REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC NO. 28 OF 2013

JAPHET MBAE RUTERE.....1ST PLAINTIFF

MARY M. MUTWIRI.....2ND PLAINTIFF

JAKUBU M'ARIMI M'RUTERE.....3RD PLAINTIFF

JAMES GATOBU M'IKIUGU.....4TH PLAITNIFF

MONICA MWARIUMWE KITHINJI.....5TH PLAINTIFF

GILBERT MBAABU.....6TH PLAINTIFF

JOSHUA KABURU KIMATHI.....7TH PLAINTIFF

MOSES GITUMA HARUN.....8TH PLAINTIFF

PATRICK KINYUA M'IRINGO.....9TH PLAINTIFF

MICHAEL MUGAMBI J. KABUGO.....10TH PLAINTIFF

DOUGLAS MUTUMA MAGANA.....11TH PLAINTIFF

FELICIANA MUTHONI RUTERE.....12TH PLAINTIFF

VERSUS

REYNOLDS CONSTRUCTION COMPANY.....DEFENDANT

RULING

1. The application before me dated 30.1.2019 is brought under the provisions of order 24 rule 3 of the civil procedure rules 2010 and all other provisions of law. The applicant Mary Naito Kinyua seeks to be substituted in place of Patrick Kinyua M'Iringo, the 9th plaintiff who died on 1.10.2016.

2. Applicant avers that she is the wife of the deceased and she had duly obtained a ***limited grant ad litem.***

3. The defendant has opposed the application through grounds of opposition where it is contended that:

(i) The application is misconceived, incompetent and fatally defective and offends the mandatory provisions of order 24 rule 4 (3) of the civil procedure rules.

(ii) The orders sought in the application cannot be granted as the 9th plaintiff's suit as against the defendant had abated at the time of filing the application.

(iii) The application for substitution can only be granted if filed within one year of the death of a party and before the abatement of the suit.

(iv) The application is vexatious and an abuse of the processes of the court and it is only fair, just and proper that this honourable court strikes out the application with costs.

4. In her submission's applicant avers that on 28/11/2018, (before Justice Cherono), she was granted 30 days within which to file the application for substitution. However, she only obtained the limited grant ad litem on 29.11.2019. That is why on 30.1.2019, applicant sought leave before this court and was granted 14 days to file the application for substitution. Applicant therefore avers that both myself and Justice Cherono extended time to file the application for substitution.

5. In support of her arguments, applicant relies on the case of **Mbaya Nzulwa vs Kenya Power and Lighting Co. Ltd (2018) eKLR** where **P.J Otieno** held as follows:

> ***"I understand that law to say that upon death of sole plaintiff or the only surviving plaintiff and on application, the court has the discretion to substitute the deceased plaintiff and that even after the suit abates, there is jurisdiction in the court to extend time. In this matter it cannot be denied that the suit has abated. An abated suit is non-existent prior to it being revived. For a suit to be revived an appropriate application must be presented to court and the court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement. I hold the view that under the proviso to rule 3 (2) the court has a discretion to extend time even where the application for substitution is not made within one year but an abated suit need revival under rule 7 (2). The proper way to proceed is to seek in the same application for substitution that the suit which has abated be revived. That to me is what the applicant and counsel ought to have done here but they have not done. I will not seek to punish the applicant and the beneficiaries to the estate for failure by delay as well as failure to seek revival of the suit. Rather I will adopt the courts duty to sustain claims for purposes of them being heard on the merits. I invite the intrinsic power of the court to administer justice devoid of technicalities as well as the overriding objective of the court and understand the applicant to plead that the suit be heard on the merits. I accede to that plea. Answering to that call, I allow the application to have the applicant substituted for the deceased plaintiff. Having done so I further order that the suit be revived for purposes of being heard on the merits".***

6. Applicant has further relied on the case of **Mwenda Munjuri vs Trustees of the Agricultural Society of Kenya (2017) eKLR** where it was held that:

> ***"The overreaching imperative in the administration of justice that guides courts, right from the constitution to statute law as well as the relevant Rules of Procedure that guide various types of litigation in our courts, have shifted and courts tend to disregard matter of technicalities especially where no prejudice is caused to the parties. The courts are nowadays focusing on facilitating a just expeditious, proportionate and affordable resolution of substantive disputes without undue regard to technicalities as set out under article 159 (d) of the constitution".***

7. Applicant avers that respondent will not be prejudiced if the matter is heard on merits and therefore urges the court to allow the application.

8. On the other hand the respondent has submitted that the courts orders of 28.11.2018 were to the effect that the suit would stand as abated if the application for substitution was not filed within 30 days.

9. It is further argued that the orders sought for can only be granted within one year of the death of a party and before the abatement of the suit. Respondent contends that the death certificate was procured on 8.9.2017 and hence the death of 9th plaintiff was known and had happened more than two years prior to the making of the application. It is submitted that the 9th plaintiff's suit as against the defendant abated upon the lapse of the prescribed one year period on 5.10.2017. To buttress this point, the respondent has relied on the case of ***Said Sweilem Gheithan Saanum vs. Commisioner of Lands& 5 Others (2015)eKLR*** where the Court Of Appeal at Malindi echoed the provisions of the Civil Procedure Rules and stated as follows;

> ***"Within one year of the death of the plaintiff or within such time as the court may in its discretion for "good reason" determine, an application must be made for the representative of the deceased plaintiff to be a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit".***

10. On whether substitution of a party can be filed after the suit has abated, it is averred that once the suit has abated, it ceases to exist in the eyes of the law and the court would have no jurisdiction whatsoever to hear and determine the suit.

11. The respondent has relied on the case of **Kenya Farmers' Cooperative Union Limited versus Charles Murgor (Deceased) t/a Kaptabei Coffee Estate (2005) eKLR** where it was stated that;

> ***"…… Does the court have jurisdiction to order substitution (except in an application to revive the suit) where the suit has already abated by operation of the law? Obviously not. Does the court have jurisdiction to hear and determine a suit that has already abated by operation of the law? Certainly not. If a suit has abated it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction….."***

12. The respondent has also cited the case of **Owners of Motor Vessel** "**Lilian S" versus Caltex Oil (Kenya) Ltd (1959) eKLR** to emphasize the point that a court has no power to act when it has no jurisdiction.

13. In conclusion, respondent avers that the application is vexatious and is an abuse of the court's process and should be dismissed with costs.

Analysis & Determination

14. Before delving into the legal analysis of the dispute, I want to dispel the notion advanced by the applicant that this court is the one which extended time for substitution of 9th plaintiff on 28.11.2018 before Judge Cherono and on 30.1.2019 before myself. This is because the orders given on 28.11.2018 and 30.1.2019 were simply giving the applicant an opportunity to file the application for substitution which in itself is not a licence to have the application allowed contrary to the laid down procedure.

15. Secondly I find that parties conducted pre-trial of the suit before me on 25.9.2018 where matter was certified as ripe for hearing and was given the hearing dates of 28 and 29th November 2018 before a visiting Judge (Cherono J) . On the morning of 28.11.2018, Mr. Mutuma addressed the court as follows: ***"I wish to inform the court that the 9th plaintiff is deceased. I have just been told today. I have talked to my colleague and we have agreed that I need to do substitution……..".***

16. Thereafter, a consent order was made to the effect inter alia that ***"The plaintiff to move the court for the intended application for substitution within 30 days from today failure to which the suit by the 9th plaintiff shall stand as abated…….".***

17. 9th plaintiff died on 1.10.2016 which means that the suit had abated by 1.10.2017. The applicant is therefore guilty of material non-disclosure as at 25.9.2018 when pretrial directions were given and again on 28.11.2018 when matter was scheduled for trial before Judge Cherono.

18. In the case of **Priscilla Ndubi and another vs Gerishon Gatobu Mbui Succession cause no. 720 of 2013 Meru, Gikonyo J.** stated thus on matters of non-disclosure;

> ***"Needless to state that in any judicial proceedings, parties must make full disclosures to the court of all material facts to the case…… this general rule of law emphasizes utmost good faith (uberimae fidei) from parties who take out or are the subject of the court proceedings. The said responsibility is part of the justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice…"***

19. Had the applicant and his advocate disclosed the fact of death of 9th plaintiff on 25.9.2018, certainly the matter would not have been certified as ripe for hearing. Again, applicant did not disclose to the court on 28.11.2018 and even on 30.1.2019 as to when the 9th plaintiff passed on.

20. The truth of the matter is that there was no suit as against defendant by 9th plaintiff as from 1.10.2017. And the orders of the court given on 28.11.2018 and on 30.1.2019 cannot be construed as a revival of the suit!

21. The legal platform on matters touching on deceased parties is anchored under order 24 rule 3 of the Civil Procedure Rules which stipulates as follows;

> ***"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 sub-rule (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".***

22. In the case of **Kenya Farmers' Cooperative Union Limited vs Charles Murgor (deceased) (supra)** cited by respondent, it was stated that ***the court obviously has no jurisdiction to order substitution where the suit has already abated except in an application to revive the suit".***

23. Likewise in **Mbaya Nzulwa vs Kenya Power & Lighting Co. Ltd (Supra),** cited by applicant, the court emphasized that there was need to revive an abated suit before extending time to substitute.

24. The revival of suit is provided for under order 24 rule 7 (2) which provides that: "***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".***

25. As rightly put in **Mbaya Nzulwa vs Kenya power and lighting co. Ltd** the proper way to proceed is to seek for revival of the suit in the same application for substitution.

26. In the case of **Muriithi Ngweya vs Gikonyo Macharia Mwangi & 3 others ELC No. 221 Murang'a,** it was held that;-

> ***"It is however not lost on the applicant that a party can apply for leave under order 24 rule 7 (2) to revive the suit which has abated and if he proves to the court that he was prevented by any sufficient cause from continuing the suit, the court shall revive***

the suit upon such terms as to costs or otherwise as it thinks fit. There must be a revival of the suit after abatement before substitution. An order for substitution without revival would be a nullity in law and of no effect…….".

27. My conclusion is that there was no suit by 9th plaintiff as against defendant on 28.11.2019 as the suit had already abated. The application for substitution is therefore anchored on quick sand and must fail.

28. **The application is hereby dismissed. I do not wish to inflict more pain on the applicant by condemning her to costs. I therefore direct that each party bears their own cost of the application.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 12TH DAY OF NOVEMBER, 2019

IN THE PRESENCE OF:-

C/A: Kananu

Kimathi A. holding brief for Mutuma for plaintiffs

Rimita holding brief for Kamande for defendants

HON. LUCY. N. MBUGUA

ELC JUDGE