



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO.37 OF 2011

KAMAU TICHU & 16 OTHERS.....PETITIONERS

VERSUS

IKERE GITAU.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL....2ND RESPONDENT

THE COMMISSIONER OF LAND....3RD RESPONDENT

RULING

(Application to extend time for substitution of a deceased litigant; one year having lapsed since the litigant died; suit thus abated after one year; time for abatement cannot be extended as it is by operation of law thus no basis for extension of time to get a legal representative; abated suit can however be revived upon application; application dismissed; interim orders granted against the deceased litigant vacated)

1. The application before me is that dated 12 October 2017 filed by the petitioners. It seeks the following principal order :-

That the time provided for the substitution of the 1st respondent (now deceased) with his legal representative be extended by a period of six (6) months hereof.

2. This case was commenced on 15 December 2011 by way of a constitutional petition under Articles 20, 21, 40, 45, 47, 48, and 73 of the Constitution. The petition has its root in the judgment of Ojwang' J (as he then was), in the suit Nairobi HCCC No. 395 of 1997, which judgment was delivered on 14 July 2010. That suit was between Ikere Gitau as plaintiff and Kamau Tichu (one of the petitioners herein) as defendant. The question in that case revolved around the ownership of the land parcel Nyandarua/South Kinangop/431 which was claimed by both plaintiff and defendant. In the judgment, Ojwang' J, held that the said property belongs to the plaintiff (1st respondent in this petition) and directed an order of eviction, payment of general damages in the sum of Kshs. 500,000/= for trespass, and mesne profits. The learned Judge also held, that what the defendant was entitled to, was proprietorship over the land parcel Nyandarua/South Kingangop/430 for which he had a title deed and not the land parcel Nyandarua/South Kinangop/431.

3. In this petition, the petitioners seek the following orders :-

(a) An injunction restraining the respondents, their agents, servants and/or employee from in any way interfering with the petitioners' quiet possession of the premises known as LR Nyandarua/South Kingangop/430 and 431 as currently occupied by the petitioner and their extended families.

(b) A declaration that the respondents are violating the petitioners' right to property as guaranteed by Article 40 of the Constitution.

(c) A declaration that the 2nd respondent has failed to protect the rights of the petitioners as guaranteed by Article 20 and 21 of the Constitution.

(d) A declaration that the 2nd and 3rd respondent have violated the petitioners' freedom under Article 47 as guaranteed by the Constitution.

(e) An order directing the 2nd and 3rd respondents to recall the unconstitutional title deeds and replace the same with others reflecting and observing the petitioners' constitutional rights as hereinbefore brought out.

(f) A declaration that the judgment delivered in Nairobi HCC No. 395 of 1997 violates the petitioners' fundamental rights as herein mentioned.

(g) An order removing the said judgment into this court and quashing the same for being unconstitutional.

4. Together with the petition, was filed an application for conservatory orders. The court (Ouko J, as he then was) at first instance allowed prayer 2 of the application, which was framed as follows:-

That upon hearing this application ex parte, this Honourable Court be pleased to grant a conservatory order restraining the respondents, their servants, agents and/or employees from in any way interfering with the petitioners/applicants quiet possession of the premises known as LR Nyandarua/South Kinangop/430 and 431 as currently occupied by the applicants and their extended families pending the inter partes hearing of this application.

5. The interim orders have been extended from time to time. On 19 October 2015, I directed that the petition itself be heard and I directed parties to file written submissions. The matter was to be heard on 7 November 2016, when Mr. Njugi, learned counsel for the applicants, informed the court that the 1st respondent died on 15 October 2016. The matter was therefore held in abeyance to await substitution. So far, no substitution has been undertaken, and it will be noted that in this application, the petitioners seek an extension of 6 months to do so.

6. There is consensus that the 1st respondent died on 15 October 2016. The general position of the law is that a suit will abate if no substitution is made within 1 year of death of the litigant. This is set out in Order 24 of the Civil Procedure Rules, although the Constitution of Kenya, Enforcement of Fundamental and Freedoms, Rules, 2013, is silent on this. Nevertheless, general rules of law, observed in civil proceedings can be imported, so as to effectuate the rules and the position of ongoing litigation. For our case, the position of the deceased 1st respondent, can be equated to the position of a deceased defendant in ordinary civil proceedings, which position is captured in Order 24 Rule 4 of the Civil Procedure Rules. The said provision of law is drawn as follows :-

4. Procedure in case of death of one of several defendants or of sole defendant

[Order 24, rule 4.]

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

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

7. It will be noted from a reading of Order 24 Rule 4(3) that the issue of abatement is an occurrence that takes place by operation of law. A suit shall abate within one year if no application for substitution is made. The court does not have discretion to extend the time for which a suit will abate, or postpone the date of abatement of a suit. This is because abatement is something that takes place automatically, by operation of law, once a year has passed after the death of a litigant. What the court may probably only do is affirm, for the avoidance of doubt, that the suit has actually abated. It follows therefore that this suit has now abated, in respect of the 1st respondent, given that one year has lapsed from the time that the 1st respondent died.

8. This application seeks an extension of time to substitute the deceased 1st respondent with his legal representative. On my part, I have not seen a provision of law that allows for this. The closest is Order 24 Rule 8, which provides 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.*

9. Looking at the above provision, it will be discerned that a litigant can apply to revive an abated suit after giving sufficient cause. The above provisions do not however give the court power to postpone the date of abatement of a suit, nor extend the time for when a suit may be declared to have abated. What the above provision allows is for one to apply to revive an abated suit. The application before me is not one for revival of an abated suit, but seeks an extension of time to apply for substitution. I think what is envisaged in the law is for a party to first have a legal representative, then after that, apply for revival of an abated suit, and satisfy the court that he had sufficient reason for not having applied for substitution within the given one year of death. The law does not envisage an extension of time to get a legal representative and I believe that this is on the basis that the case has already abated.

10. Given the above reasons, I am of the view that the application before me is not merited and it is hereby dismissed.

11. The effect is that this suit is abated as against the 1st respondent and I do mark the suit as so abated against the 1st respondent. It means

therefore that the petitioners cannot continue enjoying the interim orders and I have little option but to vacate the interim orders on record. The same are hereby vacated.

12. If the petitioners so wish, they can proceed as against the 2nd and 3rd respondents, but the 1st respondent cannot in any way be affected, by any orders since the suit against him is now abated.

13. On costs, I make no orders, since none of the respondents appeared in court or filed anything to oppose it.

14. 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 :

Ms. Wanuma holding brief for Mr. Njugi for the petitioners.

No appearance for the respondents

Court Assistant – Carlton Toroitich