



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.33 OF 2013

ANN WANJIKU KARUGA & ANOTHERPLAINTIFFS

VERSUS

FRANCIS KINGORI GATHITU & 19 OTHERS.....DEFENDANTS

RULING

(Application for substitution of some deceased defendants; Order 24 Rule 4; the persons proposed to come on record not legal representatives of the deceased defendants; application dismissed).

1. The application before me is that dated 21 April 2018 filed by the plaintiffs. It is an application said to be brought pursuant to the provisions of Order 51 Rule 1 and Order 8 Rules 4, 5, and 8 of the Civil Procedure Rules, 2010. It seeks the following principal order which is prayer (b) of the application, being :-

The applicants be granted leave to amend the pleadings herein to substitute the names of the 1, 2, 7, 8, 14 and 17 defendants who have since passed on with the names of the legal representatives namely :-

- (i) Mary Wambui Kingori (for 1st defendant)
- (ii) Francis Mungai (for 2nd defendant)
- (iii) Oscar Macharia (for 7th defendant)
- (iv) James Wanjiku Kanyi (for 8th defendant)
- (v) Jeremiah Mwaura (for 14 defendant)
- (vi) Peter Ndiritu (for 17th defendant).

2. The application is supported by the affidavit of Doris Wanjiru Thuo, the 2nd plaintiff, and she has averred inter alia that it came to her attention when the case came up for hearing, sometimes last year, that the defendants 1, 2, 7, 8, 14 and 17 have since died. She has deposed that she wishes to amend the suit to bring on board their respective legal representatives, who are the ones named above, for purposes of prosecuting the suit. It is her view that the cause of action survives the deceased persons hence the need to substitute.

3. The application is opposed by counsel on record for the defendants 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 20, who filed grounds of opposition in the following fashion :-

- (i) That the application is misconceived, incompetent and bad in law.
- (ii) That there is no sufficient material placed before the court to warrant the orders sought.
- (iii) That the applicants have not disclosed when the defendants in question passed away and who and when the persons to be substituted were appointed legal representatives of the estate of the deceased defendants.
- (iv) That the application is vague on who the administrators of the estate of the deceased defendants are.

4. A supplementary affidavit was filed, which stated inter alia, that the parties sought to be enjoined are not represented by the law firm of M/s Waiganjo & Company Advocates, and it is not for the said firm to raise any objection to their inclusion, as it does not affect their clients. It is averred that those are the people occupying the suit land and represent the estates of the deceased persons. It is contended that the parties they seek to bring on board need not have letters of administration. The supplementary affidavit also annexes the certificates of death for Francis Kingori Gathitu (1st defendant) which shows that he died on 12 May 2012; Joseph Gateri Kimaru who died on 21 November 2006; Charles Njuguna Macharia (7th defendant) who died on 13 May 2000; Miriamu Muthoni Ndiritu (17th defendant) who died on 15 August 2013; and Peter Kagwe Kamau (2nd defendant) who died on 20 March 2017. I have not seen the name of Joseph Gateri Kimaru mentioned as any of the defendants.

5. Before I delve into the application, I feel it necessary to give a little background on this suit. The same was commenced by way of a plaint which was filed on 14 December 2011. The plaintiffs' suit have averred in the plaint that one Alfred Munge Macharia alias Alfred Munga (deceased), was the registered owner of the land known as Plot No. 95 Kijabe-Hill (Subukia) (new number Nakuru/Subukia/95) and upon his death, the said property passed to the plaintiffs who are his children vide Nyahururu PMCC Succession Cause No. 131 of 2010. It is pleaded that without any colour of right, the defendants on diverse dates, jointly or severally, entered the said land, constructed houses, cultivated the same and have continued to occupy the same in different acreages which are stated in the plaint. In the suit, the plaintiffs have sought vacant possession, eviction orders, general damages for loss of user, and costs.

6. The defendants 3 - 17 and 20, entered appearance through the law firm of M/s Waiganjo & Company Advocates, and filed a joint statement of defence and counterclaim. In the defence, it is denied that the late Alfred Macharia was registered as owner of the suit land. They averred that they purchased the suit land in the year 1994 or thereabouts from one Waithira Mwangi and Nancy Wangui Mwangi, and have been in possession of the land since the year 1994. They averred that they have a decree in their favour issued in the Nakuru Chief Magistrate's Court Land Disputes Case NO. 1 of 2009. They also contended that they are entitled to the land by way of adverse possession which they claimed in their counterclaim. They further averred that the title of the plaintiffs was procured through fraud and should be cancelled, and they sought prayers that they be registered as owners of the suit land. The plaintiffs filed a reply to defence and defence to counterclaim and joined issue with the defendants. The 19th defendant entered appearance on 15 November 2017 but I have not seen a defence filed on his behalf.

7. The case itself was certified ready for hearing but when it came up for hearing on 30 October 2017, Mr. Waiganjo, learned counsel for the 3rd-17th and 19th and 20th defendants, raised the issue that some of the defendants are dead. He availed some Certificates of Death to prove this. Owing to this development, the matter could not proceed and it is after this event that this application was filed on 24 April 2018.

8. I have gone through the said application and the brief submissions made by Mr. Kimatta, learned counsel for the applicants, and Mr. Waiganjo, for the 3rd - 17th and 19th and 20th defendants.

9. The orders sought in the application are for substitution of persons who are said to be deceased. Although Orders 51 Rule 1 and Order 8 Rules 4, 5 and 8 are cited, substitution is substantially governed by the provisions of Order 24, and rule 4 thereof, addresses the position of the law where it is the defendant, or defendants, who have died. It provides as follows :-

4. Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4.]

(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 survives 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.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

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

10. The application mentions that the defendants 1, 2, 7, 8, 14, and 17 are dead. These are named in the plaint as Francis Kingori Gathitu, Peter Kagwe Kamau, Charles Njuguna Macharia, Sarah Wanjiru Kanyi, Samwel Njoroge Kariuki, and Miriam Muthoni. In the supplementary affidavit, 5 Certificates of Death are annexed, and these are for Francis Kingori Gathitu, Joseph Gateri Kimaru, Charles Njuguna Macharia, Miriamu Muthoni Ndiritu and Peter Kagwe Kamau. I have not seen the name of Joseph Gateri Kimaru in these proceedings and I do not know why this Certificate of Death was annexed. In essence, of the 6 persons said to have died, I only have Certificates of Death for 4 persons. I have no evidence that Sarah Wanjiru Kanyi (8th defendant) and Samwel Njoroge Kariuki (14th defendant) are dead. Without a Certificate of Death, or other acceptable proof of death, I cannot presume that they are indeed dead. I am therefore unable to make any orders in respect of the 8th and 14th defendants in so far as the orders sought in this application is concerned.

11. An important element in substitution, and this comes through a simple reading of Order 24 Rule 4, is that the person who is sought to be brought on board needs to be a legal representative of the deceased party to the litigation. The words used are that the court "shall cause the legal representative of the deceased defendant to be made a party...". There can therefore be no substitution unless such person sought to be introduced in place of the deceased litigant is a legal representative of the deceased party. Indeed, I need not cite any authority for this clear provision of the law.

12. It has been raised by Mr. Waiganjo, and I cannot wish that submission away, that the persons sought to be enjoined are not the legal representatives. Order 24 Rule 5 is therefore operative. It states as follows:-

5. Determination of question as to legal representative [Order 24, rule 5.]

13. Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such

question shall be determined by the court.

14. A question as to whether the persons sought to be introduced to the suit in place of the deceased defendants has been raised, and in accordance with the above provisions, I need to determine whether they are the legal representatives of the deceased persons. I have no evidence that they are legal representatives, and my determination is that they are not legal representatives. That being the case, they cannot be substituted for the deceased parties.

15. It is apparent that I see no merit in this application, but before I finish, I have noted that in respect of the 7th defendant, Charles Njuguna Macharia, the Certificate of Death shows that he died on on 13 May 2000, before the institution of this suit. One cannot purport to sue a person who is already dead. I have little option but to strike out the case against the 7th defendant and any counterclaim that he may have filed is also struck out.

16. All in all this application is hereby dismissed with costs.

17. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20th day of September 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Wangari present for 3rd -17th & 20th defendants/respondents

No appearance on the part of M/s Kimatta & co. for the plaintiffs/applicants.

Court Assistant: Nelima.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU