



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.45 OF 2013

KAMAU KANIA.....PLAINTIFF

VERSUS

PATRICK RERIMOI.....1ST DEFENDANT

MARY NDUTA KAGWIMA.....2ND DEFENDANT

AND

JACOB GITHINJI KAMAU.....APPLICANT

RULING

(Application to revive an abated suit; principles to be applied; application allowed)

1. The application before me is that dated 6 October 2017 filed on behalf of the estate of the deceased plaintiff. It is an application brought pursuant to the provisions of Order 24 Rules 4 and 7 of the Civil Procedure Rules and principally seeks orders to revive and reinstate the present suit which has abated, and upon revival of the suit, one Jacob Githinji Kamau, be substituted for the deceased plaintiff. The application is opposed, and before I go to the gist of it, a little background will be helpful.

2. The original plaint was filed on 10 January 1997 by Kamau Kania (now deceased) against one defendant, namely, Patrick Rerimoi Kipkemei. In the suit, the plaintiff averred that he is the owner of the land parcel Dundori/Mugwathi Block 2/139 having purchased it from one Daniel Kiptanui, the original allottee. He pleaded that he is thus entitled to the suit land which was then registered in the name of Mr. Kipkemei. The plaint was later amended to include Mary Nduta Kagwima, as the 2nd defendant, as it was claimed that the 2nd defendant is interfering with the said property and a permanent injunction was sought against her. No defence was filed by Mr. Kipkemei, the 1st defendant, but the 2nd defendant did file a Statement of Defence vide which she contended to be the lawful owner of the suit property. A request for judgment was applied for in respect of the 1st defendant, which was entered, and the matter proceeded for formal proof as against the 1st defendant only. The formal proof hearing was conducted by Koome J (as she then was) and she found that the plaintiff has proved his case as against the 1st defendant, and inter alia declared that the plaintiff is the lawful owner of the suit property. She however did not issue an order of eviction since this was directed against the 2nd defendant.

3. The plaintiff moved to execute the order and became registered as proprietor of the suit land. He however did proceed to apply for an order of eviction against the 2nd defendant which was granted by the Deputy Registrar. The 2nd defendant then moved the Court under a Certificate of Urgency to stop the eviction. It emerged in the course of hearing that application that the 1st defendant had actually died sometimes in the year 2004. After considering the application, Koome J, set aside the judgment of 8 December 2006 and all consequential orders.

4. On 29 May 2009, the 2nd defendant filed an application to amend her defence, to include a counterclaim, to have the title of the plaintiff, obtained pursuant to the judgment that was set aside, nullified. She also sought to seek for damages for trespass and for compensation for the loss she suffered in the process of execution of the eviction order. That application was allowed and the 2nd defendant's defence duly amended. After several mentions, the case was set for hearing on 27 September 2017. On that day, Ms. Kinuthia, learned counsel for the plaintiff, submitted that the plaintiff died on 5 June 2015. Given that position, I declared that the suit has abated and awarded costs to the 2nd defendant.

5. It is after that order that this application was filed on 12 October 2017.

6. In the application, the applicant has averred inter alia that he is the personal representative of the estate of the deceased plaintiff. He has

averred further that the cause of action succeeds the demise of the plaintiff. He has contended that there was inaction in the matter by the plaintiff's erstwhile advocates who did not move the case. Mr. Karanja for the applicant, in supporting the application, submitted inter alia that when the order of abatement was made on 27 September 2017, the applicant had already obtained grant of letters of administration, ad litem, for purposes of continuing this suit. The said grant was issued on 4 September 2017. He beseeched the court to revive the suit so that the applicant may proceed to prosecute it.

7. The 2nd defendant, who is acting in person, opposed the application. She inter alia submitted that an application for substitution is supposed to be made within one year of death and none was made within that period in this case. She also pointed me to the order of Koome J, where she set aside the judgment, and submitted that the plaintiff has been less than candid in the manner in which he earlier prosecuted the suit, and in the manner in which orders of eviction, against her, were obtained. She asserted that she got title to the suit land after following all procedures.

8. I have considered the application. This is a case of death of a sole plaintiff and therefore the provisions of Order 24 Rule 3 apply. The said provision is drawn as follows :-

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff

[Order 24, rule 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.

9. It will be seen from the above, that an application to substitute a deceased plaintiff ought to be made within one year of death, and if such application is not made, the suit will abate. Order 24 Rule 8, however has provision for relief, where an applicant may apply to revive an abated suit. The said provision is drawn as follows :-

7. Effect of abatement or dismissal [Order 24, rule 7.]

(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.

10. A person may thus apply to revive an abated suit, upon satisfying the court that he was prevented from sufficient cause from continuing the suit. The grant of an order to revive an abated suit is therefore not automatic. The court must be satisfied that there is good reason why no application to continue the suit was made within one year.

11. In this application, the applicant has deposed inter alia that after the demise of the plaintiff, who is his late father, he made numerous visits to his erstwhile advocates on record, M/s Ngigi Mbugua & Company Advocates, to follow up on the status of the suit and that the family appointed him to represent the deceased. However, no action was taken by his advocate on record. It is for that reason that the applicant sought the assistance of his current advocates on record, M/s Mirugi Kariuki & Company, to represent him.

12. I am not too sure of the reasons given, for no affidavit was filed by the law firm of M/s Ngigi Mbugua & Company Advocates, to confirm what the applicant has alleged against the said firm, but I am prepared, in the interests of justice, and so that all parties are heard, to allow the application and revive the abated suit. I have taken note of the sentiments of the respondent, but I observe that she also has a counterclaim and she cannot be heard on the counterclaim unless the plaintiff is represented. In essence, her case against the plaintiff will also be marked as abated, if I do not revive the suit. It is therefore in the best interest of all parties that I allow the application to revive the suit and allow the applicant to come into the suit, on behalf of the estate of the deceased plaintiff.

13. Given the above reasons, I allow the application and order the substitution of the deceased plaintiff by the applicant herein. The applicant is at liberty to effect amendments to the plaint, if deemed necessary, within 14 days from today, but if not, the suit to be deemed as continued by the applicant herein.

14. On costs, the same shall be to the 2nd defendant, as in my view, the applicant had more than ample time to file the application for revival of suit and substitution.

15. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 22nd day of November 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

2nd defendant/respondent acting in person

No appearance on the part of M/s Mirugi Kariuki & Co. Advocates for the applicant

Court Assistant: Carlton Toroitich