



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 28 OF 2017

ALEXANDER NYAGA MWAKE & OTHERS.....APPLICANTS

VERSUS

JOHN MWANIKI MAKENGE.....1ST RESPONDENT

ESPON N.T. MAKENGE.....2ND RESPONDENT

ALFRED NGIRI MARANGI.....3RD RESPONDENT

RULING

1. By a notice of motion dated 28th January 2019 brought under the provisions of **Order 24 Rules 1 & 3(2) and Order 50 Rule 1 of the Civil Procedure Rules** (hereinafter *the Rules*) the 1st and 3rd Respondents sought an order to the effect that the suit has abated. The said application was based upon the ground that the 2nd Respondent died more than one year ago and that no substitution had taken place under **Order 24** of the Rules.

2. The said application was supported by an affidavit sworn by the 1st Respondent on 28th January 2019 which reiterated the grounds set out in the notice of motion. The said affidavit did not specify when the 2nd Respondent died and the capacity of the 1st Respondent to make such an application on behalf of his estate.

3. The 1st Applicant filed a replying affidavit sworn on 21st March 2019 in opposition to the said application. He swore the said affidavit on his own behalf and on behalf of the 5th Applicant. He stated that he had issued a citation to the 2nd Respondent's wife, Daisy Mbuya Njeru in *Embu CM's Misc. Application No. 16 of 2018* for her to accept or refuse to take out letters of administration but she had failed to respond to the citation. The 1st Applicant therefore sought more time to join the Public Trustee in the proceedings.

4. The court has considered the Respondents' said application, the Applicants' replying affidavit in opposition thereto and the respective oral submissions of the parties. The application is based upon **Order 24 Rule 4** which stipulates as follows:

“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.”

5. Although the Respondent cited the provisions of **Order 24 Rule 3(2)** instead of **Order 24 Rule 4** in the application, the court is of the view that such anomaly is not fatal to the application. The court shall therefore proceed to consider the application on merit.

6. The court has noted that none of the parties provided any concrete evidence on when the 2nd Respondent died. The 1st Respondent's affidavit simply stated that he died more than one year ago without specifying the month and year of death. The Applicants did not provide any clue either on the date of death. They simply stated that a citation to accept or refuse letters of administration had been issued under the **Law of Succession Act (Cap. 160)**. The issuance of a citation is not necessarily evidence that the 2nd Respondent had died more than one year preceding the filing of the relevant application.

7. In the absence of a formal notification of death, burial permit, death certificate or other official document on the date of death, the court is unable to hold that the 2nd Respondent died more than one year prior to the filing of the instant application. As a result, the court shall decline to grant the application.

8. It is also doubtful if the Respondents would be entitled to apply for an order that the entire suit has abated on account of the death of the 2nd Respondent only. The Rules are clear that such abatement can only lie against the deceased Respondent or defendant only.

9. The upshot of the foregoing is that the court finds that the Respondents have failed to demonstrate that the 2nd Respondent died more than one year prior to the filing of the application. Accordingly, the notice of motion dated 28th January 2019 is hereby dismissed with costs to the Applicants. However, in view of the age and history of the suit, the Applicants are hereby directed to take concrete steps to prosecute the suit within 90 days in default of which the Respondents shall be at liberty to apply for dismissal of the suit for want of prosecution.

10. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **19TH DAY** of **SEPTEMBER 2019**.

In the presence of Ms. Nzekele holding brief for Ms. Rose Njeru for the 1st & 5th Applicants; Ms. Rose Migwi holding brief for the 1st & 3rd Respondents and in the absence of the rest of the parties.

Court Assistant: Mr. Muinde

Y.M. ANGIMA

JUDGE

19.09.19