



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO. 389 OF 2017(OS)

NJOROGE GITAU.....PLAINTIFF

VS

MWANGI MWAURA.....1ST DEFENDANT/RESPONDENT

JANIFER WANJIRU KABAYA.....2ND DEFENDANT /RESPONDENT

TIMOTHY NDUNGU..... 3RD DEFENDANT/RESPONDENT

MICHAEL KAMAU NJOROGE..... 4TH DEFENDANT/RESPONDENT

AND

MARITHA WANJIKU NJOROGE.....INTENDED SUBSTITUTED PARTY/APPLICANT

RULING

1. This ruling relates to the Notice of Motion dated the 14/5/19 filed by Applicant seeking the following orders;

- a. That the plaintiff's suit be reinstated and or revived.
- b. That time be enlarged within which to substitute the deceased Plaintiff.
- c. The deceased Plaintiff be substituted by Maritha Wanjiku Njoroge
- d. Costs of the application be provided for.

2. The application is supported by the following grounds that; the Plaintiff died on the 2/12/2017; the suit abated on 2/12/18; the Applicant has obtained letters of grant of administration ad litem in respect to the deceased's estate and that it is met and just to allow the application.

3. The application is further supported by the affidavit of the Applicant who deponed that the Plaintiff died during the pendency of the suit and the delay in substitution was because the Advocate who had conduct of the matter, Messrs Gacheche Miano died before attending to the substitution. Further that she did not know the steps to take until she instructed her current advocate.

4. The 1st and 2nd Respondent did not oppose the application.

5. The 3rd and 4th Respondents opposed the application and contended that the suit has abated and there is no suit capable of being revived. That the application for substitution has been brought with inordinate delay which delay has not been adequately explained by the Applicant. Maintaining that equity aids the vigilant and not the indolent, the 3rd and 4th respondents urged the Court to disallow the application. Further that the claim in the suit being that of adverse possession is a claim in personam and therefore the Applicant cannot be substituted in place of the deceased.

6. Except for the Applicant who filed written submissions which I have read and considered, the rest of the parties did not.

7. The provisions of Order 24 of the Civil Procedure Rules provide that where a suit has abated but the subject matter still survives, the Court may upon application by the plaintiff or administrator revive a suit where there is sufficient cause that prevented the party from filing the relevant application for substitution within 1 year.

8. According to the record this suit was filed non the 6/6/2017. The certificate of death issued on the 14/6/17 shows that Njoroge Gitau passed on the 2/12/17. The Applicant obtained letters of grant of administration ad litem issued on the 9/4/19.

9. The Applicant is the wife of the Njoroge Gitau, deceased. She explained to the Court that the Advocate who had conduct of the matter Mr Gacheche Miano died before substituting the plaintiff and she did not know how to proceed with the case until she instructed her new Counsel.

10. I agree with Counsel for the Applicant that Section 18(2) of the Limitations of Actions Act allows a person with a beneficial interest to recover the land that has vested in a trustee or any other person entitled to a beneficial interest in the land or process of sale. It is to be noted that the Plaintiff died after filing the suit adverting title under adverse possession. I disagree with the 3rd and 4th Respondents that the cause of action is in personam and therefore untenable.

11. Further the 3rd and 4th Respondents have not explained the prejudice that they will suffer if the suit is reinstated and heard on its merits.

12. I am satisfied that the Applicant has adduced sufficient reason for the delay. I am also satisfied that the Applicant has demonstrated sufficient cause as to the reasons why she did not substitute the deceased within one year.

13. The cause of action in this suit is a claim in land and therefore survived the death of the Plaintiff. It is a claim for adverse possession.

14. In the case of **Issa Masudi Mwabumba vs Alice Kavenya Mutunga & 4 others [2012] eKLR** , Koome, JA invoked those principles when dealing with an application for revival of an appeal “made two years and eight months” after the death of a party. After setting out the principles that guide the Court in the exercise of judicial discretion, the Judge, in allowing the application for revival in that matter stated:

“..... I am also guided by the provisions of Section 3A and 3B of the Appellate Jurisdiction Act otherwise known as the oxygen principle. Stemming from the overarching objectives in the administration of justice the goal is at the end of day, the Court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through the Constitution of Kenya, 2010 in particular Article 159.”

15. Section 1A read together with section 3A of that Civil Procedure Act is to facilitate just, expeditious, proportionate and affordable resolution of disputes. Guided by these principles read together with those set out in Art 159 of the Constitution, this Court is inclined to grant the application for the purposes of meeting the ends of justice to the parties in this case.

16. In the upshot the application is allowed in the following terms;

- a. That the plaintiff's suit be is hereby revived.
- b. The deceased Plaintiff be and is hereby substituted by Maritha Wanjiku Njoroge
- c. The Plaintiff to file and serve the amended plaint within 14 days from this Ruling and thereafter fix the matter for pretrial at the earliest.
- d. The costs of the application shall be met by the Applicant.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 21ST DAY OF NOVEMBER, 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Mr Kinuthia HB for Ms Wanjiru Waweru for the Plaintiff

1st – 4th Defendant: Absent

Ms Wanjiru Waweru for the Intended Party/Applicant

Ms Irene and Ms Njeri, Court Assistant