



**REPUBLIC OF KENYA**

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

**E.L.C NO. 221 OF 2017**

**MURIITHI NGWENYA.....PLAINTIFF**

**VS**

**GIKONYO MACHARIA MWANGL.....1<sup>ST</sup> DEFENDANT**

**RICHARD NYAGUTHA NGWENYA.....2<sup>ND</sup> DEFENDANT**

**LUCY WAMBUI GIKONYO.....INTENDED 1<sup>ST</sup> DEFENDANT**

**RULING**

1. The Plaintiff/Applicant filed suit against the Defendants on 16/2/12, amended on the 3/8/2012 claiming a declaration that;

a) The 1<sup>st</sup> and 2<sup>nd</sup> Defendants hold 4.4 acres in trust for the plaintiff and an Order thereafter for transfer of 4.4 acres of land from land parcel LOC 14/KAIRO/2069 held by the 1<sup>st</sup> Defendant to the Plaintiff or alternatively transfer of land parcel LOC.14/KAIRO/20170 and LOC.14/KAIRO/2071 also measuring 4.4 acres held by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Plaintiff.

b) The 2<sup>nd</sup> Defendant himself, his servants and or agents be permanently restrained from entering or in any way interfering with the Plaintiff parcel of land occupied by the plaintiff.

The parties in this suit are blood relatives. The suit land is registered in the name of the 1<sup>st</sup> Defendant (deceased) allegedly in trust for himself and the Plaintiff.

2. It would appear that the 1<sup>st</sup> Defendant died on 18/3/2012 one month after the filling of the suit.

3. The Applicant has filed a Notice of Motion dated 10/4/13 seeking for substitution of the 1<sup>st</sup> Defendant with Lucy Wambui Gikonyo. The application is based on the grounds interalia;

a) The 1<sup>st</sup> Defendant is dead.

b) The intended 1<sup>st</sup> Defendant is his wife

c) The 1<sup>st</sup> Defendant may not be so willing to file application for substitution to their advantage to await this suit to abate as I continue to suffer.

4. The application is further supported by the Plaintiff in his affidavit where he deponed that the 1<sup>st</sup> Defendant passed away on 18/3/2012 soon after service of the summons without entering appearance. That the intended Defendant is a wife of the deceased Defendant of over 50 years. That the intended Defendant may not be willing to file an application for substitution to their advantage to await the suit to abate. That due to his old age and ill health he desires the land dispute to be settled.

5. The 2<sup>nd</sup> Defendant opposed the application on grounds that the Plaintiff Applicant has disregarded the law on substitution of deceased persons, it being a matter of law and not based on the longitude of the years of marriage. That the intended substitute must be notified of the application.

6. On the 13/7/17 Mr. Kimwere, Counsel for the Plaintiff/Applicant withdrew his application filed under Notice of Motion dated 8/4/13. On the same day he informed the Court that he was ready to prosecute his application dated the 10/4/13 which was still pending on the Court

record. Apparently, he had filed two applications which on examination relate to the same plea of substitution of the 1<sup>st</sup> Defendant. However, the Applicant has filed submissions in respect to the Notice of Motion dated 8/4/14 which as stated was withdrawn on 13/7/17. I find no reason to consider the said submissions since they are unrelated to the application under consideration.

7. The 2<sup>nd</sup> Defendant filed submissions and in opposition to the application stated that substitution is not possible without letters of grant of administration of the estate of the 1<sup>st</sup> Defendant. Relying on the case of **Registered Trustees of Ruiru Sports Club & 3 Others vs. Isaac Karuri Nyongo & 15 Others (2014) ECLR** wherein the Court dismissed the Notice of Motion on grounds that the intended legal representative did not have limited grant for purposes of being enjoined to the suit.

#### Analysis & Determination

8. I have considered the application herein, the rival affidavits and the submissions where appropriate and the issue that commends itself for determination is whether the Applicant merits the prayers sought in the application.

9. Order 24 rule 4 (4) of the Civil Procedure Rules provides as follows;

“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) .....

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased Defendant. (emphasis is mine).

The law is clear on what happens when one of the Defendants dies and the cause of action survives or continues. Upon an application made, the Court shall cause the legal representative of the deceased to be made a party or to be substituted in place of the deceased party to proceed with the case.

10. Section 2 of the Civil Procedure Act defines legal representative as follows;

“means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.

The Applicant is seeking to substitute Lucy Wambui Gikonyo in place of 1<sup>st</sup> Defendant. Other than the mention of her being a wife of over 50 years, no evidence has been tabled to show that she indeed is a person contemplated by the above definition, that is to say, the legal representative of the estate of the 1<sup>st</sup> Defendant. The rule requires substitution of a Defendant with a party clothed with legal representation.

11. Can this Court permit the substitution of the 1<sup>st</sup> Defendant by the said Lucy Wambui Gikonyo? In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. The Law of Successions Act provides the procedure to be followed in the application for such a grant, and the various forms a grant may take including letters of administration. Section 54 of the Act provides that a Court may limit a grant of representation which it has jurisdiction to make in any of the forms described in the Fifth Schedule. The Fifth Schedule provides as follows at paragraph 14 with respect to grants of administration limited to suit:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.” (emphasis is mine)

12. It is in doubt whether the Applicant has followed the aforesaid procedure in seeking a legal representative of the deceased 1<sup>st</sup> Defendant's estate. The Applicant is at liberty to so cite the intended substitute as per the provisions provided in the Succession Act for the purposes of the pending proceedings. No material has been presented to this Court that indeed the said Lucy Wambui Gikonyo is such legal representative of the 1<sup>st</sup> deceased Defendant nor whether the Applicant has filed citation proceedings in that regard.

13. The Applicant has explained that the 1<sup>st</sup> Defendants dependants (the intended substitute included) are unwilling to file the said letters of grant of administration solely to defeat the Applicants claim. The provisions of the Succession Act has a cure for the Applicants frustration. I must hasten to add that in any event this Court does not have jurisdiction to determine matters relating to succession. Its jurisdiction is limited to determining disputes on the environment, and use, occupation of and title to land under Article 162(2) (b) of the Constitution as well as the Environment & Land Act, .

14. 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) ECLR** 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.

15. In the case at hand, the 1<sup>st</sup> Defendant died on 18/3/2012 and todate no substitution has been made. The application under consideration was filed in Court on the 5 /5/14, a period in excess of two years from the death of the 1<sup>st</sup> Defendants so much so that the cause of action against the 1<sup>st</sup> Defendant abated on the 17/3/13. There is therefore no cause of action surviving against the 1<sup>st</sup> Defendant as at 5/5/14 when the application was filed or at the time of rendering this ruling and for that reason I find and hold that substitution cannot be done until and unless the suit is revived.

16. It is however not lost on the Applicant that as 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 shall 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.

17. I note that the intended substitute was not served with this application and this offends the rules of natural justice and fairness as enshrined in Article 50 of the Constitution. Order 51 of the Civil Procedure Rules provides the procedure to be followed in applications filed in Court, and rule 3 requires that every person who is affected by an application to be served with the same Rule. There is no material on record to show that the intended substitute was served with the application.

18. In the end the Court finds the application devoid of merit and is dismissed with costs to the Respondent (2<sup>nd</sup> Defendant).

**DELIVERED, DATED AND SIGNED THIS 31<sup>ST</sup> JANUARY 2018**

**J.G. KEMEI**

**JUDGE**