



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 29 OF 2015

STELLA KIUMBI MCHARO (Suing in her capacity is

personal representative of the estate of

EVANS KAFUSI MACHARO (Deceased).....PLAINITFF

VERSUS

JOSEPH RUA.....1ST DEFENDANT

CHENGO.....2ND DEFENDANT

RULING

(Application for substitution of deceased 1st defendant; plaintiff having sued two persons for trespass; defendants filing a defence stating that they are on another land and not raising any counterclaim; Order 24 Rule 4; whether suit for trespass still survives the death of the trespasser; held that suit does not survive the death of the trespasser unless there was a counterclaim for the land; Order 24 Rule 4 (3) providing that suit will abate after one year if no application for substitution is filed; application filed more than 2 years after the death of the 1st defendant and close to one year after the applicant had obtained a grant of letters of administration ad litem; applicant needing to demonstrate sufficient reason why the application has been filed late; not a single reason given why the application was filed beyond the one year; no sufficient cause shown; application dismissed)

1. The application before me is that dated 23 October 2018. It is an application filed by one Carrison Karisa Rua who seeks to substitute the 1st defendant who is now deceased. The applicant has deposed that he is the legal representative of the deceased 1st defendant and has displayed a limited grant of letters of administration ad litem issued on 27 November 2017. He has deposed that the 1st defendant died on 16 August 2016 and that the cause of action continues against his estate.

2. The suit was commenced through a plaint which was filed on 24 February 2015. The plaintiff contended that the land parcel Subdivision No. 1095 (Original No. 547/7) Section III Mainland North belonged to one Evans Kafusi Mcharo (deceased) whose estate the plaintiff represents. She pleaded that in December 2014, the 1st defendant wrongfully took possession of the suit land and in the suit, she wished to have a permanent injunction against the defendants and damages. The defendants filed defence claiming that they live on the land parcel Plot No. 337/III/MN which is Government land and that the plaintiff is suing squatters residing and cultivating a different plot. No counterclaim was filed. It is not contested that the 1st defendant is now deceased and I have indeed seen the Certificate of Death which shows that he died on 16 August 2016.

3. The plaintiff did not file a reply to oppose the application but Mr. Lumatete, learned counsel for the plaintiff, submitted that 2 years have lapsed since the death of the 1st defendant hence this application should be dismissed.

4. This being an application for substitution, the provisions of Order 24 apply, specifically Order 24 Rule 4 which states as follows;

Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 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. The first thing that I need to determine is whether the cause of action survives the death of the 1st defendant. This can only be determined by looking at the claim of the plaintiff. The plaintiff's claim appears to me to be one of trespass against the two named defendants. Each trespasser is sued as an individual and any claim of trespass should determine with the death of the alleged trespasser. Given that there is no counterclaim that was filed, and the suit remains to be one of trespass, I do not see how the cause of action survives the death of the 1st defendant, for the 1st defendant is now not available to continue his alleged acts of trespass and there was no counterclaim by the deceased claiming the land. Neither is the cause of action against the 1st defendant devolved to the 2nd defendant. My view therefore is that the cause of action does not survive the death of the 1st defendant and there is no substance upon which a substitution may be made.

6. Assuming I am wrong on this and the cause of action actually does continue against his estate, the other matter I need to grapple with is whether the application should be allowed as it was filed more than one year after the death of the 1st defendant. I will repeat that the 1st defendant died on 16 August 2016. It does appear that in the year 2017, the applicant applied for a grant of letters of administration ad litem through Mombasa Chief Magistrate's Court Succession Cause No. 445 of 2017. He was issued with letters of administration ad litem on 27 November 2017. This application was filed on 23 October 2018, close to one year since the grant was made. Order 24 Rule 4 (3) does provide that an application should be made within one year of death otherwise the suit will abate. It follows that when this application was filed, the suit had already abated.

7. There is opportunity to revive an abated suit pursuant to the provisions of Order 24 Rule 7 which is drawn as follows :-

(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.

8. Order 24 Rule 7 (2) has not been cited in this application but I will assume that it is one of the prayers sought herein and that the applicant wishes to revive the abated suit. What the applicant needs to demonstrate is that he was prevented by *sufficient cause* from continuing the suit and that is why his application has been filed after the suit has already abated. I have gone through the supporting affidavit and nowhere does the applicant state why he has filed this application beyond the one year stipulated in the rules. The applicant has thus failed to demonstrate *sufficient cause* as required by Order 24 Rule 7 (2). I am thus not persuaded that I should exercise my discretion to revive this abated suit.

9. Given the above reasons, I see no merit in this application and the same is hereby dismissed with costs payable to the plaintiff by the applicant.

10. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 12th day of November 2019.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Lumatete for the plaintiff.

Mr Kalimbo holding brief for Mr Malombo for the applicant.

Court Assistant; David Koitamet.