



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

ELC NO.325 OF 2013

SAMUEL KIPKEMOI LABOSO.....PLAINTIFF

VERSUS

**STEPHEN MWANGI WAMBUGU (sued as the administrator of
the estate of the late WILLIAM WAMBUGU NJENGA).....1 DEFENDANT**

**ELKANA MUTITA WAMBUGU (sued as the administrator
of the estate of the late WILLIAM WAMBUGU NJENGA).....2ND DEFENDANT**

RULING

(Application to substitute deceased plaintiff for purposes of executing for taxed costs; plaintiff's suit dismissed with costs; plaintiff thereafter passing on; defendant proceeding to tax costs before substitution of the deceased plaintiff; apparent that bill of costs was taxed when the plaintiff was deceased; bill of costs ought not to have been taxed before substitution; application to substitute allowed but court in its own discretion sets aside the taxation of the bill of costs; bill remitted for fresh taxation inter partes)

1. The application herein is that dated 19 April 2018 filed by the defendants. It is an application brought pursuant inter alia to the provisions of Section 37 (1) of the Civil Procedure Act, Cap 21 Laws of Kenya, and seeks orders to have the deceased plaintiff, substituted with one David Kiprono Cheruiyot, for purposes of recovery of the defendants' costs which have already been taxed. The application is opposed by the said respondent.

2. I have gone through the record herein. The plaint was filed on 25 April 2012, by Samuel Kipkemoi Laboso (now deceased). In the suit, he sued the defendants as administrators of the estate of one William Wambugu Njenga. He pleaded that one Kitur Chamdany and himself, jointly purchased shares in Kalenjin Enterprises, a land buying company, which shares entitled them to a Plot No. 66, measuring about 1 acre. It was averred that they subdivided the plot on the ground amongst themselves and placed a fence, with the two subdivisions identified as Plots No. 66A and 66B. It was averred that Mr. Chamdany then sold his share of the plot to the late Njenga, but the late Njenga proceeded to obtain a title deed for the whole parcel including the plaintiff's share, which was said to have been done fraudulently. In the suit, the plaintiff wished to be declared owner of half acre within the land, now titled as Nakuru/Municipality Block 29/50 (Ronda).

3. The defendants filed defence through which they denied the claims of the plaintiff. They averred that their father (Njenga), lawfully purchased the suit land from Mr. Chamdany, and that the plot that the plaintiff was entitled to, was a different plot, identified as Plot No. 70. It was also pleaded that the plaintiff had filed a previous suit in the Magistrate's Court, being Nakuru CMCC No. 130 of 1985, which abated, (after the death of the late Njenga) and the plaintiff could not now purport to file a fresh suit.

4. I struck out this suit on 16 March 2015, because I was of the view that the same was res judicata, given that the plaintiff had earlier filed the suit Nakuru CMCC No. 130 of 1985 over the same subject matter. Upon striking out the suit, the defendants filed a bill of costs for taxation and the bill was taxed on 27 March 2018, at KShs. 169,698/= in absence of counsel for the plaintiff.

5. I have already mentioned that in this application, the defendants want substitution of the deceased plaintiff so that they can execute for their costs. It is averred in the supporting affidavit that the plaintiff died on 7 October 2015 after this suit was struck out. It is further averred that the respondent, David Kiprono Cheruiyot, was issued with a grant of letters of administration vide Nakuru High Court, Succession Cause No. 272 of 2015 and is now the personal representative of the late plaintiff. It is also pointed out that the defendants have already taxed their costs and the only thing pending is execution of the same.

6. The respondent has opposed the motion and has contested the taxation of the bill of costs, arguing that it was done when the plaintiff had died and no substitution had been effected.

7. I have considered the application, alongside the submissions of Mr. Karanja Mbugua for the applicants. There was no appearance on the

part of counsel for the respondent at the hearing of the motion.

8. There is no contest that the plaintiff died on 7 October 2015 and the bill of costs was taxed on 27 March 2018. The bill was taxed ex parte, and counsel on record for the plaintiff, did not attend to address court that the plaintiff was deceased. It is probable that the Deputy Registrar proceeded to tax the bill without the benefit of the knowledge that the plaintiff was deceased. However, it is clear to me that the bill of costs ought not to have been taxed, as further proceedings in the matter needed to have been stayed, pending substitution of the deceased plaintiff. Thus, in as much as I have no problem with this application, in so far as substitution of the deceased plaintiff is concerned, I am unable to allow the taxation of the bill of costs to stand, as the bill was taxed when the plaintiff was dead and no substitution had been done.

9. Although Mr. Karanja Mbugua, argued that the issue of taxation of the bill of costs is not what is before court, and the same ought to await a reference, I am unable to close my eyes to the apparent irregularity that has taken place in the taxation of the bill of costs, and I am unable to let that go without amends being made. This court has inherent jurisdiction to correct any apparent anomaly on the face of the record, even without being formally moved, and in any event, demanding a formal motion, would be stretching technicalities too far. There can be no question that the bill of costs ought not to have been taxed without first there being a substitution of the deceased plaintiff.

10. Given the above, I thus make the following orders :-

(i) That I allow the substitution of the deceased plaintiff with one David Kiprono Cheruiyot and henceforth the deceased plaintiff will be represented by the said David Kiprono Cheruiyot without the necessity of formally amending the plaint.

(ii) That I set aside the taxation of the bill of costs for the reason that the bill was taxed when the plaintiff was dead and before substitution had been effected.

(iii) That the defendants are at liberty to fix a date for the fresh taxation of their bill of costs inter partes.

(iv) The defendants shall have the costs of this application for the reason that the respondent never moved the court to apply for substitution despite having obtained a grant way back in December 2015.

11. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 18th day of September 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

No appearance on the part of M/s Karanja Mbugua & Co. for the defendants /applicants.

No appearance on the part of M/s Gekong'a & Co Advocates for the plaintiff/respondent

Court Assistant :Nelima.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU