



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.253 OF 2017

JOYCE NYAMBURA MBUGUA

DAVID KAMAU MBUGUA (Suing as the legal

representatives of the Estate of MBUGUA GACHIRI.....PLAINTIFFS/APPLICANTS

VERSUS

JANE WANJIRU WANGAL.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated **15th March 2018**, brought by the Applicant herein under, **Sections 1A and 3A** of the *Civil Procedure Code Cap 21 Laws of Kenya* and all other enabling provisions of Law, wherein the Applicant has sought for the following prayers:-

- 1) That the Court be pleased to enlarge the time within which to substitute the Defendant with a legal representative.**
- 2) The Court be pleased to issue an order that the Public Trustee to come on record and act as the legal representative of the Respondent**
- 3) Costs of the Application be in cause.**

This Application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit* of **David Kamau Mbugua**. These grounds are:-

- a) The Respondent is deceased.**
- b) Applicant has made several attempts to have the Respondent's daughter named Mary Wanjiru take out letters of Administration come on record and defend the suit to no avail.**
- c) Public trustee is empowered under the Public Trustee Act to administer the estate of a deceased person where no person has availed themselves to do so and where there is a property belonging to them is in dispute.**
- d) The granting of the orders will serve to meet the ends of justice as the court will be able to determine the facts of ELC Cause 253 of 2017 formerly Nairobi 496 of 2010, on merit and without any party being prejudiced.**

The Applicant in his *Supporting affidavit* averred that the court reinstated the suit and the Applicant was to pursue substitution of the Defendant/Respondent and that pleas to have the Defendant's daughter take up the matter have not borne any fruits. He averred that the Public trustee is empowered to safeguard all property on behalf of the deceased persons and can be compelled by the court to come on record and defend the suit on behalf of the deceased's estate.

The Application was dispensed with via written submissions and the Applicant through the **Law Firm of Nyawira Milimu & Omotto Advocates** filed their submissions on **5th November 2018**. It was submitted that the Defendant having passed on and none of her family members having taken out letters of administration nor shown interest in defending the suit despite being aware, then the proper party to be enjoined in the suit would be the Public trustee.

They relied on **Section 7** of the **Public Trustee Act** that provides:-

“Where the particular circumstances of any case appear to the courts or so require the court may if it thinks fit for reasons recorded in its proceedings, of its own motion or otherwise after having heard the public trustee grant under the Law of Succession Act letters of administration to the Public trustee.”

The Court has carefully considered the pleadings and submissions made by the Applicant. The issues for determination are:-

i. Whether this court has powers to enlarge time and;

ii. whether the court can compel the Public Trustee to come on record for the Defendant.

i. Whether this Court has powers to enlarge time. Section 95 of the Civil Procedure Act grants the court powers to

enlarge the time for doing any act prescribed by the Statute. The court has wide and unfettered discretion and some of the factors to consider include the delay, the nature of the dispute and whether the Respondent will suffer prejudice.

From their Affidavit, the Applicant has made several attempts to get the daughter of the Defendant to defend the suit which attempts have not been fruitful. The Court finds that to enable the matter be heard on merit, then time within which the Applicant had been granted to substitute the Defendant must be enlarged. The Court finds that the Defendant will not suffer any prejudice if the time is enlarged as her estate will have the chance to have her rights protected and the matter being determined on merit will have solved all pending issues.

Order 24 Rule 4 of the ***Civil Procedure Rules***, provides for the procedure to be followed in case of death of one or several Defendants. It provides that a cause of action shall not be defeated merely by the death of the Plaintiff or Defendant. A substitution must be undertaken within a year if the cause of action survives the deceased.

ii. Whether the court can compel the Public Trustee to come on record and act as the Legal Representative of the deceased.

Section 7 of the ***Public Trustee Act*** provides that:-

“Where the particular circumstances of any case appear to the courts or so require the court may if it thinks fit for reasons recorded in its proceedings, of its own motion or otherwise after having heard the Public Trustee grant under the Law of Succession Act, Letters of Administration to the Public Trustee notwithstanding that there are persons who under the Act or any other written law, would in the ordinary course be entitled to administer the estate of the deceased person”.

The upshot of the foregoing is that the Court finds that there is merit in the Application and enlarges the time within which the Applicant has to substitute the Defendant and the Public Trustee is therefore ordered to administer the Estate of the Defendant/Respondent for purposes of defending this suit.

Consequently, the ***Court allows the Plaintiff's/Applicant's Notice of Motion dated 15th May 2018 with costs being in the cause.***

It is so ordered.

Dated, Signed and Delivered at Thika this 25th day of March 2019.

L. GACHERU

JUDGE

25/3/2019

In the presence of

Mr. Githiri holding brief for Mr. Olembo for Plaintiffs/Applicants

No appearance for Defendant/Respondent

Lucy - Court Assistant

L. GACHERU

JUDGE

25/3/2019