



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 89 OF 2016

(Formerly Nyeri HCC No. 214 of 1985)

**JOHN BAPTISTA GACHINU (substituted by
ROMANO WANJIRU GACHINU) (substituted by
MARY WAMBUI GACHINU.....PLAINTIFF**

-VERSUS-

**CHANAN SINGH (substituted by
RANJIT SINGH (Deceased).....1ST DEFENDANT
JOAN AGNES NYOKABI.....2ND DEFENDANT
RICHARD WACHIRA.....3RD DEFENDANT**

RULING

1. By a notice of motion dated **9th September, 2013** brought under **Order 24** and **51 Rule (1)** of the Civil Procedure Rules, **Section 150** of the Land Act and **Sections 1A, 1B & 3A** of the Civil Procedure Act, the applicant herein moved this court seeking among other orders that Mary Wambui Gachinu be made a party in place of Romana Wanjiru Gachinu (deceased).
2. Upon consideration of the reasons provided by the applicants for seeking substitution of the plaintiff, the court (read High court) made Mary Wambui Gachinu a party in place of Romana Wanjiru Gachinu.
3. On **15th April, 2016** the applicant herein filed the notice of motion dated **14th April 2016** seeking the following orders:
 - 1. That the Honourable court be pleased to revive this suit which has since abated by the operations of the law;**
 - 2. That the Honourable court be pleased to order that the applicants herein be substituted in place of the deceased plaintiff;**
 - 3. That the costs of this application be costs in the cause.**
4. The application is premised on the grounds that:-
 - (a) That the first applicant was made a party in place of Romana Wanjiru Gachinu, the plaintiff herein on 18th December, 2013.
 - (b) By the time the first applicant was made a party the suit had abated.
 - (c) The applicants are desirous of prosecuting this suit.
 - (d) The cause of action survives and/or continues against the remaining defendants.

(e) The applicants are administrators of the deceased plaintiff.

5. The application is supported by the affidavit of the applicant on which the grounds on its face are reiterated.

6. The application is opposed vide grounds of opposition filed by the 2nd and 3rd respondents that the application is misconceived, incompetent, bad in law, a gross abuse of the process of the court, incurably defective, frivolous, vexatious without merit and should be dismissed with costs.

7. When the application came up for hearing, counsel for the applicant chose to rely on the grounds, the supporting affidavit and annexures. Counsel for the respondent submitted that the instant motion was filed after the court delivered a ruling in ELC NO. 183 of 2015 on 23rd February, 2017 that found the instant suit to have abated. It was his contention that this court having made that ruling, should not be asked to revive the suit.

Analysis and determination

8. As pointed out above, this court (read High Court) substituted Mary Wambui Gachinu in place of Romana Wanjiru Gachinu on 18th December, 2013. By this time, the suit had abated by operation of law following the death of the Romana Wanjiru Gachinu.

9. From the grounds urged in support of the application herein, it is clear that the applicant in the application for substitution did not apply to revive the suit but only to be substituted as the legal representative of the deceased as required under **Order 24 Rules 3(1)** and 2 of the Civil Procedure Rules which provides as follows:-

3(1) “where one or two or more plaintiffs dies...or a 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 said 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.”

10. From the above cited provision of the law, it is clear that after a suit abates, before a legal representative of a deceased plaintiff can be made a party to the suit, there has to be an application seeking orders to substitute the deceased plaintiff and revive the suit.

11. In the circumstances of this case, the applicant moved this court only for substitution without applying to have the suit revived although the suit had abated one year after the substituted plaintiff died.

12. The issue arising from the above situation is whether the applicant had power to bring and prosecute the application for substitution.

13. My view of that issue is that the applicant had no power to do so. The orders issued in the applicant’s favour were issued on the false understanding that the suit was still alive. It is noted from the proceedings, that the issue as to whether the applicant had power to bring and prosecute the application for substitution was not raised in the former application/proceedings.

14. I agree with counsel for the respondent that although the instant application was filed before this court delivered its ruling in ELC NO. 183 of 2015 on

23rd February, 2017 that found the instant suit to have abated, the plaintiff’s counsel with full knowledge of that ruling decided to prosecute this application nonetheless. Paragraphs 16 – 22 which are the relevant parts of the aforesaid ruling state;

“16. There is evidence that before HCCC No. 214 of 1985 could be heard and determined, the plaintiff in HCCC No. 38 of 1988 passed on.

17. The passing on of the plaintiff in that suit rendered both suits subject to the provisions of Order 24 Rule (3) sub-rule (1) and (2) which provides as follows:-

“24(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.”

18. By dint of the provisions of Order 24 (3)(2) where a sole surviving plaintiff passes on without being substituted within the time provided therein, the suit automatically abates as far as the deceased plaintiff is concerned.

19. With regard to the applicants' contention that there is no order in the court record declaring the suit abated, it is noteworthy that the suit abates by operation of law. For that reason, no order is required to declare the suit abated. All one needs to do to determine whether or not the suit has abated is evidence of death of the plaintiff and evidence to the effect that the deceased plaintiff was not substituted within the time stipulated in law. In this regard see the case of the case of Titus Kiragu vs. Jackcksom Mugo Mathai (2015) e KLR where it was held:-

“...It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law.”

20. In the circumstances of this case, there is evidence that the plaintiff in 214 of 1985 (Romano Wanjiru Gachinu) passed on, on 4th August, 2008 and that she was not substituted within the time provided in law (evidence on record shows that plaintiff was substituted on 18th December, 2013 outside the time provided for in law for carrying out the substitution. There being no evidence that an application for revival of the suit was made and allowed, it is, therefore, safe, from the evidence on record, to conclude that by the time the current suit was filed, that is 25th April, 2013, HCCC 214 of 1985 had abated.

21. Once a suit abates, it ceases to exist unless revived. See the case of Kaboi Mucheru v. Gakuu Mucheru Mbugi (2015) eKLR where it was held:-

“As indicated earlier, this suit abated and the Court did declare so. It is indeed clear from the provisions of Order 24 Rule 3(2) of the Civil Procedure Rules that in the case of a deceased plaintiff as is the position in this case, abatement is by operation of the law unless substitution of the plaintiff is made within one year of the plaintiff's death. There is therefore really no requirement that a Court should make a declaration to that effect.

The effect of a suit that has abated is that it ceases to exist. Black's Law Dictionary defines abatement as-

“..... the suspension or defeat of a pending action for a reason un-related to the merits of the claim”

Once a suit has abated, nothing is left because the suit is dead and it cannot be the basis upon which any order can continue to exist.”

22. Whereas its true that orders were issued in HCCC No. 38 of 1988 prohibiting the interference with the plaintiff's possession of the suit property pending the hearing and determination of 214 of 1985, those orders ceased to exist when 214 of 1985 ceased to exist (That is, abated).”

15. Having determined the fate of this suit in the aforesaid ruling, I adopt the holding in that ruling and dismiss this application with costs to the respondent.

16. Orders accordingly.

Dated, Signed and Delivered at Nyeri this 19th day of April, 2018.

L N WAITHAKA

JUDGE

Coram:

No Appearance

Court assistant - Esther