



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 175 OF 2009**

**KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF**

**VERSUS**

**PAUL LOBO.....1<sup>ST</sup> DEFENDANT**

**BERNARD ATATI.....2<sup>ND</sup> DEFENDANT**

**SAMMY KOMEN MWAITA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Application before me for determination is the Notice of Motion dated 17<sup>th</sup> October, 2018 by the 2<sup>nd</sup> Defendant seeking orders that the Suit against the 1<sup>st</sup> Defendant be declared to have abated and upon such declaration, the Suit against the 2<sup>nd</sup> Defendant should accordingly fail, and the Notice of Motion dated 17<sup>th</sup> October 2018 by Plaintiff seeking to revive the Suit against the 1<sup>st</sup> Defendant, Paul Lobo by substituting him with Sarah Maria Lobo and Myrtle Mary Desa, the Legal Representatives of the Estate of Paul Lobo.

2. The Plaintiff's Application dated 17<sup>th</sup> October, 2018 is premised on the grounds on the face of the motion and supported by the affidavit of Fatuma Abdulrahim sworn on 17<sup>th</sup> October, 2018. It is deposed that on 9<sup>th</sup> June, 2009, the Plaintiff sued the Defendants over unlawful acquisition and alienation of land **REFERENCE NUMBER MN/1/12408** being public property owned by Kenya Civil Aviation Authority. That on 18<sup>th</sup> September, 2018, the firm of Omulama E.M. & Company Advocates served the Plaintiff with copies of Grant of Probate of Written Will dated 17<sup>th</sup> April 2012, Death Certificate dated 20<sup>th</sup> June 2011 and extracts of newspaper cutting dated 24<sup>th</sup> November, 2010 which indicate that Paul Lobo, the 1<sup>st</sup> Defendant died on 22<sup>nd</sup> November 2010 in Nairobi. That pursuant to the said Grant of Probate of Written Will it is apparent that Sarah Maria Lobo and Myrtle Mary Desa are the Legal Representatives of the Estate of Paul Lobo (deceased).

3. It is deposed that the Plaintiff became aware of the death of Paul Lobo on 18<sup>th</sup> September 2018 and that prior to this knowledge of the Plaintiff was not in a reasonable position to make an Application for substitution of the deceased with the Legal Representatives of his Estate.

4. It is further deposed that the Plaintiff's cause of action against the deceased has abated hence there is need to revive the Plaintiff's Suit against the deceased through his substitution with the Legal Representatives of the Estate. It is the Plaintiff's contention that it has an arguable case with high chances of success against the estate of the deceased and that it is in the best interest of justice and public interest to revive the Plaintiff's Suit against the estate of the deceased through his Legal Representative of his Estate. That failure to revive the Plaintiff's suit against the estate of the deceased through his Legal Representatives would adversely limit and prejudice the provisions of Section 11 (i) of the Ethics and Anti-corruption Act 2011 as read with Article 159 (2)(d)(e) and 40(6) of the Constitution of Kenya to the detriment of the Government of Kenya.

5. It is further deposed that the Defendants/Respondents would not be prejudiced if the Plaintiff's Suit and the serious triable issues attendant therein are conclusively adjudicated on merit with the participation of the Legal Representatives of the Estate of the deceased. That there exist plausible reasons and circumstances that warrant revival of the Plaintiff's Suit against the estate of the deceased through the Legal Representatives thereof and that unless the orders sought herein are granted, miscarriage of justice is bound to occur contrary to public interest. The deponent believes that under Article 159 of the Constitution and Sections 1A and 3A of the Civil Procedure Act, it would be fair, expedient and in the best interest of justice and public interest to revive the Plaintiff's Suit as sought in the present Application.

6. The Application is opposed by the 3<sup>rd</sup> Defendant who filed a Replying Affidavit sworn by Sammy Silas Komen Mwaita, the 3<sup>rd</sup> Defendant on 25<sup>th</sup> January 2019. He has deposed that the Application is bad in law and brought in bad faith and an abuse of the process of the Court and the same ought to be dismissed with costs. The 3<sup>rd</sup> Defendant avers that the Suit stands abated and the Plaintiff did nothing from 22<sup>nd</sup>

November, 2010 when the 1<sup>st</sup> Defendant died until 17<sup>th</sup> October 2018 when this Application was filed. That the 1<sup>st</sup> Defendant's death was advertised on 24<sup>th</sup> November 2010 in the Daily Nation Newspaper which has a wide circulation and that the Grant of Probate of Written Will was issued on 12<sup>th</sup> April 2012 when the Suit had already abated. The 3<sup>rd</sup> Defendant states that there has been long and indeed inordinate and inexcusable delay out of which he stands to suffer prejudice contrary to fair hearing and quick/reasonable disposal of cases. The 3<sup>rd</sup> Defendant further states that the Application for substitution has no basis in law because the allegations against the deceased are in *personam*.

7. Mr. Makori, learned Counsel for the Plaintiff submitted that the cause of the action survives the 1<sup>st</sup> Defendant as it seeks to recover the land which is currently registered in the name of the 2<sup>nd</sup> Defendant. He submitted that the Plaintiff's Suit against the 1<sup>st</sup> Defendant is in rem and not in *personam* and therefore should not be dismissed. He relied on the Order 24 Rule 4(2) of the Civil Procedure Rules.

8. Mr. Magut, learned Counsel for the 2<sup>nd</sup> Defendant submitted that under Order 24 of the Civil Procedure Rules, the Suit against the 1<sup>st</sup> Defendant abated after one year from the date of his death. He submitted that the Suit against the 1<sup>st</sup> Defendant was in *personam* and the estate cannot be blamed on behalf of the deceased since the 2<sup>nd</sup> Defendant bought the property from the 1<sup>st</sup> Defendant.

9. Mr. Rutto, learned Counsel for the 3<sup>rd</sup> Defendant associated himself with the submissions of Mr. Magut, adding that the Suit stands abated and that the Application is made in bad faith and violates the right to fair trial. That the death was advertised in the newspaper and the Plaintiff ought to have been vigilant. He submitted that under the Law Reform Act, where the Suit is in *personam*, that cause of action dies with the deceased, and cannot survive the estate.

10. I have carefully considered all the material availed to this Court in support of and against the Application. Order 24 of Civil Procedure Rules provides as follows: -

**“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 Plaintiffs or Defendants than one, and anyone of them dies, and where the cause of action survives or continues to the surviving Plaintiff or Plaintiffs alone or against the 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 Plaintiffs, or against the surviving Defendant or Defendants.**

**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.**

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**7. (1) Where a Suit abates or is dismissed under this order, no fresh Suit shall be brought on the same cause of action.**

**(2) 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 foregoing provisions, it is trite that the Court is given the discretion to extend time for substitution of parties and to revive a Suit that has abated if sufficient cause is shown. The Suit herein was instituted on 9<sup>th</sup> June 2009. From the Court record, it appears no action was taken in the matter until on 25<sup>th</sup> June 2017 when the Suit came up for notice to show cause why the same should not be dismissed pursuant to notice issued by the Court under the provisions of Order 17 Rule 2 of the Civil Procedure Rules. On 25<sup>th</sup> May, 2017, Mrs. Abdulrahim Counsel for the Plaintiff indicated that the Plaintiff was still keen to prosecute the case. Mr. Ajieko Advocate who held brief for Mr. Odoyo Counsel for the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants and Ms. Wafula Advocate who held brief for Mr. Kadima, Counsel for the 3<sup>rd</sup> Defendant supported the dismissal. After consideration, the Court did not dismiss the Suit. Instead the matter was fixed on 11/7/2017 for hearing of the Application dated 2<sup>nd</sup> May 2017 by the firm of Kadima & Company Advocates seeking leave to withdraw from acting for the 3<sup>rd</sup> Defendant. That Application was allowed as already the firm of Osoro Omwoyo & Company Advocates had come on record for the 3<sup>rd</sup> Defendant vide a Notice of Change of Advocate dated 23<sup>rd</sup> April 2017 and filed on 23<sup>rd</sup> May 2017. The matter was fixed for pre-trial directions on 21/11/17 when Mrs. Abdulrahim appeared for the Plaintiff while Mr. Ajieko was present for the 3<sup>rd</sup> Defendant and held brief for Mr. Odoyo for the 1<sup>st</sup> and 2<sup>nd</sup> defendnats. Mr. Ajieko sought for more time to comply which was granted. The matter was later fixed for mention to confirm compliance on 5<sup>th</sup> February, 2018 when all the parties were represented. Mr. Ajieko held brief for Mr. Odoyo for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and for Mr. Otwere for the 3<sup>rd</sup> Defendant, while Mr. Bii was present holding brief for Ms. Fatuma Saad for the Plaintiff. The matter was

fixed for hearing on 4<sup>th</sup> July 2018. Again, Mr. Ajieko was present for the 3<sup>rd</sup> Defendant and held brief for Mr. Odoyo for the 1<sup>st</sup> and 2<sup>nd</sup> defendants while Mrs. Abdulrahim was present for the Plaintiff. The case was adjourned following an Application by the defence who had not been served with all the witness statements. Mr. Odoyo was also said to be indisposed.

12. On 17<sup>th</sup> October, 2018, M/s Magut & Sang Associates Advocates who came on record for the 2<sup>nd</sup> defendant on 17<sup>th</sup> September 2018 filed the Application seeking orders to have the Suit against the 2<sup>nd</sup> Defendant to be declared to have abated. This is because the 1<sup>st</sup> Defendant had apparently died on 22<sup>nd</sup> November, 2010. The 2<sup>nd</sup> Defendant attached a notice advertised in the Daily Nation Newspaper on 24<sup>th</sup> November 2010. On the same date the Plaintiff filed the Application dated 17<sup>th</sup> October 2018 seeking to revive the Suit against the 1<sup>st</sup> Defendant by substituting Paul Lobo (deceased) with the Legal Representatives. On 18<sup>th</sup> September, 2018, M/s Omulama E.M. & Company Advocates for the 1<sup>st</sup> Defendant had filed the 1<sup>st</sup> Defendant's list of documents which included Grant of Probate, Death Certificate, and Newspaper cutting.

13. The Application to revive the Suit and seeking the substitution of the deceased was made on 17<sup>th</sup> October 2018, about seven years after the abatement of the Suit against the 1<sup>st</sup> Defendant and on the same day the 2<sup>nd</sup> Defendant applied to have the Suit declared as having abated. As stated earlier, the Advocate for the 1<sup>st</sup> Defendant filed list of documents on behalf of the 1<sup>st</sup> Defendant on 18<sup>th</sup> September, 2018. Prior to that, the parties and in particular their Advocates, including that of the 1<sup>st</sup> Defendant had intimated to the Court that they were ready to proceed with the hearing of the case. There was no indication that the 1<sup>st</sup> Defendant had died way back in the year 2010. The Plaintiff has stated that it became aware of the 1<sup>st</sup> Defendant's death on 18<sup>th</sup> September 2018 when they were served with the 1<sup>st</sup> Defendant's list of documents dated 18<sup>th</sup>, 2018. The Plaintiff contends that the Application is merited because it was not aware of the 1<sup>st</sup> Defendant's death before 18<sup>th</sup> September, 2018. It is further contended that it is in the best interest of justice and public interest to revive the Suit against the estate of the 1<sup>st</sup> Defendant through his Legal Representatives.

14. There is no dispute that he 1<sup>st</sup> Defendant died on 22<sup>nd</sup> November, 2010. The Suit against the 1<sup>st</sup> Defendant was alive until his demise on 22<sup>nd</sup> November, 2010. An Application to substitute the 1<sup>st</sup> Defendant should have been made within one year of the deceased's death and it was that failure to apply to substitute the deceased Defendant within the stipulated one year that the Suit against him abated, necessitating this Application.

15. This Court notes from the record that the parties, including the Advocates for the 1<sup>st</sup> Defendant were acting as though the 1<sup>st</sup> Defendant had not passed on. The impression the Court gets is that none of the parties were aware of the death of the 1<sup>st</sup> Defendant until 18<sup>th</sup> September, 2018 when Counsel for the 1<sup>st</sup> Defendant filed the 1<sup>st</sup> Defendant's list of documents. From the foregoing, it is clear that the Plaintiff may not have been alive to the demise of the 1<sup>st</sup> Defendant prior to 18<sup>th</sup> September, 2018.

16. From the foregoing, I am of the most considered opinion that the Plaintiff has shown sufficient cause or reason why no Application for substitution was made within one year of the demise of the deceased Defendant. In addition, the Plaintiff has also shown sufficient cause or reason which prevented it from applying for revival of the Suit after its abatement on 22<sup>nd</sup> November, 2011, having had no knowledge of the deceased's demise before the Suit abated. I therefore exercise my discretion in favour of the Plaintiff.

17. The upshot of this is that I find that the Application by the Plaintiff dated 7<sup>th</sup> October, 2018 is merited. The same is allowed as prayed.

18. As regards the 2<sup>nd</sup> Defendant's Application dated 17<sup>th</sup> October, 2018, in my view the same fails as it was dependent on the outcome of the Plaintiff's Application. On the argument that the Suit against the Defendants is in *personam* and not in *rem*, it is my view that it would be inappropriate at this stage to delve into the merits of the Suit. Such issues can best be determined upon hearing on merit. The merits of the Suit, in my view, cannot be determined through submissions.

19. For the foregoing reasons, I decline to grant the orders sought in the 2<sup>nd</sup> Defendant's Application dated 17<sup>th</sup> October, 2018.

On costs, I order that each party bear their own costs of both Applications.

**DATED, SIGNED and DELIVERED at MOMBASA this 18<sup>th</sup> day of March 2019.**

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Mrs. Abdurahim for Plaintiff

Magut for 2<sup>nd</sup> Defendant holding brief for 3<sup>rd</sup> Defendant

No appearance for 1<sup>st</sup> Defendant.

Yumna Court Assistant

**C.K. YANO**

**JUDGE**