



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**E.L.C NO. 61 OF 2018**

**MARY WANJIRU KANYAU.....APPLICANT /PLAINTIFF**

**VS**

**SOLOMON MUCHAI NGANGA (deceased).....1<sup>ST</sup>RESPONDENT /DEFENDANT**

**NGANGA NJOROGI.....2<sup>ND</sup> DEFENDANT**

**DANIEL GAKUYA MUCHAI**

**(Sued in own capacity and as**

**the administrator of the estate of the late SOLOMON MUCHAI**

**NGANGA).....PROPOSED SUBSTITUTE FOR 1<sup>ST</sup> DEFENDANT**

**RULING**

1. The application before me dated the 16/7/19 seeks the following orders;

- a) That this application be certified as urgent and fit to be heard ex-parte on a priority in the first instance and service be dispensed with.
- b) That leave be granted for the Plaintiff to join the proposed co-Defendant as the 1<sup>st</sup> Defendant to this suit in place of the current 1<sup>st</sup> Defendant who is now deceased.
- c) That a temporary injunction does issue restraining the Proposed co-Defendant by themselves, their agents, servants, employees and or anybody or authority working or claiming under them from entering, carrying out construction on, encroaching onto, trespassing, damaging, degrading, alienating, and or in any other way interfering with the parcel of land namely LOC 16/KIMANDI-WANYAGA/T.52 pending the hearing inter-parties of this application.
- d) That the Plaintiff be granted exclusive possession of the suit property namely LOC 16/KIMANDI-WANYAGA/T.52 pending hearing and determination of this application.
- e) That a temporary injunction does issue restraining the Proposed co-Defendant by themselves, their agents, servants, employees and or anybody or authority working or claiming under them from entering, carrying out construction on, encroaching onto, trespassing, damaging, degrading, alienating, and or in any other way interfering with the parcel of land namely LOC 16/KIMANDI-WANYAGA/T.52 pending the hearing inter-parties of this suit.
- f) That the Plaintiff be granted exclusive possession of the suit property namely LOC 16/KIMANDI-WANYAGA/T.52 pending hearing and determination of this suit.
- g) That the costs of the Plaintiff's resettlement on the suit property be borne by the proposed co-Defendant.
- h) That the costs of this application be borne by the Plaintiff and Proposed co-Defendant.

2. It is based on the grounds; the 1<sup>st</sup> Defendant is deceased and the Applicant wishes to substitute him with the proposed 1<sup>st</sup> Defendant , who

is the Legal Administrator of the estate of Solomon Muchai Nganga; the proposed 1<sup>st</sup> Defendant evicted the Applicant on the 29/6/19 using orders obtained by the said proposed 1<sup>st</sup> Defendant in SRMCC No 64 of 2018 which orders are in respect to LOC16/KIMANDI-WANYAGA/T/53 which land is different from the suit land herein; that the said eviction was null and void and prejudicial to the rights of the Applicant who has been in possession of the suit land for over 40 years hence her claim of adverse possession in this suit.

3. The Applicant has filed and reiterated the said grounds in her supporting affidavit dated the 11/7/19 which I have read and considered.
4. The application was served on the proposed 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant on the 25/7/19 as evidenced by the affidavit of service dated the 26/7/19 on record.
5. The application is not opposed.
6. The Applicant filed written submissions which I have read and considered.
7. The key issues are;
  - a. Whether the suit is abated as against the 1<sup>st</sup> Defendant?
  - b. If a is answered in the affirmative, can the suit be substituted as against the 1<sup>st</sup> Defendant?
  - c. Is the Applicant entitled to orders of interim injunction against the proposed 1<sup>st</sup> Defendant
  - d. Who meets the costs of the application.
8. This suit was filed on the 13/7/2004. According to the record, the 1<sup>st</sup> Defendant died on the 6/9/16.
9. It is trite that the death of a plaintiff or Defendant shall not cause the suit to abate if the cause of action survives or continues. This suit being in respect to land rights, the cause of action survived the death of the 1<sup>st</sup> Defendant. That said the 1<sup>st</sup> Defendant was not substituted within one year which ought to have been by the 5/9/17. The suit therefore abated as provided for under Order 24 Rule 4(1) – (3);

“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.”
10. The application must be made within one year in default of which the suit shall abate as against the deceased Defendant. In **Kenya Farmers’ Cooperative Union Ltd. Vs. Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) Eklr** the Court held that a Court of law has no jurisdiction to order for substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of law.
11. It is however not lost on the Applicant that a party can apply for leave under Order 24 Rule 7(2) to revive a 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 may revive the suit upon such terms as to costs or otherwise as it thinks fit. There must be a revival of suit after abatement before substitution. An Order for substitution without revival would be a nullity in law and of no effect. See **Kenya Farmers’ Cooperative Union Ltd** above.
12. It is the finding of the Court that the suit against the 1<sup>st</sup> Defendant abated on the 6/9/2017 and no orders to revive it have been sought and obtained. Resultantly I have no jurisdiction to grant any orders respecting the substitution of the proposed 1<sup>st</sup> Defendant.

13. In view of the above finding issues Nos b-g are rendered moot.

14. The application is unmerited and it is struck out with no orders as to costs.

**15. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 11<sup>TH</sup> DAY OF DECEMBER 2019**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Mureithi for the Plaintiff/Applicant

1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondent – Absent

Irene and Njeri, Court Assistants