



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO 241 OF 2008 (OS)**

**1. NEWTON MAGHANGA MWASI**

**2. SHINGIRA MWASI**

**3. BYSON MWASI ..... PLAINTIFFS**

**-VS-**

**1. MWASI NYATTA**

**2. COMMISSIONER FOR LANDS ..... DEFENDANTS**

**RULING**

1. By a Notice of Motion dated 29<sup>th</sup> September, 2017, the 1<sup>st</sup> Defendant/Applicant seeks for orders:

**1. That the Plaintiffs' suit herein against the defendant be struck out for the same having abated following the demise of the 1<sup>st</sup> Plaintiff more than two years ago.**

**2. That the costs of this application and those of the entire suit be borne by the Plaintiffs.**

2. The Application is premised on the following grounds:

**1. That more than two (2) years has lapsed since the 1<sup>st</sup> Plaintiff passed on.**

**2. That the plaintiffs have inordinately and unreasonably delayed in prosecuting the matter.**

**3. That no action has been taken by the deceased plaintiff's estate with a view to appoint a legal representative to proceed with the suit.**

**4. That the 1<sup>st</sup> Plaintiff's case cannot abate in exclusion as this is a conjoint suit.**

**5. That it is prudent for the interest of fairness and justice that the Application be allowed as prayed.**

3. The application is supported by the affidavit of Kevin Kinuthia, the advocate for the 1<sup>st</sup> Defendant herein. He depones that on 28<sup>th</sup> July 2015, the Plaintiff's counsel informed the court that the 1<sup>st</sup> Plaintiff had since passed on and was seeking to have a legal representative of the deceased's estate to take over the proceedings on his behalf. That no legal representative has been appointed by the deceased Plaintiff's estate to proceed with the matter more than two (2) years since the passing of the deceased and as such the suit has abated.

4. The application is opposed by the Plaintiffs who filed grounds of opposition dated 3<sup>rd</sup> October, 2017 and a Replying Affidavit sworn by the 3<sup>rd</sup> Plaintiff on 3<sup>rd</sup> October 2017. Is it the respondent's contention that the abatement of the suit by the 1<sup>st</sup> Plaintiff does not of itself divest the remaining Plaintiffs of a justifiable interest over the Suit Property. The 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs aver that they have subsisting rights of action over the Suit Property upon which they can litigate notwithstanding the fact of the 1<sup>st</sup> Plaintiffs demise.

5. The Application was canvassed by way of written submissions which were duly filed by the advocates for the parties. It is the Applicants

submissions that the Plaintiffs' case has abated in its entirety the same being a conjoint suit that cannot abate to the exclusion of the 1<sup>st</sup> Plaintiff who has since passed on. The applicant relied on the case of **MSA HCCC NO.698 OF 1994. John Musoga Levangu & 122 Others –Vs Fort Properties Ltd & 4 Others.**

6. On their part, the respondents submit that the application is misconceived and flies in the face of a variety of legal principles such as the doctrine of survivorship, where, even in the case of joint interest such as may be pursued in respect of landed interest held on joint tenancy, the interest of the deceased proprietor reverts to the surviving proprietor, rather than be distinguished by the fact of death of one of them.

7. Order 24 Rule 1, 2 & 3 (1) & (2) of the Civil Procedure Rules provides as follows:

**“1. The death of a Plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.**

**2. where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving Plaintiff or Plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving Plaintiff or Plaintiffs, or against the surviving defendant or defendants.**

**3. 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 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.**

8. From the foregoing, it is clear that a suit abates by operation of law. That means that no order is required to declare the suit abated. All that one needs to determine whether or not the suit has abated is evidence of death of the Plaintiff and that the deceased plaintiff was not substituted within the time stipulated in law. In the case of **Titus Kiragu – v- Jackson Mugo Mathai (2015)eKLR** it was held that:

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

9. In the case of **Kaboi Mucheru –v- Gakuu Mucheru Mbugi (2015)eKLR** 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 no requirement that a court should make a declaration to that effect.”**

10. In the case of **Said Sweilem Gheithan Saanum –v- Commissioner of Lands (being sued through the Attorney General) & 5 Others (201) eKLR**, the Court of Appeal explained the provisions of order 24 of the Civil Procedure Rules as follows:

**“There are three stages according to these provisions. As general rule the death of a plaintiff does not cause the suit to abate if the cause 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. Where a suit abates no fresh suit can be brought on the same cause of action.**

**Thirdly, the legal representative of the deceased Plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit. The effect of an 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.**

11. In the present case the suit pending for determination before this court is the originating summons dated 12<sup>th</sup> September 2008 filed by the plaintiffs jointly claiming ownership by reason of adverse possession of land, parcel **NO.WERUGHA/WERUGHA/364** registered in the name of Mwasi Nyatta the 1<sup>st</sup> defendant herein. The 1<sup>st</sup> Plaintiff is alleged to be now deceased, though no evidence has been tabled before this court to that effect. The alleged death is however not disputed by the Plaintiffs.

12. In the affidavit in support of the Originating Summons it is deposed that the 1<sup>st</sup> Plaintiff had relocated from the suit property, leaving the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs who have been in possession and occupation of the same. In my view, the nature of the claim is that which survives the death of the deceased plaintiff and continues to the surviving plaintiffs. The court only needs to cause an entry to that effect on the record and this suit shall proceed at the instance of the surviving plaintiffs. I do not agree with the submission of the 1<sup>st</sup> defendant/applicant counsel that the matter at hand is a conjoint suit which cannot be disjointed.

13. In conclusion and having determined that the cause of action in this case survives the remaining plaintiffs, the suit therefore has not abated. It can only abate as against the deceased plaintiff.

14. Accordingly, I find that the notice of motion dated 29<sup>th</sup> September 2017 is without merit and is hereby dismissed with costs to the Respondents.

**Delivered, signed and dated at Mombasa this 25<sup>th</sup> September, 2018.**

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**C. YANO**

**JUDGE**