



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 59 OF 2017

ERNEST NGUGI WAITHAKA.....PLAINTIFF

VERSUS

PETER MUTUNGA GACHIGI.....DEFENDANT

AND

ANTHONY GACHIGI MUTUNGA.....1ST APPLICANT

JAMES MWANGI MUTUNGA.....2ND APPLICANT

RULING

(An application seeking substitution of a deceased defendant; plaintiff subsequently filed notice of withdrawal of the suit; applicant concedes that the defendant was already deceased by the time the suit was filed; the applicant objects to the withdrawal of the suit; held that the suit was null and void ab initio for being filed against a nonexistent defendant; the application for substitution dismissed)

1. The suit herein was filed on 4th November 2015 against the defendant who is described in the plaint as a male adult of sound mind residing and working for gain in Mombasa.
2. Subsequently on 14th February 2017, Notice of Motion dated 14th February 2017 was filed by two applicants namely Anthony Gachigi Mutunga and James Mwangi Mutunga. The payers sought in the application are:
 1. Spent.
 2. THAT the court be pleased to grant leave to substitute Peter MutungaGachigi (deceased), the defendant, herein with **Antony GachigiMutunga** and **James MwangiMutunga** being the legal representatives and Administrators of the estate of Peter MutungaGachigi, as defendants herein.
 3. THAT following the grant of leave to substitute the defendant/applicant; the said legal

representatives and administrators be at liberty to file a defence within a period to be fixed by this Honourable court.

4. THAT further and pending the hearing and determination of this application inter partes, the Honourable court be pleased to issue a temporary injunction restraining the plaintiff/respondent, whether by himself, his servants, agents employees, officials or any other person whomsoever from trespassing, cultivating, offering for sale, disposing, selling, transferring, alienating, constructing, and/or changing the status quo by a transfer, leasing, charging, mortgaging, bequeathing, gifting and/or in trust or any other means dealing with the suit property Title Number Naivasha/Mwicingiri Block 4/2690.

5. THAT pending the hearing and determination of the main suit, the Honourable Court be pleased to issue a temporary injunction restraining the plaintiff/respondent, whether by himself, his servants, agents employees, officials or any other person whomsoever from trespassing, cultivating, offering for sale, disposing, selling, transferring, alienating, constructing, and/or changing the status quo by a transfer, leasing, charging, mortgaging, bequeathing, gifting and/or in trust or any other means dealing with the suit property Title Number Naivasha/Mwicingiri Block 4/2690.

6. THAT the cost of this application be in the cause.

3. The application is supported by the affidavit of Anthony Gachigi Mutunga sworn on 14th February 2017. He deposes as follows at paragraph 2 of the affidavit:

“THAT we, James Mwangi Mutunga and I, are the sons of Peter Mutunga Gachigi who has been sued as the defendant in this matter. We are jointly the legal representatives and/or administrators of the estate of the said Peter Mutunga Gachigi (deceased) as per the certificate of confirmation of Grant a true copy whereof is annexed hereto and marked “AGM1”

4. This ruling is in respect of Notice of Motion dated 14th February 2017. When the application came up for hearing on 6th April 2017, Counsel for the plaintiff informed the court that the plaintiff had filed a notice of withdrawal of the suit on 24th March 2017 and that advocates for applicant were served with the notice on 3rd April 2017. Counsel submitted that there is no longer any suit before the court. Counsel submitted that the reason for the withdrawal was the realization that the defendant was deceased. The withdrawal of the suit is stated to be under order 25 rule 1 of the Civil Procedure Rules, 2010.

5. Counsel for the applicants objected to the withdrawal of the suit. Though conceding that the defendant was already dead when the suit was filed, counsel submitted that withdrawal should be rejected and the suit instead rectified by allowing the applicants to be substituted in place of the place.

6. I have considered the submissions by the applicants' and the plaintiff's counsels. Whereas none of the parties have told the court the exact date when the defendant passed away, there is no dispute that the defendant was already deceased by the time the suit was filed.

Order 1 rule 3 of the Civil Procedure Rules, 2010 prescribes who can be joined to the suit as a defendant. It states:

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

The word "person" can only refer to either a natural living person or a legal person. It follows therefore that a deceased person is not a person for purposes of Order 1 rule 3. When a suit is filed against a non-existent person, it is void *ab initio*. There is no suit. The notice of withdrawal was thus not even necessary. Even if it had not been filed there would still be no suit. Since there is no suit, there is nothing

that the applicants can join in place of the deceased. A substitution of a party can only be done where a suit exists. In the end, the Notice of Motion dated 14th February 2017 is dismissed. No order on costs.

Dated, signed and delivered in open court at Nakuru this 31st day of May 2017.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff

No appearance for the defendants

No appearance for the applicants

Court Assistant: Gichaba