

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 156 OF 2015

MOURICE MAINA L. MUHANGA

MARCELLA LIPOSHE IKANZU.....PLAINTIFFS/APPLICANTS

VERSUS

MUFOYONGO M. MUHANGA (DCD)

REGINA MUFOYONGO (Legal.....DEFENDANTS/RESPONDENTS

Representative of MUFOYONGO N. MUHANGA)

RULING

This application is dated 13th June 2016 and is brought under order 24 rule 4 and 7 (2) and under order 50 rule 6 of the Civil Procedure Rules and Section 1 (A) and 1 (B) of the Civil Procedure Act and seeks the following orders;

1. The period within which to substitute the deceased defendant above named be extended and the suit herein be revived.
2. This honourable court be pleased to order the substitution of the deceased defendant for the said REGINA ALICE MUFOYONGO above as the legal representative of the defendant and make her a party to this suit.
3. This costs of this application be in the cause.

The application is based on the affidavit of Marcella Liposhe, the second plaintiff and the following grounds; the defendant above named is deceased. The cause of action herein survives and/or continues as against the estate of the said defendant. The respondent is the legal representative of the said defendant by virtue of a grant issued to her vide KAKAMEGA HC SUCCESSION CAUSE NO. 836 OF 2006. Vide Citation Cause No. 454 of 2005 filed herein. The second plaintiff cited the respondent as the widow/wife of the defendant to take out letters of administration to enable the plaintiffs herein substitute the sole defendant herein upon learning of the death of the said defendant. That it was not until 4th of June, 2013 that the said respondent disclosed through her lawyers that she had been issued with a grant in respect of the estate of the deceased defendant vide KAKAMEGA HC SUCCESSION CAUSE NO. 836 OF 2006 way back on 19th March, 2007.

The applicant submitted that, the defendant against whom he jointly instituted the suit herein died before the suit was heard. That upon learning of his death they cited the respondent to takeout letters of administration to enable them substitute the defendant vide Citation Cause No. 454 of 2005 filed in court a copy is annexed and marked 'MLI-1'. That all along the second respondent knew that she had obtained letters of administration but concealed this vital information from plaintiff/applicants. It was not until 4th of June, 2013 that she disclosed through her lawyers that she had been issued with a grant way back on 19th March, 2007 vide KAKAMEGA HIGH COURT SUCCESSION CAUSE NO. 836 OF 2006. The respondent herein did not give the plaintiff/applicants a copy of the said grant prompting them to trace it from the archives when they were furnished with a certified copy form the registry. A copy of the said grant is annexed and marked 'MLH-2'.

The respondent submitted that, she is a widow to the late MUFOYONGO N. MUHANGA who died on 2nd November 2004. In opposition to the instant application she relied and adopted the affidavits filed by AGGREY SHITSAMA sworn on 9th June 2005 and that the late SIMON ANTHONY KHAMASI sworn on 10th May 2007 respectively. It is within her knowledge that the late SIMON ANTONY KHAMASI during his lifetime had sworn the said Affidavit on 10th May 2007 and he passed on sometimes in April, 2014 and he has not been substituted to date. There is no suit to be revived since the subject matter which is the original title number ISUKHA/SHITOTO/636 which was initially registered in the names of her late husband was subdivided and created new title Nos. ISUKHA/SHITOTO/1569, 1570, 1571 and 1572 way back in 2000 way before the suit herein was filed. That the late SIMON ANTOINY KHAMASI got registered on one of the titles known as ISUKHA/SHITOTO/1570 and ISUKHA/SHITOTO/1571 registered in the names of PATRICK L. SHIPWONI on 10/2/2000 who have not been made parties to the suit herein. It will be unfair and unjust for this matter to proceed without the estate of the late SIMON ANTHONY KHAMASI and PATRICK L. SHIPWONI since they will be condemned unheard against the principles of natural justice.

This court has carefully considered both the applicant's and the respondent's submissions, affidavits and annexures herein. It is not disputed that the respondent is the legal representative of the said defendant by virtue of a grant issued to her vide KAKAMEGA HC SUCCESSION CAUSE NO. 836 OF 2006. The second plaintiff cited the respondent as the widow/wife of the defendant to take out letters of administration to enable the plaintiff' herein substitute the sole defendant herein upon learning of the death of the said defendant way back in 2005. The plaintiff/applicant's submitted that it was not until 4th of June, 2013 that they discovered that the said respondent had been issued with a grant in respect of the estate of the deceased defendant vide KAKAMEGA HC SUCCESSION CAUSE NO. 836 OF 2006 way back on 19th March, 2007. The applicants filed this application in 2014 and we are now in 2017. The delay in bringing the instant application is inordinate and no proper reasons have been tendered hence an abuse of the due process of the court. I find this application has no merit and I dismiss it with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH DAY OF JULY 2017.

N.A. MATHEKA

JUDGE