



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 429 OF 2017

JACOB MBUTHIA GITHAIGA 1ST PLAINTIFF/APPLICANT

CHEGE GITHAIGA 2ND PLAINTIFF/APPLICANT

SARAH WANJIRU CHEGE 3RD PLAINTIFF/APPLICANT

ELIZABETH WANGARI 4TH PLAINTIFF/APPLICANT

REUBEN MURURIA 5TH PLAINTIFF/APPLICANT

VS

EPHANTUS GITHAIGA KABUKU DEFENDANT/RESPONDENT

MARTHA NYAMBURA KABUKU INTENDED RESPONDENT

JEREMIAH KABUKU GITHAIGA INTENDED RESPONDENT

RULING

1. By a notice of motion dated 24/10/2016 the Applicants herein moved this Court for the following orders;

- a. That this Honourable Court be pleased to grant leave to the applicants to amend the plaint.
- b. That the annexed draft of the amended plaint be deemed to have been filed upon payment of the necessary filing fees.
- c. That costs of the application be in the cause.

2. The application is premised on the following grounds;

- a. That the plaintiffs are brothers of the original defendant who they claim was holding the original LR.19/KIAWAMBOGO/152, which was later subdivided into LR.LOC/KIAWAMBOGO/1728 and 1729 in trust for them as it originated from their father Githaiga Mururia.
- b. That the advocates on record for the plaintiffs at the time of filing the suit while combining the parcels of land in order to share them equally, some arithmetic errors occurred which was discovered by the plaintiffs while taking statements in preparation for the hearing and the plaintiffs now want the total acreage of LOC.19/KIAWAMBOGO/152 and their small portions combined and shared among the five (5) brothers equally
- c. That some of the parties to the suit in both sides have passed on and there is need to substitute them.
- d. That the current advocates on record are newly appointed.
- e. That the amendments being sought are not prejudicial to the respondents and the said amendments are necessary in order to put the record straight in line with the current status of the suit.

3. The application is supported by the affidavit of Jacob Mbutia who affirms the averments in the grounds on the face of the application.

4. The respondents filed their grounds of opposition to the application on 2/06/2017. It is their contention that the application is a sham, vexatious and an abuse of Court process. They claim that the suit abated on 28/02/2004 and the orders issued on that date have not been vacated and therefore it would be an abuse of Court process to proceed in the face of the previous order. And that any amendment at this time is time barred by the Limitation of Actions Act.

5. Parties then choose to dispose of the application by way of written submissions.

6. The applicants submit that the application is brought under Order 8 rule 3 of the CPR, which gives the Courts powers to grant leave to amend pleadings after close of pleadings. That the plaintiffs claim is based on an apparent breach of trust by their brother who is the defendant herein for allocating himself a bigger share of land from their deceased father's land leaving the plaintiffs with smaller pieces. The plaintiffs claim therefore is for all the parcels of land that belonged to their father to be combined and then be divided among the five brothers equally. That the former advocates on record for the plaintiffs while drafting the plaint made an arithmetic error while combining the measurements of each of the units and arrived at a sum that is higher than the full acreage of the LOC.19/KIAWAMBOGO/152 which ought to be 17.3 acres. They submit that the error was inadvertent, that the amendment will put the prayers of the plaintiffs into proper perspective and is not prejudicial to the respondents. That the suit was initially filed in Nairobi then transferred to Nyeri and now to this Court. That the suit was once dismissed but it was later reinstated. It is their contention that the suit never abated since no Court ever declared it so. They claim that the respondents deliberately failed to take out letters of administration in order to render the suit abated. The applicants then moved the Court on 18/11/2015 vide Murang'a H.C Succession Cause No. 508 of 2014 through which the respondents were appointed as the administrators. That after the respondents were appointed administrator's the succession cause was stayed to enable conclusion of this matter first and the respondents never brought up the issue of abatement. They maintain that the suit is still alive with parties on both sides. They plead with the Court to exercise its discretion to allow the plaintiffs to make the amendments in regards to the acreage of the suit land.

7. The respondents submitted that on the Court record that on 31/5/2000 the suit was dismissed by Kuloba J for want of prosecution. Later on 21/3/2001 an application to remove the caution as there was no suit and they quote " as the suit is dismissed with costs the only matter which we can deal with in this suit are matters relating to taxation of costs and execution to record costs". That the plaintiffs then applied for reinstatement of the suit on 24/5/2004 and at the hearing on 19/07/2004 Aluoch J gave the plaintiffs the last chance as follows " I direct the parties to fix the case for hearing in the next 30 days failure to do this will mean that the suit will stand dismissed." They submit that by the wording of that ruling the suit was already dismissed and they were offered a last chance. From the record a hearing date was taken on 28/10/2004 way beyond the thirty days which lapsed on the 19/8/2004. Therefore as per the ruling the suit was already dismissed when the hearing date was taken. That the plaintiff went ahead to fix the suit for hearing when there was no suit and they gave a date of when the suit was fixed for hearing to have been done 28/01/2004 which was before the date of the orders given by Aluoch J. on 19/07/2004. The suit then came before the Judge on 10/02/2005 when the counsel for the plaintiff informed the Court that the defendant had died and there was need to substitute him. That the next application was done on 18/9/2008. That Order 24 rule 1 and 2 is very clear on the failure to substitute a party to suit upon their demise within one year after their death especially where only one defendant was sued. That the plaintiffs never applied and have not to date applied for extension of time on the abated suit. They maintain that an application to amend pleadings cannot be allowed to an abated and dismissed suit and pray for the same to be dismissed.

Determination

8. The Court record does not show any evidence of withdrawal of the order issued by Aluoch J on 19/07/2004 which gave a temporary and conditional extension of time to the plaintiffs on the already dismissed suit, declaring the suit dismissed on failure to set it down for hearing within 30 days of the date of the order, it would appear that the order was never vacated and in the circumstances the current suit stands dismissed however it is on record that there were proceedings in this suit before the honourable Judge on 10/02/2005 way after the lapse of the order. Those proceedings are but a nullity as they proceeded on a dismissed suit; there was no suit. The reasonable expectation would be that the plaintiffs herein applied for a further extension of the time beyond the order but there is no evidence of that either. In view of the above the order issued on 19/07/2004 stands.

9. The Court was informed of the death of the defendant in February 2005. I have not seen in the file any application for substitution of the deceased defendant neither is there any application for extension of time to do so. In that regard the failure to substitute the defendant within one year from February 2005 there can be no much debate on the fate of the suit. It abated. The effect of an abated suit is that it ceases to exist in the eyes of the law. The abatement takes place on its own force by passage of time, a 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 contention by the applicants herein that no Court ever declared the suit abated cannot succeed. See the case of **M'mboroki M'arangacha v Land Adjudication Officer, Nyambene and 2 others, Meru H.C.C. Application No.45 of 1997** where the High Court held that an order to record the abatement of a suit was not necessary. It then follows that the pleadings to an abated suit cannot be amended as the suit itself no longer exists. The plaintiffs herein ought to have made an application before this Court for withdrawal of the order issued on 19/07/2004 by Aluoch J, then apply for revival of the already abated suit before substitution of the deceased defendant. If I may borrow the statement of Lord Denning in **MacFoy v United Africa Co. Limited (1961) 3 All ER 1169**, that

"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the Court declare it to be so....".

10. The law on the Procedure in case of death of one of several defendants or of sole defendant is captured under Order 24, rule 4 of the Civil Procedure rules reproduced as below

"(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.”

11. There are three stages according to these provisions. As a general rule the death of a defendant does not cause the suit to abate if the cause of action survives. But within one year of the death of the defendant or within such time as the Court may in its discretion for “good reason” determine, an application must be made for the legal representative of the deceased defendant to be made a party. The “good reason” therefore relates to application for extension of time to join the defendant’s legal representative to the suit. Secondly, if no such application is made within one year or within the time extended by leave of the Court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action. Thirdly, the plaintiff may apply for the abated suit to be revived after satisfying the Court he was prevented by “sufficient cause” from continuing with the suit.

12. In view of the above the prayers sought in the applicant’s application dated 24/10/2017 in terms of prayer 1 and 2 cannot be granted as pleadings cannot be amended in a non-existent suit. Consequently, the file is ordered to be closed and the same should be taken to the archives.

13. The application is hereby dismissed with no order as to costs.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 23RD DAY OF FEBRUARY, 2018

J G KEMEI

JUDGE