



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 64 OF 2013

JACKSON KIPROTICH CHERUIYOT.....PLAINITFF

VERSUS

AGNES MORAA OMITIDEFENDANT

RULING

(Application for substitution of deceased plaintiff and amendment of Originating Summons; suit being for adverse possession; plaintiff passing on before conclusion of the suit; applicant holding letters of administration ad litem; application allowed but amendment to reflect that it is the deceased who was in possession and not the applicant)

1. The application before me is that dated 10 June 2017 which application is brought pursuant to the provisions inter alia of Order 8 Rule 3 and Order 24 Rule 3(1) of the Civil Procedure Rules. It seeks orders of substitution of the plaintiff, who is said to be deceased, and amendment of the Originating Summons herein. It is stated in the supporting affidavit, that the plaintiff died on 20 November 2016 while this suit was still pending, and that the applicant has taken out a grant of letters of administration ad litem for the estate of the deceased, aimed at continuing this suit.

2. The suit itself was commenced on 12 July 2006 by Jackson Kiprotich Cheruiyot, who claimed to have acquired by way of adverse possession, the land parcel Miti Mingi/Mbaruk Block 3/1598, which land is registered in the name of the respondent, one Agnes Moraa Omiti. The applicant in the Originating Summons (whom for ease of reference, and to avoid confusion with the applicant in this application, I will refer to as the plaintiff) asserted that he has been in occupation of the suit property since the year 1992 or thereabouts, hence his claim to be declared as owner of the suit land by way of adverse possession. The respondent (whom I will refer to as the defendant) opposed the suit by filing a Replying Affidavit vide which she refuted the allegations of the applicant. For one reason or another, the matter never took off for hearing until 28 March 2017, when it was announced that the plaintiff is deceased.

3. I have looked at the application herein which is based on the provisions of Order 24 Rule 3 which provides as follows :-

[Order 24, rule 3.]

(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

4. The case herein involves a sole plaintiff and therefore Order 24 Rule 3(1) applies. In the event that the cause of action survives the death of the deceased plaintiff, the court may cause his legal representative to be made a party to the suit and to continue with the suit. That is what the applicant seeks in this application. I have no problem with the applicant coming into the suit in place of the deceased plaintiff, for I have seen for myself, that he holds a grant of letters of administration ad litem. The application has also been made within one year of the death of the plaintiff and the suit has therefore not abated.

5. I however have a problem with the manner in which the applicant wishes to amend the Originating Summons which draft is annexed to the application. In the draft amended Originating Summons, the applicant has simply replaced his name with that of the deceased plaintiff and if the Originating Summons is allowed to be amended in that fashion, then it means that the person who is claiming to have been in adverse possession is the applicant herein and not the deceased. It should be clear in the Amended Originating Summons that the applicant herein is only continuing the suit on behalf of the estate of the deceased, meaning that it has to be maintained, that it is the deceased who was in actual possession of the suit property and not the applicant. I direct that the amendment be effected in this fashion within the next 14 days. Apart from the above issue, the application is otherwise allowed with no orders as to costs.

6. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 30th day of January 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Mr. Kairu holding brief for Mr. Andama for the applicant.

No appearance for the respondents.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU