



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 79 OF 2013

SAMMY MBURU KAMANDE.....PLAINTIFF

VERSUS

PETER GAITUNGU GATURA.....DEFENDANT

RULING

The plaintiff brought this suit against the defendant on 16th January, 2013 seeking; a declaration that the defendant acquired Title No. Karai/Renguti/422(hereinafter referred to as “the suit property”) fraudulently by hiving it from Title No. Karai/Renguti/418 belonging to the plaintiff; an order directing the Registrar of Lands to cancel the title for the suit property and, a declaration that the suit property belongs to the plaintiff as the original owner. The defendant entered appearance and filed a statement of defence on 29th September,2014 denying the plaintiff’s claim. On 10th March, 2015, the plaintiff’s advocate informed the court that the plaintiff had died and that he wished to file an application for substitution of the plaintiff with his legal representative. The court stood over the matter to 23rd April, 2015 and the plaintiff’s advocate was advised to make a formal application for substitution of the plaintiff with his legal representative.

When the matter came up on 23rd April, 2015, the plaintiff’s advocate did not turn up. On that day, the court made an order that pending the hearing and determination of this suit or until further orders by the court, the status quo regarding the suit property shall be maintained. No further action was taken in the matter by either party for almost a year. On 22nd June, 2016, the defendant brought an application dated 8th June, 2016 seeking an orders that, this suit be dismissed, the orders of status quo made on 23rd April, 2015 be discharged and the defendant be restored to the suit property with immediate effect.

This is the application the subject of this ruling. The application was brought on the grounds that, the defendant is the registered owner of the suit property and that no steps had been taken with a view to proceeding with the suit since the year 2015 when the court was informed that the plaintiff had died. The defendant has contended that the plaintiff’s advocates have not taken steps to file an application for substitution of the deceased plaintiff with his legal representative. The defendant has contended that for the court to continue to entertain this suit would be a waste of the court’s time. It is on account of the foregoing that the defendant urged the court to dismiss the suit and to discharge the orders of status quo in force.

The defendant’s application was served upon the advocates on record for the plaintiff. When the application came up for hearing on 8th February, 2017, the plaintiff’s advocate asked for more time to respond to the application. The court allowed the plaintiff’s application for adjournment and stood over

the application to 12th June, 2017 for hearing. The plaintiff's advocate was granted 14 days within which to respond to the application. When the matter came up on 12th June, 2017, four (4) months later, the plaintiff's advocates had not responded to the application. The plaintiff's advocate asked yet again for an adjournment that was refused by the court.

The parties thereafter argued the application orally. In his submission, Mr. Ndwiga who appeared for the defendant relied entirely on the grounds set out on the face of the application and on the affidavit of the defendant which was filed in support of the application. Mr. Ndwiga cited the case of Catherine Atieno Okongo vs. John Mwangi Karanja & Another [2015] eKLR and urged the court to allow the application.

In his response, Mr. Ojijo who appeared for the legal representative of the deceased plaintiff and who had not filed any response to the application submitted that the defendant's application was based on procedural technicalities which the court should overlook pursuant to the provisions of Article 159(2)(d) of the Constitution. Counsel submitted that the plaintiff's suit was brought as a result of the illegalities that were committed by the defendant in the acquisition of the suit property. Mr. Ojijo submitted that the Land Disputes Tribunal had already nullified the defendant's title over the suit property. By way of a rejoinder, Mr. Ndwiga submitted that the defendant's application was brought under Order 24 of the Civil Procedure Rules which provides that, where a plaintiff dies and is not substituted within a period of one year, the suit abates. Mr. Ndwiga submitted further that the Land Disputes Tribunal had no jurisdiction to cancel a title to land.

I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the submissions that were made before me by the defendant's advocate and the advocate for the legal representative of the deceased plaintiff. It is not disputed that the plaintiff died on or about 10th March, 2015 when his death was communicated to the court.

Order 24 rules 1, 3(1) and (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.

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."

It is not disputed that no application was made within one (1) year to substitute the deceased plaintiff with his legal representative with the result that, the plaintiff's suit as against the defendant abated. The provisions of the Civil Procedure Rules which I have reproduced above allows a defendant to apply to court for the costs of abated suit. In the application before me, the defendant has not sought the costs of the suit but has sought for the dismissal of the suit and the discharge of the temporary orders of status quo that were made pending the hearing of the suit. The defendant has sought a further order that it be reinstated on the suit property. In the case of Catherine Atieno Okongo & another v John Mwangi Karanja & another [2015] eKLR that was relied on by the advocate for the defendant in support of his submissions, the court stated as follows:

"It is clear from the record that this application has been filed approximately ten (10) years after the Plaintiffs' deaths. As a matter of law therefore this suit abated since no application for

substitution was made within one year of the death of the Plaintiffs. A suit that has abated is no suit for all purposes; it is non-existent in law. See Eliakim Saka Odipo v Dismus Kweyu Malalaso [2009] eKLR and John Chege Mwangi & 3 Others v Obadiah Kiritu Methu [2012] eKLR.”

I am fully in agreement with this statement of the law. A suit that has abated does not exist in law. Such suit cannot and does not need to be dismissed. Apart from an order for the revival of the suit or an order for costs which the court is allowed to make in favour of a defendant, the court cannot make any other or further orders in such suit for or against the deceased plaintiff. Where a suit has abated, any temporary order that had been issued pending the hearing of the suit automatically ceases to exist or stands discharged on the date of abatement. It is not necessary for the court to make an order for the discharge of such orders.

The upshot of the foregoing is that the defendant's Notice of Motion dated 8th June, 2016 has no merit. The same is dismissed with costs to be in the cause.

Delivered and signed at Nairobi this 19th day of December 2017

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Plaintiff

Mr. Wilson h/b for Njenga for the Defendant

Catherine Court Assistant