



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL APPEAL NO. 88 OF 2015**

**CHARLES NGARE GATHANGA.....APPELLANT**

**VERSUS**

**OBADIAH KARIUKI KAMAU.....RESPONDENT**

**(Being an appeal against the decision of Hon. J. Kituku, Principal**

**Magistrate, Kiambu dated 21/10/2015 in Kiambu CMCC No. 91 of 2015)**

**JUDGEMENT**

1. This appeal arose from the decision of Honourable J. Kituku, Principal Magistrate, Kiambu made on 21/10/2015 in Kiambu Civil Case Number 91 of 2015. It is based on grounds that the Learned Magistrate erred in holding that the Respondent had a proprietary right in land reference number Kiambaa/Kihara /2363; that the Learned Magistrate erred in ordering eviction of the Appellant by the Respondent; and that the Learned Magistrate erred in signing the order dated 09/11/2015 despite it having mistakes and inaccuracies and that the entire judgement was against the weight of evidence.

2. Parties filed written submissions which the court has looked at. The gist of the Appellant's case is that the Appellant who is now deceased, entered into a lease agreement with the Respondent over the suit land. The suit land was held by the Respondent and Rebecca Wambui jointly as trustees on behalf of Francis Kamau Gitonga who was then 14 years old. The Appellant claimed that he paid rent to the Respondent's co-trustee, Rebecca Wambui but the Learned Magistrate found that that was irregular since the lease agreement was between the Appellant and the Respondent as trustee for Francis Kamau Gitonga. The court found that neither of the trustees could have entered into the lease with the Appellant and held that the Appellant was a trespasser on the suit land and the Plaintiff could therefore bring the suit against the Appellant.

3. The Respondent submitted that the dispute related to a lease with the Appellant which expired in 2016. Further, that the suit land does not form part of the estate of the Appellant who is now deceased, and the cause of action has therefore been overtaken by events. The Respondent attached a copy of the Appellant's death certificate which shows the Appellant died on 23/08/2016. He argued that the appeal had collapsed since the Appellant was not substituted in the proceedings.

4. The court has considered the appeal and the submissions filed. The court record shows that Mary Wanjuhi Kiogera, filed the application dated 18/03/2019, claiming to be the administratrix of the estate of the appellant, in an effort to substitute the Appellant. When that application came up for hearing on 25/03/2019, Mary Wanjuhi Kiogera's advocate indicated that she was abandoning all the prayers in that application and only pursuing the prayer for leave to come on record on behalf of Mary Wanjuhi Kiogera. That application was not determined. When the matter came up for highlighting of submissions on 16/5/2019, counsel informed the court that he had substituted the appellant who had died. The record shows that leave to substitute the Appellant was not granted by the court and that no substitution had been made as at 16/05/2019, more than two years since the Appellant died. The cause of action against the Respondent abated on 23/08/2017.

5. Order 24 Rule 3 of the Civil Procedure Rules requires the substitution of a dead Plaintiff to be made within one year of his death through an application by his legal representative where the cause of action survives or continues after his death. The subject matter of the suit was the lease the Appellant entered into with the Respondent on 1/5/2011 for a term of 5 ½ years at a monthly rent of Kshs. 2000/=. The lease expired in November 2016 or thereabouts and was not extended. It has not been shown that the cause of action survived the Appellant's death.

6. The appeal has no merit and is dismissed. Each party will bear its costs.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of July 2019**

**K.BOR**

**JUDGE**

**In the presence of: -**

Obadiah Kariuki- the Appellant

No appearance for the Respondent

Mr. V. Owuor- Court Assistant