



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC APPEAL NO. 63 OF 2015

MARGARET NJOKI MBUGUA.....APPELLANT

=VS=

JOSEPH MBAGE GACHOMBA.....1ST RESPONDENT

BERNARD NJOROGE.....2ND RESPONDENT

MARY MUMBI.....3RD RESPONDENT

[Being an Appeal against a Ruling by Hon.(MRS)C.C OLUOCH ,

Principal Magistrate, Kiambu made on 22nd January 2014].

JUDGEMENT

1. The Respondents are administrators of the estate of the late Maliusa Gachomba Mbage alias Malioth Gachomba (deceased) who died on 2nd December 1992. The deceased had filed a suit against the appellant and the Land Registrar Kiambu in Kiambu Principal Magistrate's Court Civil Case number 16 of 1992. After the demise of the deceased, the deceased's family engaged the law firm of M/s Kariuki Muigua & Co. Advocates who applied for substitution of the deceased's eldest son Joseph Mbage Gachomba vide application dated 30th March 1998. This application was allowed by consent notwithstanding the fact the family of the deceased had not obtained letters of administration in respect of his estate. Letters of administration were later on given on 15th March 2002.

2. The Deceased's family engaged the firm of M/s Kitheka & Co. Advocates after the firm of M/s Kariuki Muigua & Co. Advocates ceased to act for the family of the Deceased. The firm of M/s Kitheka & Co. Advocates then applied for substitution of the deceased with his administrators vide application dated 30th June 2003. The application was allowed and the administrators of the estate of the Deceased were allowed to come in. The plaint was accordingly amended to reflect the changes.

3. The Respondents changed their lawyers and this time engaged the law firm of M/s Mwhiki Njuguna & Co. Advocates who filed a notice of motion dated 1st December 2011 seeking to revive the suit on the grounds that the two previous applications which had been made and allowed had been made unprocedurally as revival of the suit which had abated would have been the first application before one for substitution. This application was however dismissed for non-attendance on 1st February 2012. An application to set aside the dismissal order was made on 15th February 2012 but before the same would be

heard, the Appellant filed an application dated 31st March 2012 in which she sought orders that the suit had abated or in the alternative the suit be dismissed for want of prosecution.

4. The appellant's application of 31st March 2012 was heard and the same was dismissed in a ruling delivered on 22nd January 2014. It is this ruling which triggered the present Appeal in which the Appellant raised the following grounds :-

- 1) That the learned Magistrate erred in law and fact in failing to make a finding that this civil suit No. 16 of 1992 had abated.**
- 2) That the learned magistrate erred in law and fact in making a finding that substitution of parties which was done on 16th March 1998 was a remedy for a suit that had abated.**
- 3) That the Learned magistrate erred in law and fact in dismissing the applicant's application when the same was not objected to in submissions and further when the respondents themselves were aware that the suit had abated and had filed an application to revive the suit.**
- 4) That the learned magistrate erred in law and in fact in not making a finding that the respondents had in their replying affidavit dated 19th April 2012 admitted that the substitution was irregularly made and therefore served no purpose thereby admitting that the suit had abated.**
- 5) That the learned Magistrate erred in law and fact in not making a finding on the notice of abatement filed by the Honourable Attorney General who was the 2nd defendant on 7th June 2000 by which time no application for substitution had been made.**
- 6) That the learned Magistrate erred in law and fact in not making a finding that there was no application to revive the suit since the one dated 1st October 2011 seeking to revive the suit had been dismissed.**

5. This is a first appeal to this court. I am obliged to re-evaluate the entire evidence placed before the trial Magistrate and reach my own conclusion. In this regard, I have gone through the record and I will deal with grounds 2, 5 and 6 together. These three grounds are misconceived. The trial magistrate is being accused of making a finding that substitution of parties which was done on 16th March 1998 was a remedy for a suit that had abated. Firstly there was no substitution of parties made on 16th March 1998. Secondly, the trial magistrate did not make any finding regarding the application dated 16th March 1998. She only addressed herself to the application dated 30th March 2003 which allowed the Respondents to come into the suit.

6. The trial magistrate is again being accused of not making any finding regarding a notice of abatement filed by the attorney general on 7th June 2000. The issue of Attorney General's Notice of abatement of the suit was not a subject of the application before the Trial Magistrate. The trial magistrate had no business making any finding on what was not before her.

7. The trial magistrate is being accused in ground 6 for not making a finding that there was no application to revive the suit as the one dated 1st October 2011 had been dismissed. There was no issue before the trial magistrate on whether there was or there was not an application to revive the suit. The trial magistrate had been asked to declare that the suit had abated or in the alternative dismiss the suit for want of prosecution. I therefore find no merit in grounds 2,5, and 6 which must fail.

8. I will now deal with ground 1,3 and 4 in which the appellant contends that the trial magistrate failed to make a finding that the suit had abated despite the Respondents admitting that the same had abated and an application had been made for its revival though the same had been subsequently dismissed. There is no contention that M/s Mwiwaki Njuguna & Co. Advocates who had come on record for the Respondents had advised the respondents that the two previous applications had been made unprocedurally. The

advocates went ahead to make an application for revival of the suit. The trial magistrate rightly observed in her ruling that the respondent's counsel were wrong in making such an application. The trial magistrate was alive to the fact that an application to substitute the deceased had been made on 30th June 2003 and had been allowed and plaint amended accordingly. There was no appeal or review sought against that ruling or order. Article 159 of the Constitution had been pointed out to the trial Magistrate. Even if procedurally, it was expected that an application for revival of a suit be made after which substitution could be allowed, there was nothing wrong in allowing substitution even though there was no specific prayer for revival of the suit in the application. The essence of allowing the respondents to come in place of the deceased was to continue with the suit. It will be absurd to expect that the respondents could be allowed into a suit for the sake of it. To insist that revival should have been asked specifically is to give undue regard to technicalities of procedure which should not be encouraged because the court's concern is to dispense substantive justice as opposed to technical justice.

9. The appellant in ground 3 contends that the trial magistrate was wrong in dismissing the appellant's application when the same had not been objected to in the Respondents written submission. I have gone through the submissions filed on behalf of the Respondents. There were no admissions made. The appellant's application was opposed and the counsel for the Respondents emphasised on the need for courts to invoke the provisions of Article 159 of the Constitution. The application for revival of the suit which was unnecessary had in any case been dismissed as at the time the ruling was delivered. The

trial magistrate pointed out that that step was wrong because the court had not declared the suit as having abated. This is the only observation in the ruling which I fault. Abatement of suits is an automatic process which is provided in law. A court does not need to declare a suit as having abated before an application for revival can be made. Application for revival is provided for in the rules of civil procedure. The application for revival of the suit by the Respondents new lawyers was made because no application for revival of the suit had been made. I have said hereinabove that the application was unnecessary in view of the fact that the Respondents had already been substituted. I therefore find that the Appellants appeal lacks merit. The same is hereby dismissed with costs to the Respondents.

Dated, Signed and delivered at **Nairobi** on this 27th day of **November 2017**.

E.O.OBAGA

JUDGE

In the presence of:-

M/s Olubala for M/s Maina for Respondent

Court Assistant: Hilda

E.O.OBAGA

JUDGE