



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO 184 OF 2013

VUE TAURE VUE

TSORI CHIWAI SUDI.....PLAINTIFFS

VERSUS

FELIX TSORI CHIVATSI

DANCAN JAMES WAITA.....DEFENDANTS

RULING

1. By a Notice of Motion Application dated 5th December 2017, the two Plaintiffs herein Vue Taura Vue and Tsori Chiwai Sudi sought orders against the two Defendants Felix Tsori Chivatsi and Dancan James Waita as follows:-

- 1. That the application herein be certified urgent and service thereof be dispensed with in the first instance.***
- 2. That the Honourable Court be pleased to reinstate the interim orders of injunction issued on 11th October 2016 pending the hearing of this application and the application dated 11th October 2016.***
- 3. That the Court be pleased to confirm the Orders of injunction issued on 11th October 2016 until the hearing (sic) of this suit.***
- 4. That the Court be pleased to allow the Plaintiff to substitute the 2nd Plaintiff Tsori Chiwai Sudi(now deceased) with Anthony Kiringi Tsori, the Administrator ad Litem of the estate of the deceased.***
- 5. Costs be in the cause.***

2. The said application was based on the grounds that this Court had on 11th October 2016 issued interim orders of injunction restraining the defendants from disposing, selling, alienating, transferring or charging all those parcels of land Number Kilifi/Vyumbani/353, 354, 355, 356 and 357. It was the Applicant's case that before the earlier application could be dispensed with, the 2nd Defendant passed away and the interim orders were extended from time to time to allow for substitution of the 2nd Plaintiff.

3. It was further the Applicant's position that those interim orders of injunction were discharged on 3rd April 2017 when due to some inadvertent confusion on their part, Counsel for the Applicant failed to attend Court when the matter came up for hearing. The Applicant hence intended to preserve the subject suit land by bringing the present application.

4. In response to the said application, the 1st Respondent Felix Tsori swore a Replying Affidavit on 15th December 2017(filed herein on 23rd January 2018) in which he avers that the application for reinstatement has been brought too late in the day and that in any event, the 2nd Plaintiff passed on on 17th November 2016 and the suit had accordingly abated.

5. In addition to the Replying Affidavit, the 1st Respondent filed on the same day a Notice of Preliminary Objection seeking to have the application struck out on the grounds:-

- 1. That the claim by Tsori Chiwai Sudi, who died on 17th November 2016 abated on 17th November 2017. As such, there cannot be substitution for purposes of an abated claim;***

2. That the 1st Plaintiff lacks the locus standi to bring the application for substitution of the 2nd Plaintiff with Anthony Kiringi Tsori (the Administrator ad Litem of the Estate of the 2nd Plaintiff), such an application can only be filed by the said Anthony Kiringi Tsori; and

3. That as the suit long abated the prayer for reinstatement of the interim orders issued on 11th October, 2017 is totally misguided.

6. On this part, the 2nd Respondent Duncan James Waita also swore and filed a Replying Affidavit to the application on 26th January 2018. It was the 2nd Respondent's case that the 1st Plaintiff sought time to file an application for substitution on 9th March 2017 but kept on requesting for extension of the orders without proceeding with the substitution. He avers in particular that the last time the matter was mentioned in Court on 3rd April 2017, there was no appearance for the Plaintiff in Court yet the grant of letters of administration had then already been issued on 27th March 2017. The 2nd Respondent therefore also contends that there has been inordinate delay in filing the present application and that the suit has already abated.

7. When this matter came up on 5th February 2018, this Court determined that the parties would first argue the Preliminary Objection filed by the 1st Defendant. As it were, the Applicants sought leave to file a further affidavit and time to prepare for the Preliminary Objection which had been served upon them, from the record, on 25th January 2018. Having taken into consideration the prevailing circumstances herein, Counsel for the Applicant was granted time until 11.00 a.m to file a further affidavit and to proceed to prepare for the Preliminary Objection. On the said date when the Court reconvened at 11.15 a.m, the Plaintiffs had filed two applications under Certificate of Urgency, one seeking substitution and the other seeking to amend certain aspects of the application dated 5th December 2017.

8. The two applications were certainly filed to defeat the orders of the Court earlier on granted at 9.00 a.m. on the same day when the application was first mentioned and the Court declined to hear the same and ordered that the Preliminary Objection proceeds to hearing as earlier scheduled. Thereafter Mr. Ogetto, Learned Counsel for the Applicant declined to participate in the proceedings and left the matter to the Court.

9. I have considered the Preliminary Objection dated 15th December 2017 and the oral submissions in support thereof made by both Ms Murage and Ms Mwanja, Learned Counsels respectively appearing for the 1st and 2nd Respondents. I have equally considered the authorities to which the two Learned Counsels referred me.

10. Order 24 of Rule 3 of the Civil Procedure Rules provides that:-

(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 sub-rule(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.

11. As it is clear from the provisions of Order 24 Rule 3(2) of the Civil Procedure Rules, abatement is by operation of the law unless substitution is made within one year of the Plaintiff's death. 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.

12. In the matter before me, it is not disputed that the 2nd Plaintiff died on 17th November 2016. The present application brought by the 1st Plaintiff for substitution having been filed on 5th December 2017 therefore came one month later after the suit as against the Plaintiff had abated.

13. In any event, I do agree with Counsel for the 1st Defendant that the 1st Plaintiff has no locus to bring the application as he is not the legal representative of the estate of the 2nd Plaintiff. Indeed, the application before me confirms in my view, the Defendants' contention that the Plaintiff have had no interest in prosecuting this matter and/or bringing it to conclusion. Thus, while the grant of letters of administration were issued on 27th March 2017, no application was made for substitution until 5th December 2017.

14. Again while the application was filed one month after the suit abated, no application was made for the revival of the suit. The application dated 5th December 2017 is devoid of the vitality for the revival of a suit that has abated and is rather pre-occupied with the need for revival and extension of injunctive orders which the Plaintiffs earlier on enjoyed. The application neither bears a prayer for the revival of the suit nor does it give any reason why substitution was not applied for in good time.

15. It should again be understood that once the suit has abated, there is no suit. There is indeed nothing and out of nothing you can derive nothing. This is the reason the law requires one to apply first to resuscitate the suit to life first, before applying for substitution. As it were, the prayers to reinstate interim orders and to substitute the 2nd Plaintiff with one Anthony Kiringi Tsori are founded on nothing and will elicit nothing; the prayers have no foot to stand on for the suit has abated.

16. The long and short of it is that I find merit in the 1st Defendant's Preliminary Objection dated 16th December 2017. The application dated 5th December 2017 is accordingly dismissed with costs to the Respondents.

Dated, signed and delivered at Malindi this 28th day of June, 2018.

J.O. OLOLA

JUDGE