



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 181 OF 2015

MUKULU KAULA.....PLAINTIFF

DICKSON MUTUKU KAULA.....APPLICANT

VERSUS

AGNES MILELE.....1ST DEFENDANT/RESPONDENT

KITINGO MUASA2ND DEFENDANT/RESPONDENT

MILELE MUASA.....3RD DEFENDANT/RESPONDENT

LAND REGISTRAR, MAKUENI.....4TH DEFENDANT/RESPONDENT

RULING

1. In the Notice of Motion dated 11th September, 2018, the Applicant is seeking to substitute the Plaintiff. The Application is premised on the ground that the Plaintiff died on 20th November, 2016; that the Applicant has sought and obtained Limited Grant of Letters of Administration Ad Litem in respect of the Estate of the deceased and that the cause of action is still subsisting.
2. In their Grounds of Opposition, the Defendants averred that this suit has abated; that the mandatory provisions of Order 24 Rules 3 and 7 of the Civil Procedure Rules have not been complied with and that the Applicant does not have the *locus standi* and legal capacity to seek for the revival of the suit.
3. In his submissions, the Plaintiff's advocate submitted that the Application was timeously filed; that the delay in filing the Application was occasioned by the inability to secure funds to apply for the Letters of Administration Ad Litem and that the Application should be allowed.
4. On the other hand, the Defendants' advocate submitted that Order 24 Rule 3 of the Civil Procedure Rules provides a strict and sequential procedure for revival of abated suits and that the Applicant must revive an abated suit first, then apply for extension of time to make the Application for substitution.
5. The Defendants' counsel submitted that the suit abated by operation of the law on effluxion of time and that having not applied for the revival of the suit and extension of time to file the Application for substitution, the Application is incompetent.
6. This suit was commenced by way of a Plaint dated 9th July, 2015 which was filed on the same day. The Defendants entered appearance on 4th August, 2015 and filed a joint Defence on 19th August, 2015.
7. The Plaintiff never set the suit down for hearing or for a pre-trial conference until 21st September, 2018 when the matter came up for Notice to Show Cause why the same should not be dismissed for want of prosecution. On the day the matter came up for dismissal for want of prosecution, the Plaintiff's advocate informed the court that they had filed the current Application for substitution of the Plaintiff who died on 20th November, 2016.
8. Order 24 Rule 3(1) and (2) of the Civil Procedure Rules provides as follows:

***“3. (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.”

9. The above provisions of the law clearly stipulate what happens when a Plaintiff dies and the cause of action survives him. According to the law, the Application for substitution of the deceased Plaintiff must be done within one (1) year of his death. If the Application for substitution is not done within one (1) year, the suit automatically abates.

10. Where a suit has abated, Order 24 Rule 7 (2) allows the person claiming to be the legal representative of a deceased Plaintiff to apply for the revival of a suit which has abated, and if it is proved that he was prevented for any sufficient cause from continuing the suit, the court shall revive the suit on such terms as to costs or otherwise as the court thinks.

11. The current Application does not have a prayer for revival of this suit. Indeed, the suit having abated on or about 21st November, 2017, by operation of the law, the order for substitution cannot be made before the suit is revived by the Applicant.

12. In the circumstances, I decline to allow the Applicant's Application dated 11th September 2018. The Application is struck out with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE