



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC. CASE NO. 1357 OF 1984

CECILIA NYATHIRA1ST PLAINTIFF

SAMSON NJOROGE KAMAU.....2ND PLAINTIFF

STANLEY KIMANI KAMAU.....3RD PLAINTIFF

DICKSON WANDAKA.....4TH PLAINTIFF

VERSUS

JOHN KAREKO WARUI.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 17th June 2013 in which the Proposed Defendants/Applicants seek for the following orders:

1. Spent
2. That James Gaita Kareko and Jane Wairimu Maingi be substituted as the Defendants in this suit in place of the late John Kareko Warui and time be extended so that this Application is declared as filed in time.
3. That this suit be revived.
4. That the order declaring the counterclaim to have abated and striking it out made on 6th April 2011 be set aside, the counterclaim be reinstated and any act or acts done pursuant to the said order be vacated and set aside.
5. That a temporary injunction do issue against the Plaintiffs/Respondents and or their servants, agents or anybody claiming any right under them from selling or in any other way alienating or wasting or building any structures or buildings on the suit premises namely Dagoretti/Thogoto/573 pending the hearing of this Application.
6. That this Honorable Court be pleased to grant such further orders as it may deem just for the interest of justice.

7. That the costs of this Application be provided for.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of James Gaita Kareko, one of the Proposed Defendants, sworn on 17th June 2013, in which he averred that he and his sister, Jane Wairimu Maingi are co-administrators of the estate of their late father John Kareko Warui who was the Defendant in this suit. He further stated that the Deceased died on 15th May 2009. He informed the court that he and his said sister did not petition for grant of letters of administration over the estate of their late father until the year 2012. He annexed a copy of the Letters of Administration dated 19th November 2012 obtained by them. He further stated that prior to their obtaining letters of administration, an application was made in this matter for a declaration that their deceased father's counterclaim had abated, which application was allowed on 8th February 2011. He averred further that the matter was not cause listed yet it appears that the matter was taken to the Judge who made the orders in the absence of counsel for his late father. He sought that in the circumstances this Application be allowed.

The Application is uncontested. Despite being duly served with this Application, the Plaintiffs did not file any response or objection to the same.

The first issues to consider and determine are whether or not to order that James Gaita Kareko and Jane Wairimu Maingi be substituted as the Defendants in this suit in place of the late John Kareko Warui and whether or not to revive this suit by setting aside the orders issued by this court on 6th April 2011 striking out the counterclaim and issue an order reinstating the counterclaim. The instructive law applicable is to be found in **Order 24 Rule 7(2)** of the **Civil Procedure Rules, 2010** which provides as follows:

“...the person claiming to be the legal representative of a deceased plaintiff ... may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise it thinks fit.”

The Proposed Defendants/Applicants have explained to this court that the reason why they were not able to continue this suit on behalf of their late father was because they were in the process of obtaining grant of letters of administration over the estate of their late father, the Defendant in this suit. However, while they were caught up in that process, their late father's counterclaim was deemed to have abated and it was struck out by an order of this court issued on 6th April 2011. It is my finding that the reason advanced by the Proposed Defendants/Applicants as to why they were prevented to continue the suit is satisfactory. They have produced a copy of their Letters of Administration which was issued on 19th November 2012 by which they were appointed as the administrators of the estate of their late father. I am satisfied with this do proceed to set aside the order of 6th April 2011 declaring the counterclaim herein as having abated. I reinstate the counterclaim and also allow the substitution of the Applicants as Defendants in this suit in the place of their late father.

I will not issue any temporary injunction as prayed for by the Applicants for the reason that there is no demonstrated risk the Applicants stand to suffer in relation to the suit premises at the present moment that did not exist during the long time it has taken them to obtain the letters of administration. I however direct them to set down their counterclaim for hearing at the earliest opportunity.

The costs of this Application shall be in the cause. It is so ordered.

DELIVERED, SIGNED AND DATED AT NAIROBI THIS 7TH DAY OF APRIL 2017.

MARY M. GITUMBI

JUDGE