Plaintiffs' Submissions

7. The defendant's advocate states in his affidavit that she acts for the defendant but does not cite the source of her authority to swear it since the defendant is dead. The death of a client terminates the advocate's authority to act. Without authority from the deceased's representative or personal administrator an advocate of a deceased client is without authority to act.

8. Where litigation is pending the advocate has an option of filing an application to cease acting. It is only after her appointment by the representative or personal administration that an advocate can file an application as the one under consideration. Hence the advocate is a stranger to this suit.

9. The application is frivolous, misconceived, is an abuse of the process of court, is premature and a waste of courts time. They pray that the same be dismissed with costs to be borne by the advocate.

The Defendant's/Applicant's Submission

10. The defendant died on 12th April 2015 and annexed is a copy of the permit for burial. There have been no instructions to substitute the deceased with her legal representative or at all. The suit has abated.

11. They have put forward the cases of: **Kenya Farmers Cooperative Union Ltd vs Charles Murgor (deceased) t/a Kaptabei Coffee Estate [2003] Eklr; Wallace Kinuthia vs Anthony Nd'ung'u Muongi & 3 Others [2013] eKLR; Said Sweilem Gheithan Saanum vs Commissioner of Lands (being sued through Attorney General) & 5 Others [2015] eKLR; Regina Waithira Mwangi Gitau vs Boniface Nthenge [2015] eKLR.**

12. The supporting affidavit sworn by the advocate on record for the deceased is not defective in content or form. Therefore the preliminary objection raised herein to strike the said affidavit and application is not is not merited. They pray that the application be allowed.

13. I have considered the preliminary objection and the notice of motion dated 13th September 2017. I have also considered the written submission of counsel and the authorities cited. The issues for determination are:-

(i) *Whether or not the preliminary objection is merited.*

(ii) *Whether or not the suit has abated.*

14. The preliminary objection is dated 19th September 2017 is premised on Order 19 Rule 3 of the civil Procedure Rules. That the affidavit sworn by the advocate who appeared does not meet the minimum requirements of an affidavit under the said rule. Order 19 rule 3 of the Civil Procedure Rules provides that:-

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove;

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof”

15. I have gone through the supporting affidavit sworn by Wambui Ndegwa advocate. In paragraph 3 she deposes that the defendant herein passed away suddenly on 12th April 2015. She then annexed the permit for burial which is evidence of the death of the defendant. In my view the permit for burial would be the source of her information. There is no doubt that the defendant has passed on.

16. The plaintiffs' advocate admits in his affidavit that counsel for the defendant informed the court of her client's demise on 19th April 2017. I therefore find that the preliminary objection herein is not merited and the same is dismissed.

17. As stated earlier there is no doubt that the defendant has passed on. The permit for burial annexed to the supporting affidavit of the Advocate shows that the defendant passed away on 12th April 2015. The date of the permit for burial is 15th April 2015. This permit for burial has not been disputed.

18. Order 24 Rule 1 of the Civil Procedure rules provides that:-

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

Rule 4 (1) provides that:-

“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.”

19. Rule 4 (3) provides that:

“Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.”

This provision is set in mandatory terms. As it is not in dispute that the defendant died on 12th April 2015, it goes without saying that the substitution ought to have been done by 12th April 2016. This was not done. It was held in the cited case of **Wallace Kinuthia vs Anthony Nd'ung'u Muongi & 3 Others [2013] eKLR** that as per the provisions of Order 24 Rule 4 (1) of the Civil Procedure Rules, *“a suit abates by operation of law where no substitution is made within one year on the death of the defendant.”*

20. I am also guided by the cited cases of **Said Sweilem Gheithan Saanum vs Commissioner of Lands (being sued through Attorney General) & 5 Others [2015] eKLR** where the Court of Appeal held that:-

“.....If no application for substitution is made within a year or within the time extended by leave of the court, the suit shall

abate. Where a suit abates no fresh suit can be brought on the same cause of action.....The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes places 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.....”

21. The death of the defendant is not disputed nor is the date. It follows that this suit has abated.

22. In conclusion I find merit in this application and the same is allowed consequently, the suit herein has abated as against the defendant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 28TH day of MARCH 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendant

.....Court Assistant