



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CASE No. 266 OF 2012

MARGARET JEPKOSGEI ROP PLAINTIFF

VERSUS

NELSON N WAWERU DEEFENDANT

RULING

1. This suit was filed on 31st December 2012 by Margaret Jepkosgei Rop (hereinafter ‘the deceased’) who later passed away on 26th January 2014. She brought the suit against Nelson N. Waweru (hereinafter ‘the defendant’) who responded by filing a counterclaim against her and one Florence Jepkemoi Silah (hereinafter ‘2nd respondent’). Upon the deceased’s demise, limited grant *ad litem* in respect of her estate was issued to Victor Kipchirchir Rutto and Tallay Jepkogei Rop (hereinafter ‘the applicants’) on 5th March 2015 in **Nakuru High Court Probate and Administration Cause Number 40 of 2015**.

2. The applicants filed Notice of appointment of advocates in this matter on 10th July 2015 and Notice of Motion dated 10th July 2015. This ruling is in respect of the said application. The applicants seek the following orders:

a) That this honourable court be pleased to substitute the applicants, VICTOR KIPCHIRCHIR RUTTO and TALLY JEPKOGEI ROP in place of MARGARET JEPKOSKEI ROP (Deceased) as the legal administrator of the estate herein.

b) That this honourable court be pleased to revive this suit against the Defendant/Respondent herein.

c) That costs of this application be provide (sic) for.

3. The application is supported by an affidavit sworn by Victor Kipchirchir Rutto wherein the facts captured at paragraph 1 of this ruling are narrated. Those facts are generally not in dispute.

4. The defendant responded to the application through Grounds of Opposition dated 7th April 2016 in which he contends that the application has been brought after unreasonable delay, that the application is a non-starter owing to abatement of the suit and that the orders sought cannot be granted in the absence of an application for enlargement of time.

5. On her part, the 2nd respondent filed Grounds of Opposition in which she contends that the limited grant *ad litem* does not confer on the applicants *locus standi* to take over and prosecute the deceased’s abated case, that there is no suit in existence to warrant the orders sought and that the application is

incompetent.

6. The application was canvassed through written submissions. The applicants filed submissions on 29th June 2017, the defendant filed submissions on 12th June 2018 while the 2nd respondent opted to rely entirely on her grounds of opposition. The submissions by parties were generally along the lines stated in their respective grounds of opposition. The defendant cited the case of **Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR** to support his argument that the orders sought cannot be granted in the absence of an application for enlargement of time. I have carefully considered the application, the grounds of opposition and the submissions.

7. **Order 24 rule 3** of the **Civil Procedure Rules** provides:

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.

8. Further, **Order 24 rule 7** of the **Civil Procedure Rules** provides:

7. (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.

9. As already noted, there is no dispute that the plaintiff herein passed away on 26th January 2014. It follows therefore that the suit abated by 27th January 2014. There is equally no dispute that the applicants obtained limited grant *ad litem* in respect of the deceased's estate on 5th March 2015 and proceeded to file the present application on 10th July 2015. For the grant to have been issued on 5th March 2015 the petition for grant must have been filed much earlier in the year, within a month or so of the abatement. I also note that the present application was filed about 4 months after the grant was issued. Either way, I do not consider the delay herein as unreasonable. In the case of defendant cited the case of **Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR** relied on by the defendant, the delay was a staggering 6 years.

10. Can an order of revival of an abated suit and substitution be made after abatement? I firmly believe that it can be made. It is for that reason that **Order 24 rule 3** of the **Civil Procedure Rules** has the proviso "***Provided the court may, for good reason on application, extend the time***" and for similar reasons that **Order 24 rule 7 (2)** of the **Civil Procedure Rules** permits a person claiming to be the legal representative of a deceased plaintiff to apply for an order to revive such a suit. All that an applicant has to demonstrate is a good reason or sufficient cause. In this case, the applicants have demonstrated that they were only able to obtain limited grant *ad litem* in respect of the deceased's estate on 5th March 2015 by which time the suit had abated. That is a good reason. Further, I do not think that failure to expressly seek enlargement of time is a bar to granting the orders. The court's overall mission to do substantive

justice under **Article 159** of the **constitution** must supersede any requirement in the rules to formally seek enlargement of time, more so in a case like the present one where the applicants have clearly manifested a desire that the abated suit be revived and that substitution be granted. To hold otherwise would amount to elevating procedural rules to a fetish.

11. As to whether the limited grant *ad litem* does not confer on the applicants *locus standi* to take over and prosecute the deceased's abated case, I note that all that **Order 24 rule 3(1)** of the **Civil Procedure Rules** requires is that the applicant be the legal representative of the deceased plaintiff, a test which the applicants have satisfied. Whether or not they can successfully prosecute the case is a matter for the trial court.

12. In view of the foregoing discussion, I am satisfied that the application has merit. I therefore make the following orders:

- a) This suit is hereby revived.
- b) Victor Kipchirchir Rutto and Tally Jepkogei Rop are hereby substituted as plaintiffs herein in place of Margaret Jepkoskei Rop (deceased).
- c) The plaintiffs to file and serve an amended plaint to reflect the substitution within 14 (fourteen) days of delivery of this ruling.
- d) The defendants are at liberty to file and serve amended defences within 14 (fourteen) days of service of the amended plaint.
- e) Costs in the cause.

13. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 18th day of September 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Okiro holding brief for Ms Kinuthia for the applicants

No appearance for the 1st defendant/ respondent

No appearance for the 2nd defendant/ respondent

Court Assistants: Beatrice & Lotkomoi