



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 1 OF 2018

DANIEL KAHARA WAKIGO.....APPELLANT

VERSUS

SALOME WANGUI CHEGE.....1ST RESPONDENT

THE PUBLIC TRUSTEE.....2ND RESPONDENT

(Being an appeal from the Ruling/order of the Senior Resident Magistrate's court

at Nairobi of the Honourable Orange K. I Mr. delivered on 10th January 2018

in Civil Case No. 1795 of 1995)

BETWEEN

DANIEL KAHARA WAKIGO.....PLAINTIFF/APPLICANT

VERSUS

SALOME WANGUI CHEGE.....1ST DEFENDANT/RESPONDENT

THE PUBLIC TRUSTEE.....2ND DEFENDANT/RESPONDENT

RULING

1. The notice of preliminary objection by the respondents is dated 24th January 2018.

2. The grounds are:-

(1) The 1st respondent who died on 15th June, 1999 is not a legal person capable of suing or being sued, and cannot be a party for purposes of the appeal herein, or at all; hence there is no such party before the honourable court.

(2) Vide a grant of representation intestate dated 4th November, 2013 issued in Nairobi High Court Succession Cause No. 202 of 1990; In the Matter of the estate of Chege Kirumba (Deceased), the 2nd respondent was removed as Administrator of the aforesaid Estate being the capacity in which the office of the public trustee had been joined to the appellant's suit hence there is no such party before the honorable court.

(3) The appeal offends mandatory provisions of order 24 rule 4 and 7 of the Civil Procedure Rules.

(a) The suit against the deceased 1st respondent abated prior to the decision appealed from;

(b) The cause of action did not survive the 1st respondent's death or continue against the 2nd respondent alone;

(c) No fresh suit/appeal shall be brought on the same cause of action upon abatement.

(4) On the whole, the appeal is fatally incompetent, bad in law, incurably defective and is an abuse of court process, and the prayers sought thereby are untenable; hence, it is liable for striking out with costs in limine.

3. On the 24th January 2019, the court directed that the preliminary objection be canvassed by way of written submissions.

The Appellant's submissions

4. The issues being raised in the preliminary objections are matters that are within the domain of the proceedings in the SRM's court Case No. 1795/1995 which as matters stand is now nonexistent.

5. The court is limited to the hearing of the appeal emanating from the SRM's court Milimani. The respondents had a chance to file a cross appeal in any issue they fill was not considered by the Hon. SRM's Court so that this honourable court could make a final finding while exercising its appellate jurisdiction.

6. The appellant would forever be condemned unheard and he would lose his parcels of land without any recourse, should he be locked out from challenging the ruling delivered on 10th January 2018 in Nairobi CMCC No. 1750 of 1995. The issues raised do not qualify to be a preliminary objection. Order 1 rule 9, provides that no suit can be defeated by reasons of misjoinder or non joinder. He prays that the preliminary objection be dismissed.

7. The 2nd respondent did not file any submissions.

The Administrators' (Beneficiaries) of the Estate of Chege Kirumba's (Deceased) Submissions

8. The appeal offends the mandatory provisions of order 24 rule 4 and rule 7 of the Civil Procedure Rules. The 1st respondent died on 15th June 1999 prior to the hearing and/or determination of the original suit before the subordinate court. The appellant failed to apply for substitution of Salome Wangari Chege (Deceased) with her legal representatives before the subordinate court. The appeal is bad in law, incompetent and fatally defective.

9. The 2nd Respondent, relinquished its representation of the Estate of Chege Karumba (Deceased) following appointment by the High Court (Honourable L. Kimaru) of John Kimbuku Chege & 3 Others as Administrators of the said estate. They have put forward the case of **Trouistik Union International & Another vs Jane Mbeyu & Another [2008] 1KLR**. The 2nd respondent lacks capacity to represent the Estate of Chege Kirumba (Deceased) since it is not the legal representative the deceased. The 2nd respondent ought to have been substituted with the administrators of the Estate of Chege Kirumba before the trial court.

10. The effect of an abated suit is that it ceases to exist in law. It is the legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased defendant. The court does not have jurisdiction to hear and determine a suit that has already abated by operation of the law. 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. If it is an error of jurisdiction it can be raised at any time.

11. They have put forward the cases of **Kenya Farmers Cooperative Union Ltd vs Charles Murgor t/a Kaptabei Coffee Estate [2005] Eklr; Ng'ang'a Mathenge vs John Ndirangu Maina & Another [2016] eKLR; Wallace Kinuthia vs Anthony Nd'ung'u Mwogi & 3 Others [2013] eKLR**. They pray that the appeal be struck out with costs to the interested parties/applicants.

12. I have carefully considered the submissions. The main issue is whether the objection raised by the interested parties is on a point of law.

13. According to **Black's Law Dictionary, 10th Edition**, A preliminary objection means:-

"In a case before an international tribunal, an objection that, if upheld would render further proceedings before the tribunal impossible or unnecessary. An objection to the court's jurisdiction is an example of a preliminary objection".

In the case of Mukisa Biscuits Co. Ltd vs West End Distributors Ltd [1969] EA 696 the court stated as per to Charles Newbold P:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued or the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercised of judicial discretion".

14. The appellant admits that the 1st respondent is deceased and substitution has not been done. **Order 24 rule 4** of the Civil Procedure Rules provides:-

"(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.”

Rule 7 provides that:-

“(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(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.”

15. In the case of **Kenya Farmers Cooperative Union Ltd vs Charls Murgor t/a Kaptabei Coffee Estate [2005] eKLR J.H. P. G Waweru** held that:-

“.....But it is really a matter that goes to the jurisdiction of the court. 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. It can be raised at any time”.

I am guided by the above authority.

16. The appellant in his submissions admits that the suit is nonexistent. I agree with the applicant’s submissions that the 2nd respondent relinquished its representation of the Estate of Chege Kirumba (deceased) following the appointment of the administrators by Honourable J L. Kimaru.

17. The upshot of the matter is that I find merit in the preliminary objection herein and the same is upheld. The appeal herein is struck out with costs to the applicants. In the alternative the same is summarily rejected under Section 79 B of the Civil Procedure Act.

It is so ordered.

Dated, signed and delivered in Nairobi on this 11th day of December 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Otieno for Sumba for the Appellant

Ms Otieno for Miyare for the 1st respondent

Kajuju - Court Assistant