



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 31 OF 2015

CONSOLIDATED WITH NYERI ELC NO. 115 OF 2015

IN THE MATTER OF L.R. NO. TETU/UNJIRU/1468

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 L.O.K

THE REGISTERED TRUSTEES, AFRICAN

INDEPENDENT CHURCH OF AFRICA.....PLAINTIFF

-VERSUS-

MONICAH WANGUI GATHUMA.....DEFENDANT

DUNCAN NDERITU GATHUMA.....APPLICANT

RULING

1. This ruling is in respect of the notice of motion dated **14th May, 2018** brought by Duncan Nderitu Gathuma, (hereinafter referred to as the applicant), seeking to be substituted in place of Monicah Wangui Gathuma (deceased) as the defendant in this suit.
2. The application is premised on the grounds that the defendant died on 4th March, 2018; that following the death of the defendant, the applicant obtained letters of administration *ad litem* in respect of the estate of the defendant. Arguing that no prejudice will be occasioned on the respondents if the order sought is granted, the applicant has deposed that it is mete and just that the order sought be granted.
3. The application is supported by the affidavit of the applicant (supporting) in which the grounds in support of the application are reiterated and the following documents annexed in support of the averments contained in the application: -certificate of death in respect of the deceased, marked **D-1**; grant of letters of administration *ad litem* issued to the applicant in respect of the estate of the deceased, marked **D-2**.
4. The application is opposed on the ground that the applicant is incapable of being substituted in place of the deceased as the subject matter of the suits herein is the estate of John Gathuma Waititu in respect of which he is not an administrator.
5. When the application came up for hearing, counsel for the applicant urged the court to allow the application as it was brought in time; the suit survived the deceased and that the applicant has obtained letters of administration *ad litem* in respect of the estate of the deceased.

6. With regard to the respondent's contention that the applicant cannot be substituted in place of the defendant for the aforementioned reasons, counsel for the applicant stated that in ELC NO.115 of 2015, the deceased was sued in her own personal capacity and not in her capacity as the administrator of the estate of her husband, also deceased.

7. Maintaining that the deceased was sued in her capacity as a person in possession of the suit property and not as the administrator of the estate of her deceased husband, counsel for the applicant submitted that the cause of action survived the deceased.

8. Based on the case of **Trouistik Union International & another vs. Mbeyu & Another (1993) KLR 230** where it was *inter alia* held that an administrator is not entitled to bring an action as an administrator before he has taken letters of administration and that if he does, the action is incompetent at the date of its inception (holding paraphrased), counsel for respondent maintained that the deceased was sued and sued as a legal representative of the estate of her husband and, for that reason, submitted that the applicant who is not a legal representative of his father's estate cannot be substituted in place of his mother for purposes of defending the suit she instituted as an administrator of the estate of her husband.

9. Concerning the submission by the applicant's counsel that the defendant was sued or sued as a person in possession of the suit property, counsel for the respondent submitted that if that was the case, the defendant's cause of action died with her, that's to say did not survive her.

10. In a rejoinder, counsel for the applicant reiterated that the cause of action survived the defendant. In support of that assertion, counsel for the respondent relied on the cases of **Asher vs. Whitlock (1865) L.R 1 Q.B 1** and **Betha Kanini Baini v. Agnes Ithiru Njoka (2011) eKLR**.

11. Arguing that the deceased's right in the suit property are premised on possession and not on title, counsel for the applicant submitted that the applicant has a right to defend the claim for adverse possession.

12. In the case of **Betha Kanini Baini v. Agnes Ithiru Njoka supra, Kasango J.**, stated: -

“Possession of land if lawful entitles the possessor to exercise right to possess, use and enjoy that land. It can indeed be said that the rights of a possessor of land are akin to the rights of a registered owner. ...a possessor can enforce those rights against one seeking to either eject them from the land or to interfere with their occupation of it.”

13. In that case the Honourable Judge was persuaded by the decision in the case of **Asher v. Whitlock**

supra where it was stated: -

“...But I take it as clearly established, that possession is good against all the world except the person who can show a good title and it would be mischievous to change this established doctrine...”

Analysis and determination

14. This being an application for leave to substitute a deceased litigant, the law applicable is found in **Order 24 Rule 4** of the Civil Procedure Rules, which provides as follows: -

“24(4)(1) Where...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 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 a legal representative of the deceased defendant.”

15. Concerning who a legal representative, for purposes of that part of law, **Order 24 Rule 5** provides as follows: -

“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 a question shall be determined by the court.”

16. As pointed out above, a question has been raised as to whether the applicant not being the legal representative of the estate of his father's estate in respect of which the deceased defendant had brought this suit has capacity to be replaced as the defendant in this suit. My view of that issue is that, the legal representative contemplated in **Order 24 Rule 4** is different from the legal representative contemplated in **Section 3** as read with **Section 82** of the Law of Succession Act as the legal representative appointed under **Order 24** of the Civil Procedure Rules (CPR) is appointed solely for purposes of proceeding with the case the deceased defendant had instituted. It matters not whether the suit was in respect of another deceased person. What is important, for purposes of **Order 24** of the CPR is that the suit survived the defendant the applicant seeks to replace. As the defendant will not be filing a new suit but merely continuing a suit commenced by a person who had capacity to bring it, the suit contemplated in the **Trouistik Union International & another vs. Mbeyu & Another** case *supra* will not arise as the suit to be continued was proper and competent from its inception. That competency did not die with the death of the deceased defendant to insist that the person who pursues the suit must exactly assume the same character as her when she filed the suit.

17. In the circumstances of this case the applicant, having obtained grant of letters of administration *ad litem* allowing him to proceed with the suit instituted by the deceased defendant is, in my view, a fit and proper candidate to be made the legal representative of the deceased for the sole purpose of proceeding with this suit and the other suits this suit was consolidated with.

18. Being of the view that a claim for adverse possession is in the nature of a claim that could survive the defendant, based on my finding that the applicant is a fit and proper candidate for replacing the defendant in this suit for the aforementioned purpose, I find and hold that the applicant has made up a case for being granted prayer number (1) in the notice of motion dated 14th May, 2018, which I hereby grant him as prayed.

19. The costs of the application shall abide the outcome of the suit.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 17th day of December, 2018.

L N WAITHAKA

JUDGE

Coram

Mr. Ng'ang'a h/b for Mr. Wahome Gikonyo for the applicant

Mr. King'ori for the respondent

Court assistant - Esther