



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 187 OF 2016

ESTA KUTO.....APPLICANT

VERSUS

M. ORIENTAL BANK.....1ST DEFENDANT/RESPONDENT

JEREMIAH KOSGEI.....2ND DEFENDANT/RESPONDENT

KIPKOSGEI KUTO.....3RD DEFENDANT/RESPONDENT

AND

DANIEL GUTO.....1ST PLAINTIFF/APPLICANT

JAMES GUTO.....2ND PLAINTIFF/APPLICANT

RULING

This is an application by Daniel Guto and James Guto being the legal representatives of the Estate of Esta Guto (deceased) to be substituted in the place of the plaintiff. The applicants pray for extension of time in respect of the abated suit and the same to be reinstated. The application is based on grounds that the plaintiff passed on the 28.3.2017, applicants took out letters of administration on the 15.5.2018 and requested Kipkosgei Kuto to engage the respondents with a view of resolving the matter without interfering with the deceased’s estate. They were informed that negotiations were going on well and that the dispute would be resolved. There is need to preserve the Estate of the deceased.

In the supporting affidavit, Daniel Guto reiterates the grounds of the application.

In their brief submissions, the applicants submit that spousal interest in matrimonial property is an ascertainable interest. Section 28(a) and Section 93 of the Land Registration Act of 2012 are relevant to the case.

The 1st defendant/respondent argues that the suit abated on 27.3.2018 and that there is no suit. The 1st defendant argues that spousal rights are very personal and no representative can claim or inherit the spousal rights of deceased. They are not transferable and cannot continue after death.

I have considered the application, rival written submissions and do find that the same revolves on the issue as to whether spousal rights survive after the death of the spouse. To begin with, it is worth noting that Section 28 of the Land Registration Act was amended by deleting sub-section (a) by Act No. 28 of 2016. The implication of the above is that spousal interests are no longer recognized as overriding interests.

Matrimonial property is recognized in the Matrimonial Property Act, 2013. In that Act, Matrimonial home means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property.

Matrimonial property Act provides as per Section 6(1) (a), (b), (c). as follows: -

Meaning of matrimonial property -

(1) For the purposes of this Act, matrimonial property means—

(a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

(4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

7. Section 7 of the Act provides for ownership of matrimonial property as follows:- Subject to section 6(3) provides for ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. Section 10 of the Act provides that:

10. Spousal liability

(1) Any liability incurred by a spouse before the marriage and relating to the property shall, after marriage, remain the liability of the spouse who incurred it.

(2) Despite subsection (1), any liability that was reasonably and justifiably incurred shall, if the property becomes matrimonial property be equally shared by the spouses, unless they otherwise agree.

(3) Parties to a marriage shall share equally any—

(a) liability incurred during the subsistence of the marriage for the benefit of the marriage; or

(b) reasonable and justifiable expense incurred for the benefit of the marriage.

From the two above sections, Matrimonial Property vests in the spouses according to their contribution and no spouse will be held liable for the liability incurred by the other spouse unless it was reasonably and justifiably incurred. Part II of the Law Reforms Act, Cap. 26, Laws of Kenya provides for survival of causes of actions. Section 2 provides for the effect of death on certain causes of actions. Thus: -

(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

In view of the provision of the Law Reforms Act, the cause of action herein survives as it is not envisaged by the proviso to section 2(1) of the Law Reforms Act. However, at the death of the spouse if the property in dispute was matrimonial property, the same devolves to the remaining spouse who is the defendant in this case and already a party. The applicants being sons to the deceased and the surviving spouse cannot rank higher than their father who is the 3rd defendant in this matter. The upshot of the above is that the application is dismissed with no orders as to costs. Orders accordingly

Dated and delivered at Eldoret this 23rd day of November, 2018.

A. OMBWAYO

JUDGE