



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 507 OF 2013**

**JOHNSTONE MUCHEMI MUGUTU.....PLAINTIFF**

**VERSUS**

**SIMON KIHARA KAMAU.....1<sup>ST</sup> DEFENDANT**

**MUIRURI KINYUA.....2<sup>ND</sup> DEFENDANT**

**DAVID NDUNG’U KAMAU.....3<sup>RD</sup> DEFENDANT**

**AND**

**KENTON KIJABE CO-OPERATIVE SOCIETY LTD.....INTERESTED PARTY**

**RULING**

**(Application for substitution of deceased plaintiff; application being filed after one year of death; application allowed but for reasons recorded costs awarded to the respondents)**

1. The application before me is that dated 22 November 2018 filed by one Christine Mumbi Muchemi, who wishes to substitute the plaintiff, who is said to be deceased, and continue the suit. She also seeks enlargement of time for purposes of the substitution. The application is opposed.

2. The context of the case is that the plaintiff filed this suit on 23 August 2013, and averred to be the owner of the land parcel Longonot/Kijabe Block 3/1513 (Kenton). He sued three persons, namely Simon Kihara Kamau, Muiruri Kinyua and David Ndungu Kamau, claiming that the defendants have invaded the suit land and started excavating sand. In the suit, he sought orders to have the defendants permanently restrained, alongside general and exemplary damages. Through an application dated 12 September 2013, Kenton Kijabe Co-operative Society Limited, applied to be enjoined as interested party in the suit, contending that it is the rightful owner of the suit land. The application for joinder was allowed by consent and directions given on compliance so as to make the case ready for trial.

3. On 17 May 2017 when the matter came up for mention, it was presented that the plaintiff is deceased. On 19 February 2018, this court was availed of the copy of the Certificate of Death of the plaintiff which showed that he died on 14 February 2017. Given that one year had lapsed from the time of his demise, I ordered that the case be marked as abated with liberty to the defendants to apply for costs. An application for costs was duly filed on 7 March 2018, but before it could be heard, this application was filed. In the supporting affidavit to the application, the applicant has averred that she is the daughter of the deceased plaintiff and that she holds a grant of letters of administration. She has deposed that the delay in substituting the deceased plaintiff was occasioned by financial constraints on her part after the death of her father.

4. The motion is opposed by the replying affidavit of Isaac Kigo Mbugua, the Chairman of the interested party. He has deposed inter alia that the suit has already abated and it is superfluous for the applicant to apply for enlargement of time. It is also averred that the applicant has not explained why she did not apply to substitute from 14 January 2017 to 22 November 2018 a period of almost two years. He has also contended that the supporting affidavit is defective for the signature of the deponent is on a separate page.

5. I have considered the application. In the instance of the death of a party, Order 24 of the Civil Procedure Rules applies. Specifically, for our situation, since there was a sole plaintiff, Rule 3 of Order 24 applies. It provides as follows :-

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff

(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs 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.*

6. It will be seen from the above, that where a sole plaintiff dies, and the cause of action survives, the legal representative of the deceased plaintiff can apply to continue the suit, but such application needs to be made within one year, or else the suit will abate. The proviso to Rule 3, does give the court discretion to extend the time for applying for substitution.

7. I note that the respondents have argued that the suit has already abated and the order for extension of time is misplaced. That objection is not unfounded, for what the applicant needed to do was to apply for an order under Rule 7 (2) of Order 24 for revival of an abated suit. The whole of Rule 7 is drawn as follows :-

7. Effect of abatement or dismissal

(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.

8. Technically therefore, since the suit had already abated, the applicant also needed to seek revival of the abated suit, but I do note that there is no such order sought in this application. I am also not too persuaded about the excuse that the application was not filed within a year because of financial constraints for the applicant has not stated what she does for a living, what her earnings are, and how she was unable to afford the Kshs. 475/= that was paid to court for the subject application.

9. Be that as it may, it is apparent to me that what the applicant wants is to continue the suit on behalf of the estate of the deceased plaintiff. So that the plaintiff's estate can be given an opportunity to ventilate their case, in my discretion, I will enlarge the time for substitution, and also revive the abated suit. I direct that an amendment to the plaint be made to give effect to the substitution.

10. On costs, the objections of the respondents were not misplaced and it will be observed that I have only allowed the application based on the court's own discretion so that the whole suit can be heard. I will therefore award costs of Kshs. 10,000/= to the respondents which costs must be paid within 14 days or else the order of revival of the abated suit will lapse.

11. Orders accordingly.

**Dated, signed and delivered in open court at Nakuru this 12<sup>th</sup> day of June 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Mr. Odhiambo for the applicants.

Mr Karanja Mbugua for the respondents.

Court Assistant :Janepher Nelima & Patrick Kemboi.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**