



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 1228 OF 2016

(FORMERLY HCC NO. 144 OF 2001)

MANSON MOREKA MONYENYE.....1ST PLAINTIFF

CLIFFORD NYAGAKA MAKERE.....2ND PLAINTIFF

VERSUS

DAVID OMURWA ONYONI.....1ST DEFENDANT

HARUN OMURWA MWAMBA.....2ND DEFENDANT

JAMES NYABARO MWAMBA.....3RD DEFENDANT

DISTRICT LAND REGISTRAR – KISII.....4TH DEFENDANT

DISTRICT SURVEYOR – KISII.....5TH DEFENDANT

THE ATTORNEY GENERAL.....6TH DEFENDANT

R U L I N G

1. The plaintiffs instituted the instant suit against the defendants vide a plaint dated 10th September 2001. The 1st, 2nd and 3rd defendants filed a joint statement of defence dated 2nd October 2001 on the same date. On 27th March 2006 the 1st and 3rd defendants amended the defence to plead a counterclaim and in the filed defence and counterclaim the 2nd defendant was omitted as the defence was headlined “**Amended statement of defence for the 1st and 3rd defendants.**”. The suit was first fixed for hearing on 12th February 2004 before **Bauni, J.** and on the late Minda advocate who appeared for the 1st and 3rd defendants informed the court that the 2nd defendant was dead. The suit was subsequently part heard by **Ruth Sitati, J.** on 24th March 2011 when the 1st plaintiff testified and completed his evidence.

2. I have given the above brief background to contextualize the twin applications filed by M/s G. M. Nyambati & Co. Advocates who appear for the 1st and 3rd defendants seeking the substitution of the 2nd defendant and the 3rd defendant by their legal personal representatives following their death. Both applications are dated 20th March 2017 and are filed on the same date.

3. In one application, it is sought to substitute one Peter **Ongwae Omurwa** as the 2nd defendant in place of **Harun Omurwa Mwamba** who was sued as the 2nd defendant and is shown to have died 7th April 2001 as per copy of death certificate annexed and marked “**P00-02**”. The applicant has annexed Letters of Administration Ad Litem issued on 8th March 2017 annexed and marked “**P00-01**”.

4. In the other application it is sought to substitute one, **Rose Moraa Orwochi** as the 3rd defendant in place of **Philip Nyabaro Mwamba** who is shown to have died on 3rd September 2016 as per the copy of death certificate annexed and marked “**RM02**”. The applicant is the widow of the deceased 3rd defendant and has annexed a copy of Letters of Administration Ad Litem issued to her on 8th March 2017 annexed and marked “**RM0-01**”.

5. The plaintiffs did not oppose the substitution of the 3rd defendant with his wife but opposed the substitution of the 2nd defendant with the said Peter Ongwae Omurwa arguing that there was no valid suit against the 2nd defendant as the suit, as is evident, from the plaint was filed

after the 2nd defendant had died. The 2nd defendant died on 7th April 2001 whereas the suit was filed on 10th September 2001 well over 5 months after the 2nd defendant had died.

6. The issue to determine is whether in fact there was a valid suit against the defendant at the inception of the suit. The answer to this must be a resounding no as one cannot bring a suit against a person who is dead. Such a suit can only be instituted against the duly authorized legal personal representative of the deceased estate.

7. Order 24 Rule 4 of the Civil Procedure Rules which governs the substitution of deceased defendants presupposes that there was already a valid suit against the deceased defendant and the cause of action survives the death of the defendant. Order 24 Rule 4(1) provides:-

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 a party and shall proceed with the suit.

8. Under Section 82 of the Law of Succession Act, Cap 160 of the Laws of Kenya only the personal legal representative of a deceased person has authority to act for or represent the estate of such person. Section 82(a) provides thus:-

82. Personal representatives, subject only to any limitation imposed by their grant, have the following powers:-

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate.

9. In the case of the 2nd defendant herein, no suit could have been instituted against him while he was dead. Such a suit could only have been instituted against the personal legal representative of the 2nd defendant. The suit against the 2nd defendant was consequently void *ab initio* as he could not have been sued when he was in his grave. It does appear the parties other than of course the 2nd defendant (who ought not to have been a party at any rate) acknowledged the 2nd defendant was dead way back in 2004 and the plaintiff never sought to have the 2nd defendant substituted. I suppose it was this realization that informed the amendment of the defence by the 1st and 3rd defendants who appropriately deleted the 2nd defendant's name from their defence and counterclaim. The suit against the 2nd defendant was a suit that never was and the name of the 2nd defendant is ordered deleted from being a party in these proceedings. There is no suit against the 2nd defendant in respect of which Peter Ongwae Omurwa can be substituted and his application for substitution is hereby declined.

10. The application by Rose Mora Orwochi to be substituted in place of the 3rd defendant is merited and the same is hereby allowed. The costs of the applications will be in the cause.

11. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 16TH DAY of MARCH, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

.....for the 1st and 2nd plaintiffs

.....for the 1st, 2nd and 3rd defendants

.....court assistant

J. M. MUTUNGI

JUDGE