



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 3253 OF 1995

KARERI MURICHU.....PLAINTIFF

VERSUS

WILSON MUNIU.....1ST DEFENDANT

WAMANDE KIMERIA.....2ND DEFENDANT

RULING

1. On 19/1/2018, the plaintiff, Kareri Muricho, brought a notice of motion dated 18/1/2018 seeking an order substituting Hannah Wanjiru as 1st defendant in place of Wilson Muniu. The applicant contended that subsequent to the initiation of this suit, Wilson Muniu died. He further contended that Hannah Wanjiru is the person currently residing on the suit property and no order can be directed against her without making her a party to this suit. His case is that the object of this suit is to evict the trespassers out of the suit property. The application is supported by an affidavit sworn by the plaintiff on 11/1/2018.

2. On 31/5/2018, the court directed the applicant to file a supplementary affidavit to exhibit copy of the death certificate relating to the 1st defendant. The court record does not, however, bear any supplementary affidavit by the applicant. Secondly, at the hearing of the application, Mr Kinyanjui, counsel for the 2nd defendant, intimated that he had filed grounds of opposition in response to the application. Similarly, the court record does not, bear the said grounds of opposition.

3. At the hearing, Ms Muigai, counsel for the applicant argued that the applicant seeks to join Hannah Wanjiru not as a personal representative but as the person who is now in occupation of the suit property. She contended that she is the one now trespassing on the suit property. She added that it is not necessary to start a fresh suit.

4. In response, Mr Kinyanjui argued that the application is speculative because there is no evidence of death of the 1st defendant. He added that in any event, the claim against the 1st defendant abated upon expiry of 12 months from the date of his demise. He contended that the application is a frivolous after- thought brought to salvage the abated claim. Secondly, he argued that if Hannah Wanjiru is a trespasser, the cause of action occurred at the time of filing suit and the same is statute barred.

5. I have considered the application together with the parties' rival submissions. For avoidance of doubt, the applicant seeks the following verbatim orders:

- a) That the plaintiff be granted leave to substitute the name of the 1st defendant in this suit being WILSON MUNIU with the name HANNAH WANJIRU***
- b) That the person HANNAH WANJIRU be a party in this matter***
- c) That the court do allow HANNAH WANJIRU to participate in the hearing of this suit scheduled for 13th February 2018.***
- d) That the costs of this application be in the cause.***

6. The tenor and import of the above orders is that the applicant seeks an order of substitution in respect of the first defendant who it is contended is now deceased. Regrettably, no evidence of death has been exhibited. Consequently, it is not clear if the claim against the 1st defendant still subsists. By operation of the law, the claim would stand abated upon expiry of 12 months from the date of death of the deceased.

7. A similarly intriguing omission is the failure to annex a copy of the draft amended plaint which would disclose the date when the alleged acts of trespass by Hannah Wanjiru were committed.

8. The present suit was filed in 1995. It is now 23years old. In my view, if acts of trespass have been committed by Hannah Wanjiru subsequent to the filing of the suit, those acts constitute a separate and distinct cause of action which should be pursued outside the legal framework on substitution.

9. For the above reasons, I decline to grant the orders sought in the notice of motion dated 18/1/2018. This being a 1995 case, I direct that this matter be mentioned before the Deputy Registrar on Monday 29/10/2018 to fix a hearing date before one of the judges who will be serving at Milimani during the service week.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Odieki holding brief for Ms Muigai Advocate for the plaintiff

June Nafula - Court Clerk