



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.100 OF 2017

[FORMERLY HIGH COURT CIVIL SUIT NO.314 OF 2002]

WILLS OKORE OLAGO.....PLAINTIFF

VERSUS

MURURI MBUI MATHARA AD KIMWA COMPANY.....1<sup>ST</sup> DEFENDANT

JOSEPH WILBRODA OLUOCH.....2<sup>ND</sup> DEFENDANT

DESTARIO OKUMUOKUMU OBUYA.....3<sup>RD</sup> DEFENDANT

NORAH AGOLA ONGORO.....4<sup>TH</sup> DEFENDANT

THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT

THE CHIEF LAND REGISTRAR NAIROBI.....6<sup>TH</sup> DEFENDANT

THE DISTRICT LAND REGISTRAR KISUMU.....7<sup>TH</sup> DEFENDANT

THE DISTRICT SURVEYOR.....8<sup>TH</sup> DEFENDANT

BOAZ OMARO.....9<sup>TH</sup> DEFENDANT

ALFRED KWENDO.....10<sup>TH</sup> DEFENDANT

WELLINGTON EKHUYA ANYOSO.....11<sup>TH</sup> DEFENDANT

GIRO COMMERCIAL BANK.....12<sup>TH</sup> DEFENDANT

RULING

1. The notice of motion dated 3<sup>rd</sup> September 2012, and filed on the 5<sup>th</sup> September 2012, is for **Peter Ochieng Okore and Elizabeth Akinyi Okore** to be substituted for **Willis Okore Olago**, the Plaintiff, and for leave to amend the plaint. The application was filed through M/S Ken Omollo & Company Advocates for the Plaintiff and is based on the eight (8) grounds on its face and supported by the affidavit sworn by the two administrators of the estate of the Plaintiff on the 5th September 2012.

2. The application is opposed by Muriri Mbui Muthara and Kimwa Company plus Joseph Wilbroad Oluoch, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, through the grounds of opposition dated 28<sup>th</sup> September 2012, and filed through M/S Otieno, Yogo & Company Advocates.

3. That when the application came up for hearing on the 23<sup>rd</sup> September 2014, the court among others directed that written submissions be filed. Thereafter, other court appearances followed culminating with the mention of 23<sup>rd</sup> January 2018 when the application was fixed for ruling today.

4. The court has after perusing the court record noted the following submissions have been filed;

- a) 1<sup>st</sup> and 2<sup>nd</sup> Defendants counsel's submissions filed on the 24<sup>th</sup> October 2014.
- b) Giro Commercial Bank Limited, 12<sup>th</sup> Defendant's, submissions dated 7th March 2015 and filed through M/S L.G. Menezes Advocates.

That both submissions refers to **Order 24 Rule 7(2) of Civil Procedure Rules** which obligates persons seeking to be substituted for a Plaintiff in an abated suit to "prove that he was prevented by any sufficient cause form continuing the suit" before the court can consider to revive or set aside the dismissal order of the suit.

5. The following are the issues for the court's determination;

- a) Whether the notice of motion was filed through counsel who is properly on record.
- b) Whether sufficient cause has been shown why the two named administrators of the estate of Willis Okore Olago, the Plaintiff, did not apply to be substituted as the Plaintiff and continue with the suit before the expiry of one year (12 months) from the date of the death of the Plaintiff.

6. The court has carefully considered the grounds on the notice of motion, affidavit evidence by the joint administrators of the Plaintiff's estate, the grounds of opposition by 1<sup>st</sup> and 2<sup>nd</sup> Defendants, written submissions by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants plus the 12<sup>th</sup> Defendant and come to the following conclusions;

a) That this suit was commenced by Willis Okore Olago, the Plaintiff, through the plaint filed by him in person on the 25<sup>th</sup> October 2002, and amended on the 26<sup>th</sup> November 2002. That vide notice of appointment dated 18<sup>th</sup> July 2004, M/S D.O.E Anyul & Company Advocates came on record for the Plaintiff. That a further amended plaint dated 28<sup>th</sup> October 2009, drawn and filed on the 29<sup>th</sup> October 2009 by M/S Behan & Okero Advocates for the Plaintiff. Through notice of appointment of advocate dated 1<sup>st</sup> August 2012, M/S Ken Omollo & Company Advocates came on record for Willis Okore Olago, the Plaintiff, and subsequently filed the notice of motion subject matter of this ruling. The counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant took issue with whether the counsel who filed the application was properly on record underground (1) of the grounds of opposition. That though the counsel did not submit on that ground, it is imperative that the court addresses the issue in view of the fact that the copy of the certificate of death attached to the affidavit sworn by Peter Ochieng Okore and Elizabeth Akinyi Okore in support of the application shows that Willis Okore Olago, the Plaintiff, died on the 3<sup>rd</sup> January 2011. That it follows therefore that Willis Okore Olago, the Plaintiff having died on the 3<sup>rd</sup> January 2011, could not have been the one that instructed M/S Ken Omollo & Company Advocates to come on record for him on the 1<sup>st</sup> August 2012, which is about one year eight months after his death. That accordingly, M/S Ken Omollo & Company Advocates, is not properly on record for the Plaintiff and on that ground the application fails.

b) That the notice of appointment of advocate by M/S Ken Omollo & Company Advocates dated and filed on the 1<sup>st</sup> August 2012 stated that the Plaintiff had appointed the firm "to act for him in this matter." That however the notice of motion dated 3<sup>rd</sup> September 2012 and signed off by "M/S Ken Omollo & Company Advocates for the plaintiff "appears to be by Peter Ochieng Okore and Elizabeth Akinyi Okore, the administrators of the estate of Willis Okore Olago, having been so appointed in Kisumu H.C. Succession Cause No.588 of 2011, who seeks to be substituted in place of the Plaintiff among others. That there is nothing on the court record to show or confirm that the two named joint administrators had appointed M/S Ken Omollo & Company Advocates to come on record and represent them in filing the notice of motion dated 3<sup>rd</sup> September 2012. That accordingly the costs of the application should be paid by M/S Ken Omollo & Company Advocates.

c) That the affidavit evidence filed in support of the notice of motion, especially the copy of the grant in Kisumu H.C. Succession Cause No.588 of 2011, shows that it was issued on the 23<sup>rd</sup> February 2012, yet the application was not filed until the 5<sup>th</sup> September 2012. That there is no explanation offered through the affidavit sworn by the two joint administrators why they did not move the court before the expiry of one year from the date of death of the Plaintiff or soon after they obtained the grant. There has been inordinate delay in moving the court to revive this suit which abated on or about 3<sup>rd</sup> January 2012, which is when a period of one year lapsed from 3<sup>rd</sup> January 2011 when the Plaintiff passed on, without an application for his substitution being filed.

7. That flowing from the foregoing, the court finds no merit in the notice of motion dated 3<sup>rd</sup> September 2012 and filed on the 5<sup>th</sup> September 2012. The court therefore orders as follows;

- a) That the notice of motion dated 3<sup>rd</sup> September 2012 and filed on the 5<sup>th</sup> September 2012 is dismissed with costs to be paid by M/S Ken Omollo & Company Advocates.
- b) That for avoidance of doubts, the Plaintiff having died on the 3<sup>rd</sup> January 2011, and one year having lapsed without any application to substitute him having been filed, this suit abated as against all the Defendants on the 3<sup>rd</sup> January 2012.

c) That accordingly the file be and is hereby closed.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 18<sup>TH</sup> DAY OF APRIL 2018**

In presence of;

Plaintiff            Absent

Defendant s       Absent

Counsel            Mr. Anulem for Achura for Plaintiff

                         Mr. Odeny for Ndeda for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**18/4/2018**

**18/4/2018**

**S.M. Kibunja Judge**

**Parties absent**

**Mr. Achula for Plaintiff**

**Mr.Odeny for M/S Ndeda for the Defendant**

**Court: Ruling dated and delivered in open court in the presence of Mr. Anule for Achura for the Plaintiff and Mr. Odeny for Ndeda for the Defendant.**

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**18/4/2018**