



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT MURANG'A
ELC NO.275 OF 2017

PRISCA NJOKI CHOMBA

ANASATACIA CHOMBA

EMMA WANGUI CHOMBA - PLAINTIFFS/RESPONDENTS

VS

CHARLES MWANGI CHOMBA - DEFENDANT/ APPLICANT

RULING

1. By a Notice of Motion dated 7th April 2017 the Defendant/Applicant brought an application before this Court for orders that;

a) That this honourable Court be pleased to declare this suit abated.

b) That costs be provided for.

2. The application is premised on the grounds as thus;

a) That one of the plaintiff's Prisca Njoki Chomba passed on sometimes in 2014.

b) That no application has been made to substitute her in the proceedings.

c) That more than one year has lapsed since her death.

d) Unless the orders are issued the defendant will continue to be unable to deal with his land as he wishes.

3. The application is supported by the affidavit of Charles Mwangi Chomba the defendant herein. He alludes to a letter from the chief marked as CMC 1 as evidence of death of the Plaintiff as annexure CMC1 but the said letter is not on record.

4. The application came up for hearing on 5/10/2017. Counsel for the plaintiffs submitted that he does not intend to substitute the 1st Plaintiff as the claim by the plaintiffs is by way of originating summons for adverse possession and trust in land and as such the claim was joint in nature therefore the cause of action survives the death of either of the plaintiffs. He confirmed that he will

not substitute the 1st Plaintiff. Instead he urged the Court to make a note in the record by dint of Order 24 rule 2 to that effect and allow the claim to proceed by the surviving two plaintiffs. Counsel for the defendant on the other hand submitted that the suit abated in respect to the 1st plaintiff. However, the gist of the application is for orders to declare that the suit is abated.

5. **Order 24 Rule 1, 2, & 3(1) – (2)** of the Civil Procedure Rules provides as follows: -

“(1) The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

(2) Where one of two or more plaintiffs or defendants than one, and one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs or against the surviving defendant or defendants.

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 subrule (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:

Provided the Court may, for good reason on application, extend the time.”

6. The suit abates by operation of law. For that reason, no order is required to declare the suit abated. All one needs to do to determine whether or not the suit has abated is evidence of death of the plaintiff and evidence to the effect that the deceased plaintiff was not substituted within the time stipulated in law. In this regard see the case of the case of Titus Kiragu vs. Jackcksom Mugo Mathai (2015) e KLR where it was held:-

“...It is not the act of the Court declaring the suit as having abated that abates the suit but by operation of law.”

7. In the case of Kaboi Mucheru v. Gakuu Mucheru Mbugi (2015) eKLR where it was held: -

“As indicated earlier, this suit abated and the Court did declare so. It is indeed clear from the provisions of Order 24 Rule 3(2) of the Civil Procedure Rules that in the case of a deceased plaintiff as is the position in this case, abatement is by operation of the law unless substitution of the plaintiff is made within one year of the plaintiff’s death. There is therefore really no requirement that a Court should make a declaration to that effect.

8. The effect of a suit that has abated is that it ceases to exist. Black’s Law Dictionary defines abatement as-

“..... the suspension or defeat of a pending action for a reason un-related to the merits of the claim”

Once a suit has abated, nothing is left because the suit is dead and it cannot be the basis upon which any order can continue to exist.”.

9. In Said SweilemGheithanSaandum vs. Commissioner of Lands (being sued through Attorney

General) & 5 others [2015] eKLR the Court of Appeal explained the provisions of Order 24 of the Civil Procedure Rules, 2010 as follows:

“There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the Court may in its discretion for “good reason” determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The “good reason” therefore relates to application for extension of time to join the plaintiff’s legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the Court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the Court he was prevented by “sufficient cause” from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.”

10. In the present case the suit pending for determination before this Court is the originating Summons dated 26th April 2011 filed by the Plaintiff/Applicants jointly claiming a share of parcel land no. LOC.6 MUTHITHI/373 which is purported to have been registered in the names of the Respondent in trust for the Applicants herein. One of the plaintiffs who is the mother of the two other Applicants is alleged to be now deceased, no evidence has been tabled before this Court to that effect. That contention was not however opposed by Counsel for the plaintiffs at the hearing of the application. The evidence of the death of the plaintiff is crucial as it informs the Court the time lapse when substitution ought to have been done. Though in this case the plaintiffs counsel seems to be alluding to non-substitution. In the absence of evidence of death, abatement does not apply. Moreover, the nature of the claim is that which survives the death of the deceased plaintiff and continues to the surviving plaintiffs. Counsel for the plaintiffs submitted that since the claim was joint the Court should allow the 2nd and 3rd plaintiffs to continue with the suit. I agree with the Counsel for the Plaintiffs and subject to cogent evidence of death, the Court only needs to cause an entry to that effect on the record and the suit shall proceed at the instance of the surviving plaintiffs. That is the correct position.

11. In conclusion, in the absence of evidence that the 1st Plaintiff is deceased and also having determined that the cause of action in this instant case (if indeed the 1st Plaintiff is deceased) survived the two remaining plaintiffs, the suit therefore has not abated. It can only abate as against the alleged deceased Plaintiff. I hold that this application is mischievous, lacking in merit and is hereby dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 18TH DAY OF OCTOBER 2017.

J.G. KEMEI

JUDGE