



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 188 OF 2017

GLADYS NJERI MUHURA

(Suing as the legal representative

of the late MUHURA KIGANDA)..... PLAINTIFF/APPLICANT

VS

DANIEL KARIUKI MUTHIGURO

(intended legal representative of

The late LISPHA WAGATURI MUTHIGURO.....DEFENDANT/ RESPONDENT

RULING

1. The Plaintiff applicant by a Notice of Motion dated 17/7/2017 moved this court for the following orders;

a. That the suit be revived.

b. The Daniel Kariuki Mithuguro be substituted in place of the late Lispha Wagaturi Mithiguro so as to act as the legal representative of the late Mithiguro Kiganda.

c. Costs to be provided.

2. The application is premised on the grounds that this suit abated since the defendant herein died on 1.10.2013 and no one was willing to substitute her from her family and relatives hence the stipulated one year lapsed at no fault of the plaintiff. Secondly that the Respondent herein as the legal representative of Lispha Wagaturi Mithiguro may now be substituted in her place so that he can proceed with the case to its logical conclusion.

3. The application is supported by the affidavit of Gladys Njeri Muhura who reiterates the grounds on the face of the application and adds that she has now obtained an amended grant in favour of the proposed legal representative of the defendant who she believes is suitable to substitute his mother in this suit. That since the suit abated over two years ago it is necessary to revive it.

4. The application was opposed by a replying affidavit of Daniel Kariuki Mithiguro filed on 24/7/7/2017 who deposes that the grant of letters of administration ad litem obtained on 21/6/2017 were obtained fraudulently as he did not apply nor consent to being appointed as an administrator of the estate. That he is not the only child of the deceased and is therefore at a loss on how the applicant arrived at appointing

him as the representative of the deceased. He claims that the applicant failed to issue to him a notice of Nominee as required in law as the intended Respondent yet she went ahead and obtained the ad litem grant without his authority or consent. Further that the applicant has failed to give any reasons as to why she did not obtain the grant within the stipulated time before the suit abated, for that failure he contends that suit has abated and cannot be revived. Also that the suit land was not registered in the name of his mother therefore the suit did not survive his mother. That the suit land is registered in the name of his father and he has not been appointed as an administrator of the estate of his father therefore he cannot be sustained in this suit. That the applicant has failed to disclose to the court that the suit land has other beneficiaries who have not been listed before this court and the intended Respondent does not own any land of his own. He contends that there was inordinate delay in bringing this application with no reasonable explanation. He claims that the applicant has failed to lay a firm legal basis to substitute him for his deceased mother in this case.

5. The applicant submitted that the court has powers under section 7(2) of the CPR, to revive suits that have abated if an application is made by considering whether the Plaintiff was prevented by any sufficient cause from continuing with the suit. She claims that she could not file for substitution without a nominee. She claims that since this is a land matter it survives the demise of the defendant. That the failure to take out letters of administration by the family of the deceased was a deliberate attempt to ensure this suit abated. That the legal representative need not be a registered owner of the land. She maintains that the delay in bringing the present application was not inordinate for the reasons afore said.

Determination

6. It is on record that the defendant, Lisper Wagaturi Muthigiro died on the 1/10/13. It therefore means the suit abated by 30/9/14. The suit having been a land matter survived the defendant's death, that is to say, the cause of action continued to have a legal existence after the death of the defendant. The general rule is that suits and actions must be prosecuted by and against living parties. Since the deceased person cannot be a party to a legal proceeding the effect of the death is to suspend the action as to the deceased until the legal representative is substituted as a party. Unless and until such substitution is made within one year or by extension/leave of the Court any further proceedings in the case are void as to the deceased.

7. In the instant suit the cause of action survived the death of the defendant. However, the suit also abated as at the 1/10/2014.

8. Under Order 24 rule 3(2) there must be an application for revival of the suit after abatement before substitution. An order for substitution before revival of the suit is a nullity. See the case of **Kenya Farmers Coop Union Limited Vs Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) eklr**. It is on record that the Plaintiff gave reasons for the delay in substituting the defendant; that the family were evasive or uncooperative in filing the necessary succession cause for legal representation of the deceased, forcing the plaintiff to proceed under the relevant provisions of the Succession Act by citing the son Daniel Kariuki Muthigiro as a legal representative.

9. From the above I am satisfied of the reason given by the applicant as to why the substitution was not done within one year as plausible and is sufficient grounds for this Court to exercise its discretion to revive the suit as per the provisions of Order 24 rule 3.

10. Order 24 rule 4(1) of the Civil Procedure Rules provides as follows;

“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”.

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

“Legal representative means a person who in law represents the state 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 definition of the legal representative above is similar to the definition of a personal representative as defined under section 3 of the Law of Succession Act. A legal representative therefore is a person to whom a grant of letters of administration in respect of the state of the deceased are issued. In this instant case letters of grant of administration ad litem (limited) were issued to the said Daniel Kariuki Muthigiro on 21st June 2017 in succession cause No 266 of 2017 in respect to the estate of Lispha Wagaturi Muthigiro alias Lisper Wagaturi Muthigiro. The letters were limited only to the purpose of substitution in Muranga ELC No 188 of 2017 with no powers to distribute the estate.

11. Section 54 rule 14 of the Succession Act Cap 160 gives powers to the court to issue the ad litem grant to a nominee who is unwilling to act as so. The said rule states as follows;

“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 “

Further section 16 states;

“ Appointment of person not normally entitled to a grant Where it appears to the court to be necessary or convenient to appoint some person to administer an estate or any part thereof other than the person who would in ordinary circumstances be entitled to a grant of representation, the court may, in its discretion and having regard to all the circumstances of the case, appoint such other person to be administrator and grant letters of administration, whether limited or otherwise, as it shall think fit.”

12. I have looked at the replying affidavit of the intended substitute where he challenges the manner in which he was appointed as a legal representative of the estate, albeit temporarily for purposes of substitution in this case. He claims that the said letters were obtained without his consent and therefore they are fraudulent. There is no material evidence that has been placed before this Court to support this allegation. Fraud being a strict liability offence must not only be pleaded but must be proved to the required standard. In any event he has the liberty to challenge or revoke the said representation in the probate Court. As long as the said representation has not been revoked, I hold and find that the intended substitute is legally and properly appointed. The purpose of the representation is carefully spelt in the letters of administration ad litem; for purposes of prosecuting the instant case. The intended substitute need not be the registered owner of the suit property nor own property himself. The law has allowed him to step into the shoes of his deceased mother, the erstwhile defendant. It therefore follows that consent is therefore not a must for the grant of administration ad litem.

13. In the end I find that the application has merit and is granted as follows;

- a. The order reviving the suit is allowed.
- b. Daniel Kariuki Muthigiro is substituted in place of the late Lispha Wagaturi Muthigiro.
- c. Costs in the cause.

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

J G KEMEI

JUDGE