



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELC NO. 183 OF 2015**

**(Formerly Nyeri HCCC NO. 12 of 2013)**

**JOHN NYOKABI MACHARIA RUNG'ARE**

**RICHARD WACHIRA MACHARIA RUNG'ARE.....PLAINTIFFS**

**-VERSUS-**

- 1. AGNES MUTHONI**
- 2. ALICE NJERI**
- 3. BETH NYAMBURA**
- 4. CHRISTOPHER WANJOHI**
- 5. GRACE CHEGE**
- 6. JACKLINE NJOKI**
- 7. JOSEPH MWANGI**
- 8. JAMES KAHONO**
- 9. KAMUNDIA ISAACK**
- 10. MARY WAMBUI**
- 11. OLIVER MAKANGA KAGIA**
- 12. PAUL WAMUGUNDA**
- 13. ROSE MUTHONI**
- 14. SAMSON WACHIRA NJERU**
- 15. SHARON WANJUGU**
- 16. TABITHA WAITHIEGENI**

**RULING**

1. Vide the plaint dated **12th April 2013**, the plaintiffs seek eviction orders against the defendants and their families from the parcel of land known as **L.R No.Nyeri Municipality Block 9395/II** (hereinafter referred to as the suit property). The plaintiffs also seek damages for trespass, costs of the suit and interest.
2. It is the plaintiffs' case that the defendants have, without any colour of right, trespassed into the suit property. Explaining that they are the registered owners of the suit property, the plaintiffs term the impugned actions of the defendants a gross violation of their right to property.
3. Upon being served with suit papers, the defendants filed the statement of defence dated **22nd May, 2013** in which they, *inter alia*, explain that they are tenants of Romana Wanjiru Gachinu (hereinafter referred to as the deceased person); that they were put into possession of the suit property by the deceased person and that they have continuously been paying rent to the deceased person's legal representative.
4. In their statement of defence, the defendants have intimated their desire to have the claim against them struck out on the ground that it discloses no cause of action against them.
5. In accordance with their desire to have the claim against them struck out, on 6th March 2014, the defendants filed the notice of motion dated **3rd September, 2013** praying that the plaint filed herein be struck out with costs to them.
6. The application is premised on the grounds that the suit is scandalous, frivolous, vexatious and otherwise an abuse of the process of the court. Maintaining their contention that they are merely tenants of the deceased, the defendants contend that the suit should have been brought against the legal representative of the deceased person as opposed to them. The defendants also contend that the plaintiffs have failed to reveal to the court about Nyeri HCCC No.214 of 1985 between the plaintiffs and the deceased person herein over the suit property. The defendants contend that the said suit is still pending.
7. In reply and opposition to the application the plaintiffs filed the grounds of opposition dated **29th March, 2014** and the replying affidavit sworn on **29th April, 2014**. In those replies, the plaintiffs contend that the application is misconceived, incompetent, bad in law and a gross abuse of the court process; that Nyeri HCCC NO. 214 of 1985 is no longer in existence and that the parties in Nyeri HCCC No. 214 of 1985 are different from the parties in this suit.
8. In a rejoinder counsel for the defendants, Mr. Andrew Kariuki, filed the affidavit he swore on **13th May, 2015** (further affidavit) in which he deposes that Nyeri HCCC No. 214 of 1985 still exists; that the plaintiffs in this suit are the defendants in that suit and that the current suit offends the provision of **Section 6 and 8** of the Civil Procedure Act (cap 21) Laws of Kenya; that the plaintiffs have concealed material facts to the court (have failed to inform the court about the existence of the other suits between the plaintiffs and the deceased person over the suit property).
9. Based on orders issued in Nyeri HCCC No. 39 of 1988, Mr. Kariuki contends that the plaintiffs' were restrained from evicting the deceased pending the hearing and determination of Nyeri HCCC No. 214 of 1985.
10. Reiterating the defendants' contention that they are merely tenants of the deceased person herein, Mr. Kariuki, maintains that the defendants have wrongly been sued.
11. Through their further affidavit, sworn on 8th July, 2014, the plaintiffs' maintain that Nyeri HCCC

No.214 of 1985 no longer exists. On that issue, the plaintiffs have explained that by the time the deceased person was substituted with Mary Wambui Gachinu the suit had already abated.

### **Submissions**

12. On behalf of the defendants, reference is made to the hand written proceedings concerning HCCC No. 214 of 1985, which form part of the defendant's bundle of documents and submitted that there is evidence of existence of HCCC No. 214 of 1985. Concerning the contention by the plaintiffs' that Nyeri HCCC No.214 of 1985 abated following the passing on of the plaintiffs therein without being substituted, it is submitted that there is no order in the court record marking the suit as abated. In view of the foregoing, it is submitted that the plaintiffs' contention that there has been no previous proceedings in any court between them and the defendants over the suit property herein is untrue/misleading.

13. It is pointed out that there existed Nyeri HCCC No. 39 of 1988 in which orders were issued restraining the plaintiffs from interfering with the defendants' possession of the suit property until Nyeri HCCC No. 214 of 1985 is heard and determined. It is further submitted that the orders issued in Nyeri HCCC No.38 of 1988 have never been set aside.

14. On behalf of the plaintiffs reference is made to **Order 24 Rule 3 sub-rule (1) and (2)** and submitted that Nyeri HCCC No. 214 of 1985 abated by operation of law on or about 3rd August, 2009.

### **Are there other suits between the plaintiffs and the defendants?**

15. With regard to this question, it is common ground that there existed two suits between the plaintiffs and the deceased person herein. In one of those cases, HCCC No. 38 of 1988; **John Baptista Gachinu v. Richard Wachira Macharia & 2 others**; it was held:-

**“The plaintiff to remain in possession of the suit premises until determination of Civil Suit No. 214 of 1985.....Plaintiff's possession may not be interfered with until the determination of civil suit No. 214 of 1985.....The present suit shall stay pending outcome in No. 214 of 1985.”**  
See the document marked A.K 5 in the affidavit of Andrew Kariuki sworn on 13th May, 2014.

16. There is evidence that before HCCC No. 214 of 1985 could be heard and determined, the plaintiff in HCCC No. 38 of 1988 passed on.

17. The passing on of the plaintiff in that suit rendered both suits subject to the provisions of **Order 24 Rule (3) sub-rule (1) and (2)** which provides as follows:-

**“24(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.”**

18. By dint of the provisions of **Order 24 (3)(2)** where a sole surviving plaintiff passes on without being substituted within the time provided therein, the suit automatically abates as far as the deceased plaintiff is concerned.

19. With regard to the applicants' contention that there is no order in the court record declaring the suit

abated, it is noteworthy that the suit abates by operation of law. For that reason, no order is required to declare the suit abated. All one needs to do to determine whether or not the suit has abated is evidence of death of the plaintiff and evidence to the effect that the deceased plaintiff was not substituted within the time stipulated in law. In this regard see the case of the case of **Titus Kiragu vs. Jackcksom Mugo Mathai (2015) e KLR** where it was held:-

**“...It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law.”**

20. In the circumstances of this case, there is evidence that the plaintiff in 214 of 1985 (Romano Wanjiru Gachinu) passed on, on 4th August, 2008 and that she was not substituted within the time provided in law (evidence on record shows that plaintiff was substituted on 18th December, 2013 outside the time provided for in law for carrying out the substitution. There being no evidence that an application for revival of the suit was made and allowed, it is, therefore, safe, from the evidence on record, to conclude that by the time the current suit was filed, that is 25th April, 2013, HCCC 214 of 1985 had abated.

21. Once a suit abates, it ceases to exist unless revived. See the case of **Kaboi Mucheru v. Gakuu Mucheru Mbugi (2015) eKLR** where it was held:-

**“As indicated earlier, this suit abated and the Court did declare so. It is indeed clear from the provisions of Order 24 Rule 3(2) of the Civil Procedure Rules that in the case of a deceased plaintiff as is the position in this case, abatement is by operation of the law unless substitution of the plaintiff is made within one year of the plaintiff’s death. There is therefore really no requirement that a Court should make a declaration to that effect.**

**The effect of a suit that has abated is that it ceases to exist. Black’s Law Dictionary defines abatement as-**

**“..... the suspension or defeat of a pending action for a reason un-related to the merits of the claim”**

**Once a suit has abated, nothing is left because the suit is dead and it cannot be the basis upon which any order can continue to exist.”**

22. Whereas it is true that orders were issued in HCCC No. 38 of 1988 prohibiting the interference with the plaintiff’s possession of the suit property pending the hearing and determination of 214 of 1985, those orders ceased to exist when 214 of 1985 ceased to exist (That is, abated).

23. Whereas the defendants contend that they are beneficiaries of the orders issued in 38 of 1988, I note that those orders related to an individual and not a group of people. Besides, there is no evidence that the defendants or any of them is the administrator of the estate of the plaintiff, in HCCC No. 38 of 1988. In the absence of any evidence capable of proving that the defendants’ or any of them is the administrator or the legal representative of the deceased, as contemplated under **Section 3** of the Law of Succession Act, Cap 160, Laws of Kenya, I can do no better but to find that the defendants are intermeddling with the estate of a deceased person. In this regard see **Section 45** of the Law of succession Act, which makes it an offence for a person who is not an administrator of the estate of a deceased person to intermeddle with the property of a dead person.

24. Whereas the defendants claim to be paying rent to Mary Wambui Gachinu, there is nothing in the court record to show that the said Mary Wambui Gachinu is an administrator of the estate of the plaintiff in the suits between the plaintiffs herein and the plaintiffs in the abated suits. The grant issued to Mary Wambui in the abated suit was limited. The grant was for a specific purpose to wit, representing suit Nyeri HCCC No.214 of 1985.

**Bar from institution of other suit**

25. The law does not contemplate that following abatement of a suit a new suit will be brought in respect of the same subject matter. In this regard see **Order 24 Rule 7** as read with **Section 8** of the Civil Procedure Act.

**“Order 24 Rule 7(1)** provides as follows concerning a suit that has abated:-

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

That notwithstanding, sub-section 2 gives the plaintiff or the person claiming to be the legal representative of a deceased plaintiff an opportunity to revive a suit that has abated by applying for an order to revive the suit.

26. From the above analysis of the law and the facts of this case, the inevitable conclusion is that there are no pending suits between the plaintiffs herein and the defendants or the defendant’s predecessors in entitlement.

**Propriety of the current suit**

27. On the propriety or otherwise of the suit by the plaintiffs, I hold the view that as persons with an interest in the suit property (plaintiffs are registered owners of the suit property), the plaintiffs were justified in bringing the current suit against the persons in occupation of the suit property (the defendant) for determination of the legality or otherwise of the defendant’s possession of the suit property.

27. For the foregoing reasons, I find the notice of motion dated 3rd September, 2013 misconceived and lacking in merit. Consequently, I dismiss it with costs to the plaintiffs/respondents.

**Dated, signed and delivered at Nyeri this 23rd day of February, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Kihara h/b for Mr. Wahome gikonyo for the plaintiff

Mr. Ng'ang'a h/b for Mr. Kariuki for the defendant

Court assistant - Lydia