



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C SUIT NO. 2419 OF 1992

ROBERT MBUGUA NDACHI.....1ST PLAINTIFF

FRANCIS GATHUKU KIHOTO.....2ND PLAINTIFF

VERSUS

JOSEPH NDUNGU NJENGA.....1ST DEFENDANT

MINEH NYAMBURA MBURU.....2ND DEFENDANT

MOSES NJENGA NGANGA.....3RD DEFENDANT

NJERI GITAHU.....4TH DEFENDANT

RULING

The Plaintiffs filed suit through the plaint dated 06/05/1992 seeking to be declared the sole proprietors of land reference number Ndeiya/Ndeiya/718 (“the Suit Property”) and a permanent injunction to restrain the Defendants from encroaching, alienating, trespassing or in any way dealing with the Suit Property. The Defendants filed a defence and counterclaim dated 01/11/1993. From the court record, it appears that the suit stalled after the 1st Plaintiff died.

Through the application dated 26/08/2019, Lucy Wambui Mbugua seeks to revive the suit and to substitute the 1st Plaintiff and thereafter amend the plaint in consonance with the substitution. The application is made on the ground that the 1st Plaintiff died on 13/10/2014 and that the cause of action continues to survive the 1st Plaintiff. His legal representative wishes to proceed with the suit. The application was further supported by the Applicant’s affidavit sworn on 26/08/2019 in which she deponed that letters of administration intestate in respect of the 1st Plaintiff’s estate were issued to her on 18/07/2017 and the grant was confirmed on 17/12/2017. She explained that the delay in seeking letters of administration was occasioned by lack of finances, a factor beyond her control and that she petitioned for the letters of administration in 2016 as soon as her financial position improved. She claims to have instructed her advocates to file the necessary application and pursue the 1st Plaintiff’s claim but averred that the court file could not be traced. She annexed copies of letters her advocates wrote to court seeking the court’s assistance in tracing the court file. At some point she changed advocates, and her new advocates also wrote letters to the court seeking assistance in tracing the court file. She filed the application dated 16/04/2019 seeking to be substituted but when it emerged that the suit had abated seeking leave to revive the suit. She urged the court to allow the application in the interest of the 1st Plaintiff’s estate.

The Defendants filed grounds of objection dated 30/09/2019 in opposition to the application. The main ground of objection was that the 1st Plaintiff died on 03/10/2014 and was not substituted within a year and the suit therefore abated. It was also argued that the 2nd Plaintiff is a stranger to the proceedings since no representation was obtained in respect of the estate of the late James Thuo Kihoto, whom the 2nd Plaintiff sued on behalf of, he having died before this suit was filed.

The Defendants also filed a replying affidavit sworn by the 1st Defendant on 30/09/2019 who deponed that on 03/12/2014 when the advocates for the parties appeared in court, the court directed the Plaintiff’s representative to file an application for substitution. He deponed that the Defendants have continued to be in occupation of the suit land and that it would be unfair to continue to subject them to litigation in fits and starts and urged the court to reject the application.

The court has considered the application, the response, rival submissions by the parties as well as the authorities relied on by the parties. The 1st Plaintiff died on 13/10/2014. Under Order 24 rule 4 of the Civil Procedure Rules, the 1st Plaintiff should have been substituted within a year. This suit abated by operation of law on 13/10/2015. Order 24 Rule 7(2) of the Civil Procedure Rules gives the court discretion to revive an abated suit if there is sufficient proof that the applicant was prevented by any sufficient cause from continuing the suit. The Applicant cited financial disability as the cause for the delay in taking further steps in this matter. She also stated that the court file went missing.

The issue for determination is whether the Applicant's reasons for the delay in applying to revive the suit amount to sufficient cause. The application for letters of administration intestate was made in 2016. Had the Applicant been financially able, she would have made the application for grant of letters of administration much earlier. The court finds the Applicant's explanation plausible and truthful. After obtaining letters of administration, there is evidence that the Applicant could not pursue the suit because the court file had gone missing. There are letters authored by her advocates which show that her advocates sought this court's intervention in tracing the court file. The court notes that half share of the Suit Property was listed in the confirmed grant in respect of the 1st Plaintiff's estate dated 01/02/2018. The court is also persuaded by the decision in **Kamau Kania Patrick Rerimoi & 2 Others [2017] eKLR** where the court revived an abated suit in the interest of all the parties after observing that the Defendant had also filed a counterclaim, which would stand dismissed if the Plaintiff's suit were found to have abated. The Defendants have a defence and counterclaim dated 01/11/1993 that should be heard and determined on merit.

The application dated 26/08/2019 is allowed. Costs shall be in the cause.

Dated and delivered at Nairobi this 12th day of November 2019

K.BOR

JUDGE

In the presence of: -

Justus Olaka holding brief for J. Njuguna for the Applicant

Joseph Mwaniki Gitau for the Defendants

Mr. V. Owuor- Court Assistant