



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO.558 OF 2012

VERONICAH JEBICHII KORIR.....PLAINTIFF

VERSUS

JUDETHEUS KIPLAGAT MALAKWEN.....1ST DEFENDANT

JOSEPH MALAKWEN LELEI.....2ND DEFENDANT

RULING

INTRODUCTION

This ruling is in respect of an application brought by way of Notice of Motion dated 6th June, 2017 by the defendant/applicant who sought an order:

1. That the suit has abated

This application was certified urgent and a dated given for inter parte hearing on 19th July 2017 when the application was argued.

Defendant/Applicant's Counsel's Submission

Applicant's Counsel submitted that the application is self-explanatory as the plaintiff died on 5/3/16 and that an application for substitution ought to have been made by 5/3/17 but the same has not been done to date. He urged the court to declare that the suit had abated.

Counsel also took issue with the replying affidavit filed in court by the respondent and stated that the deponent was not truthful in his averments. He specifically referred the court to an affidavit by the same respondent sworn on 11/4/13 whereby he had stated that he was a grandson but in the current affidavit he has stated that he is the son of the deceased. It was further submitted that a statement filed in court on 18/7/12 by Lutwima Chesambu who stated that she is the only child of the deceased plaintiff.

Mr. Momanyi Counsel for the applicant submitted that there has neither been an application for substitution nor for extension of time filed in court. He further submitted that a claim for adverse possession is personal in nature and does not survive a deceased person. He therefore urged the court to allow the application as the suit had abated.

Plaintiff/Respondent's Submissions

Miss Tum Counsel for the plaintiff/applicant opposed the application and relied on the replying affidavit of Mathew Kimutai Ngetich which confirmed that the deceased died on 5/3/16 and a petition for grant of letters of administration filed on 30/5/17. Counsel submitted that the petition was filed before the current application and that the plaintiff has always been desirous of prosecuting this suit.

It was also submitted that the delay has not been inordinate and that the issue as to whether the applicant in the succession cause is a son or a grandson can be dealt with in the P&A cause. Counsel urged the court to dismiss the application with costs.

Analysis and Determination

I have looked at the oral submissions by both counsels and I am of the view that the main and single issue to be resolved by this court is whether or not this suit abated one year after the plaintiff had died? That calls for a clear interpretation of Order 24 rule 3 which states as follows: -

3. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under sub rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

It is not in dispute that the plaintiff herein died on 5th March 2016 and it further not in doubt that a proposed legal representative petitioned the court for letters of administration on 30th May 2017 which is two months after the expiry of one year. I notice from the court record that neither an application for substitution nor for extension of time has been filed to date. Rule 3 gives the court discretion to extend time but the same has not been sought for. The court cannot assume what parties want or intend to do with their pleadings. Parties are bound by their pleadings.

Does a claim of adverse possession survive upon death of a party or it is extinguished? Mr. Momanyi Counsel for the applicant submitted that a claim for adverse possession is personal in nature and does not survive a deceased person.

Section 2 (1) of the Law Reform Act stipulates that on the death of any person, 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. The proviso to the sub-section indicates the causes of action that do not survive namely defamation or seduction or inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery. Accordingly, the submission by Counsel of the Applicant that a claim in adverse possession does not survive the deceased is not supported by the provisions of Section 2 (1) of the Law Reform Act.

In my view, there was even no need of filing this application for a declaration that the suit had abated as the same is by operation of the law as was stated by Onyancha J. in the case of **Titus Kiragu v Jackson Mugo Mathai & another [2013] eKLR**.

Most parties file the application for purposes of clarity, finality of matters and an order to be noted in the court record. No application was made for substitution of the deceased plaintiff within the stipulated time. At the time of filing this application the respondent had also not filed any application for extension of time for substitution. It seems the respondent is not interested in pursuing this case.

Looking at the record of this case, the same has delayed at the instance of the plaintiff for one reason or another. This is an old matter which was filed in 2009 and so far, nothing much has happened. The

response by counsel for the respondent as to why a substitution has not been made is not convincing. Counsel just stated that the delay is not inordinate and did not address the court on why an application for substitution or extension of time has not been made.

I have considered the submissions of both counsels, the applicable law together with the relevant authorities. I am also alive to the provisions of Article 159 (2) of the Constitution which obliges courts to administer justice without undue regard to procedural technicalities. This provision applies to all parties to the suit. When administering justice, you must take the circumstances of the case into consideration and where required use the discretion judiciously.

Having said that I find that the current suit has abated and no sufficient reason has been advanced why no substitution proceedings were undertaken. I therefore find that the application dated 6th June 2017 has merit and is hereby allowed with costs.

The suit is marked as abated.

It is so ordered.

Dated and delivered at Eldoret on this 21st day of September, 2017.

M.A ODENY

JUDGE

Read in Open court in the presence of:

Miss Tum for Plaintiff/Respondent

Mr. Momanyi for Defendant/Applicant

CC: Koech