

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL SUIT NO. 992 OF 2007

MUNGAI MBAE

GRACE WANGECI MUNGAI..... APPLICANTS

VERSUS

JAMES MWANGI NDUATIRESPONDENT

RULING

What I have before me is the Notice of Motion application dated 3rd August 2012 that was brought by the 2nd applicant on 7th August, 2012. In the application, the 2nd applicant has sought to be made a party to this suit in place of the 1st applicant who is deceased. The application is supported by the 2nd applicant's affidavit that was sworn on 3rd August 2012. In her affidavit, the 2nd applicant has stated that she is the widow of the 1st applicant (hereinafter referred to only as "**the deceased**") who died on 10th August 2011. She annexed to her affidavit as exhibit a copy of the deceased's death certificate dated 22nd March 2012. The 2nd applicant has stated that she had on 30th May 2012, applied for a limited grant of letters of administration to enable her represent the estate of the deceased which grant had not been issued to her by the court as at the time she filed the application under consideration.

The 2nd applicant has stated that she was apprehensive that suit herein would abate on 10th August, 2012 unless the present application was filed before that date and this is what prompted her to file the application. She has contended that this move was aimed at saving the suit herein from abating. It is not clear from the record whether the 2nd applicant's application was opposed by the respondent. I have not seen on record any grounds of opposition or replying affidavit.

On 11th July, 2014, the court gave directions that the application be heard by way of written submissions. The 2nd applicant did not file submissions as had been directed by the court. The respondent filed his submissions on 13th August 2014. In his submissions, the respondent argued that the 2nd applicant's application lacks merit and amounts to an abuse of the court process since the 2nd applicant is already a party to this suit. The respondent submitted further that when this suit was filed, the 2nd applicant was given a written authority dated 1st December 2009 by the deceased to prosecute this suit on his behalf and as such it is not necessary for the 2nd applicant to be substituted in this suit in place of the deceased while she is already a party to the suit.

The issue for determination in the application before me is whether the 2nd applicant should be made a party to this suit in place of the deceased, 1st applicant. The enabling provisions of the law for substitution of deceased parties are found in Order 24 of the Civil Procedure Rules. The application herein was brought under Order 24 Rule 3(1) of the Civil Procedure Rules which provides as follows:-

" 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 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."

This suit was brought by the applicants by way of Originating Summons dated 21st March, 2013. The

applicants have claimed that they had acquired all that parcel of land known as **Loc:7/Ichagaki/1049** (hereinafter referred to only as “**the suit property**”) by way of adverse possession and sought to be registered as the owners thereof. In the circumstances of this case, I am of the view that the 2nd applicant’s application to be made a party to this suit in place of the deceased is misconceived for two reasons. First, as I have mentioned above, this is a claim over land by adverse possession. In her affidavit in support of the Originating Summons sworn on 21st March, 2003, the 2nd applicant had deposed that the deceased and she had been in actual possession of the suit property since 1965. I am of the view that the cause of action in this suit survived or continued to the 2nd applicant. It is not clear therefore why the 2nd applicant wishes to be made a party to the suit as a legal representative of the deceased while she can proceed with the suit a lone.

Secondly, even if it is assumed that the cause of action herein did not survive or continue to the 2nd applicant a lone, under Order 24 Rule 3(1) of the Civil Procedure Rules which has been invoked by the 2nd applicant, only the legal representative of the deceased can be made a party to the suit in place of the deceased. The 2nd applicant who by her own admission has not been issued with a grant of letters of administration in respect of the estate of the deceased does not therefore qualify to be substituted herein in place of the deceased, 1st applicant.

The upshot of the foregoing is that, the 2nd applicant’s application dated 3rd August, 2012 has no merit. The same is accordingly dismissed with costs to the respondent.

Delivered, Dated and Signed at Nairobi this 29th Day of January, 2016

S. OKONG’O

JUDGE

In the presence of

N/A for the Applicants

Mr. Ilako h/b for Kinuthia for the Respondents