



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL CASE NO 104 OF 1999

GIDEON NASSIM KITI.....PLAINTIFF/RESPONDENT

VERSUS

AISHA ALI MOHAMED.....DEFENDANT

FAIZA OSCAR MEULI.....1ST INTERESTED PARTY

OMAR MOHAMOUD MOHAMED FARAH.....2ND INTERESTED PARTY

FAIZA OSCAR MEULI (Suing as administrator of the Estate of

AISHA ALI MOHAMED.....APPLICANT

RULING

1. For determination is the Chamber Summons dated 16th May, 2018 by Feiza Oscar Meuli. The summons is taken out under the provisions of Order 1 rule 10, Order 24 rule 4 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The orders prayed for are:

(a) that the firm of O. M Robinson & Co. Advocates be granted leave to act for the Defendant/applicant in this matter.

(b) that this Honourable Court be pleased to grant leave to FEIZA OSCAR MEULI as the administrator of the Estate of AISHA ALI MOHAMED to be substituted as the Defendant in this suit.

(c) that the plaint be amended accordingly.

(d) that the costs of this application be provided for.

2. The application is premised on the following grounds:

(a) That the defendant in this matter is deceased and the cause of action has survived her.

(b) That the Applicant is the Legal Representative of the Estate of the deceased.

(c) That the Estate of the deceased should be substituted in place of the Defendant to enable the Legal Representatives to continue with execution of the decree issued herein.

(d) That the Estate of the deceased is a necessary party to this suit.

(e) That the amendment will help this Honourable Court deal effectively with the matter that is before it.

3. In the affidavit in support of the motion, the applicant annexed inter alia Grant of letters of administration issue don 30th March 2016, in respect of the estate of the defendant's death certificate showing the defendant died on 23rd December, 2009 and warrants to give possession was issued on 28th September, 2012.

4. The application is opposed by the plaintiffs who filed a preliminary objection dated 2nd October, 2018 which stated thus;

(1) That the suit against the Defendant abated by operation of law on 23rd December, 2010 since the Defendant died on 23rd December, 2009 and no application for substitution of the Defendant was done within one year of death of the Defendant. As such, there cannot be substitution for purposes of an abated claim.

(2) That as the suit long abated in the year 2010, the suit ceased to exist and it cannot be the basis upon which any order can issue. The application herein is therefore misconceived, frivolous, vexatious and an abuse of the process of the court.

5. The 1st prayer seeking for permission for the firm of O. M Robinson & Co. Advocates to act for the defendant was settled by the letter of consent dated 4th July, 2018 and signed by Wameyo Onyango & Co. Advocates and the current advocates. What is remaining for determination is prayer 2 and 3. In prayer 2, the applicant is seeking to substitute the defendant. The plaintiff is opposed to the grant of this order because according to him, the claim has abated.

6. From the documents filed, judgment was entered in this matter on 25th May, 2007 where D. K. Maraga J. (as he then was) found that there was no merit in the Originating Summons taken out by the plaintiff and proceeded to dismiss the suit with costs. Basically what means is that there is no suit pending. What then does the law provide where the defendant dies after judgment. Can she be submitted as is prayed in this case? The plaintiff has substituted that there is no suit for which the applicant herein can join. However this matter having been concluded, I do not think the same can be said to abate. Order 24 in my view does not apply where the suit has been concluded. This is in line with the provisions Order 24 rule 10 which states that provisions to rule 3 (in case of death of plaintiff) or rule 4 (in case of death of defendant) does not apply to proceedings in execution of a decree or order.

7. The 3rd prayer is for the plaint to be amended to reflect the substitution. Although Order 8 rule 3 allows for amendment at any stage of the proceedings; I do not think an amendment is necessary where judgment has been entered. The administrator is being substituted for purposes of executing the decree and not for determination of issues in controversy between the parties. I therefore find that allowing prayer no 3 is making an order in vain since the applicant as the administrator merely comes to wear the shoes of the deceased defendant for purposes of execution. Consequently, I can only allow the application in terms of prayer 1 and 2 of the Chamber Summons.

8. This court takes liberty to remind the applicant that the orders issued pursuant to the judgment of the court delivered on 25th May, 2007 was a negative order. There was no order granted for vacant possession. The deputy registrar of this court should only sign decrees extracted as per the finding of the Judge and nothing more. Each party shall bear their respective costs of the application.

Ruling DATED & SIGNED at Mombasa this 7th day of March 2019.

A. OMOLLO

JUDGE.

DELIVERED at Mombasa this 8th day of March, 2019.

M. THANDE

JUDGE.