



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 110 OF 2014

WASHINGTON NAMWAYA WASIKE.....PLAINTIFF

VERSUS

DIXON JOWE.....1ST DEFENDANT

ANDREW AGWANDA OWUOR.....2ND DEFENDANT

STEVEN OGOLA OMOLLO.....3RD DEFENDANT

LIVINGSTONE WANDERA WASIKE.....4TH DEFENDANT

THE CHIEF LAND REGISTRAR.....5TH DEFENDANT

THE COUNTY LAND REGISTRAR-BUSIA COUNTY.....6TH DEFENDANT

THE ATTORNEY GENERAL.....7TH DEFENDANT

R U L I N G

1. What is for determination before me is a motion of notice dated 30/6/2017 and filed on 3/7/2017. It was brought under order 24 Rule 4(3) of Civil Procedure Rules and the following prayers are sought:

(a) That this suit be abated

(b) That the costs of the suit and this application be provided for.

2. The application is essentially against the Plaintiff – **WASHINGTON NAMWAYA WASIKE** – and is premised on the fact of the death of the 4th Defendant – **LIVINGSTONE WANDERA WASIKE** – which is said to have occurred on 26/6/2014. By the time of filing the application, the 4th Defendant had not been substituted and it’s posited that the suit herein has abated against him by operation of the law, one year having passed without substitution. There are other Defendants namely: **DIXON JOWE, ANDREW AGWANDA OWUOR, STEVEN OGOLA OMOLLO, THE CHIEF LAND REGISTRAR, THE COUNTY LAND REGISTRAR – BUSIA** and the **ATTORNEY GENERAL**. The suit remains intact against them.

3. The suit herein was filed on 15/7/2012 and the 4th Defendant filed his defence on 10/9/2012. He then passed-on on 26/6/2014 and has not been substituted yet.

4. The Plaintiff opposed the application vide a replying affidavit dated 28/8/2017 filed on the same date. The Plaintiff explained that after the death of 4th Defendant, he took steps to have some of his family members cited in probate proceedings with a view to effecting substitution. But before the proceedings were concluded, one RUTH AKOTH WANDERA became the administratrix of the 4th Defendant estate via separate probate proceedings. The Plaintiff then prepared application for substitution through counsel but the same was mis-filed. The mis-filing is said to have occasioned the delay. The delay was said to be excusable as it was not intentional.

5. The application was canvassed by way of written submissions. Counsel for Defendant, Mr. Otanga, filed submissions on 1/11/2017. He submitted, *inter alia*, that Order 24 Rule 3 of Civil Procedure Rules, 2010, states that where a defendant dies and is not substituted within one year, the suit abates against him. Counsel then pooh-poohed the reasons proffered by the other side as an excuse for the delay and asked the court to be guided by the decided case of **THE HONOURABLE ATTORNEY GENERAL Vs the LAW SOCIETY OF KENYA & Another: CA: Application No. 133/2011, NAIROBI** where good or sufficient cause was said to comprise in that which is “*rational, plausible, logical, convincing, reasonable and truthful*”.

6. It was the Defendant’s counsel further submission that substitution not having been done within one year after the death of the Defendant, the suit automatically abated when that period expired. For this proposition, counsel sought succor in the cases of **JOHN MASKANA MASAMBA Vs TOYA JUMA LUKOYA [2005] eKLR** and **SWEILEM GHEITHAM SAANUM Vs COMMISSIONER OF LANDS & 5 others [2015] eKLR**.

7. The Plaintiff’s counsel, Mr. Manwari, filed two sets of submissions, first on 18/10/2017 and second on 21/11/2017. In the first set, counsel submitted, *inter alia*, that the reasons given in the Plaintiff’s replying affidavit were sufficient. He pointed out that failure to file application to substitute was due to error on his part and he implored that the error should not be visited on the Plaintiff. In the second set made in reply to submissions of Defendants counsel, Manwari submitted that the reasons given by the Plaintiff meet the criteria set out in the Attorney General’s case (supra) availed by the Defendant’s Counsel.

8. Counsel for Plaintiff quoted the words of Madan JA (as he then was) in **BELINDA MURAI & others Vs AMOS WAINAINA** as referred to in **SAID SULEIMAN GEITHAM SAANUM Vs COMMISSIONER OF LANDS & 5 others: CIVIL APPEAL No. 16 of 2015, MALINDI** where the learned judge emphasized the need for the court “*to do whatever is necessary*” to correct the mistake “*if the interests of justice so dictate*”. This court was asked to disallow the application herein.

9. I have considered the pleadings on record generally, the application as filed, the response made, and the rival submissions. The law applicable where a suit is said to have abated was succinctly stated in the SAID SWEILEM’S case (supra) which both sides sought to rely on. In the case, Order 24 of Civil Procedure Rules was quoted in the relevant parts, with the learned judges (ASIKE-MAKHANDIA, W. OUKO and K. M’MOITI JJAs) expressing the import of the provisions thus:

“... As a general rule the death of a Plaintiff does not cause the suit to abate if the case of action survives. But within one year of the death of the Plaintiff or within such time as the court may in its discretion for “good reason” determine, an application must be made for the legal representative of the deceased Plaintiff to be made a party. The “good reason” therefore relates to application for extension of time to join the Plaintiff’s legal representative to the suit.

“Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate.

“... The effect of the abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased Plaintiff”

10. It can be seen from the foregoing that the learned judges had in mind a situation where the Plaintiff dies. And this is so because that is what happened in the case before them. The matter we have here relates to a deceased Defendant. And in the matter before the learned judges, the application under focus related to revival of a suit and substitution of a party. We are not dealing with such an application here. The application under focus relates to issuance of an order stating that a suit has abated. That is all what this court is required to do, besides giving directions on costs.

11. There are provisions however in Order 24 of Civil Procedure Rules covering a situation where a Defendant dies. The provisions also cover a situation where a deceased Defendant is not substituted within one year. The relevant provisions are to be found in order 24 Rule 4(1) and (3) of Civil Procedure Rules, 2010. They are as follows:

Order 24(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 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:

Subrule (2)

Subrule (3) where within one year no application is made under subrule 1, the suit shall abate as against the deceased defendant.

12. From the provisions stated, it is clear that the consequence of non-substitution of a deceased Defendant are the same as those of non-substitution of a deceased Plaintiff. In sum, it can be said that non-substitution of a deceased party within one year of death where the cause of action survives such party leads to automatic abatement of suit. Such abatement does not require a court of law to declare it has materialized. All what is required is expiry one year without substitution and the suit ceases to exist in the eyes of the law.

13. It may be useful to point out here that the law does not seem to recognize a situation where proceedings for substitutions are already in place before expiry of one year. It would appear that even where plans are underway to substitute a deceased party before expiry of one year, the suit still abates where the relevant order has not been issued in such proceedings before expiry of one year.

14. And this is precisely the situation that obtains in the matter at hand. The 4th Defendant died on 26/6/2014. Records show that Manwari made application for substitution but allegedly mis-filed it. In the meantime, the requisite period expired without an order of substitution being made. The fact of the matter is that the suit abated against the 4th Defendant. In my view, the fact of abatement is already accomplished, there being no order for substitution made before expiry of the requisite period.

15. The case of SAID SWEILEM GHEITHAN (supra) is clear that the court need not declare that such abatement exists, the abatement having already taken place on its own force by passage of time. The learned judges were however quick to point out that sometimes, the court may be required to issue an order because of the legal consequences – like the issue of costs or execution – that follow such abatement. In their words, it is clear that **“for convenience an order of the court is necessary for a final and effectual disposal of the suit”**.

16. The application at hand is actually one where an order is deemed necessary **“for a final and effectual disposal of the suit”** as against 4th Defendant. Manwari strenuously opposed issuance of such order and made what would be formidable arguments in favour of revival of suit or substitution of a deceased party. But the arguments are misplaced as regards this application because, as explained earlier, abatement has already taken place by operation of the law. Even if the court were to decline to issue the order, the fact of the matter is that abatement has already taken place. The court is being asked to do the obvious – issue an order stating that the suit has obtained as against 4th Defendant – and it has no choice in my view but to issue the order.

17. As an aside, I may observe that the only option open to the Plaintiff is to make an application for extension of time to enjoin a legal representative and revive the suit. The arguments raised here by Manwari may be useful for such application. They are not useful here as abatement is already a fait accompli. The upshot is that I allow the application herein with costs to Defendant.

Dated, signed and delivered at Busia this 31st day of July, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

1st Defendant:

2nd Defendant:

3rd Defendant:

4th Defendant:

5th Defendant:

6th Defendant:

7th Defendant:

Counsel of Plaintiff:

Counsel of Defendants: