



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
CONSTITUTIONAL PETITION NO. 7 OF 2015
(FORMERLY ELD. ELC. PET. NO. 1 OF 2013)

NICOLAAS HENDRICK CLAASSEN:.....PETITIONER

VERSUS

THE COMMISSIONER OF LANDS & 4 OTHERS:.....RESPONDENTS

RULING

1. This is a ruling in respect of a notice of motion dated 23.10.2014 which seeks to substitute the Petitioner Nicolaas Hendrick Claasen (deceased) with the applicant Karl Wehner Claassen (applicant). The application is expressed to be brought under the provisions of section 1A 1B, 3 and 3A of the Civil Procedure Act and order 1 Rule 10 of the Civil Procedure Rules.
2. The deceased had filed a constitutional petition against the five respondents in which he contended that his constitutional rights under Article 21, 21(3) and 27 of the constitution had been violated and or breached. He also sought a declaration that the respondents' decision to forcefully evict him from some 13 parcels of land and distribution of the same was a violation of his constitutional rights contrary to Article 40 (1) of the constitution. As a result of breach of his constitutional rights, he sought compensation of Kshs.13,914,000,000/= for loss of 4638 acres of land or any other sum as may be determined by the court.
3. The deceased died on 26.5.2014 before his petition could be heard. The applicant who is the son of the deceased brought this application seeking to be substituted in place of the deceased and continue with the petition. The applicant avers that he is the sole beneficiary of the estate and that he is the administrator having been granted letters of administration on 7.10.2014.
4. The applicant's application was opposed by the 1st, 2nd, 3rd and 4th respondents based on grounds of opposition dated 3..8.2015 and filed in court on 4.8.2015. The respondents contend that the application is incurably defective frivolous and is otherwise an abuse of the process of the court. They contend that the application is brought under wrong provisions of the law.
5. The respondents further contend that the constitutional Petition seeks declaratory orders and interpretation of alleged violation of the deceased's constitutional rights which is a claim of a personal nature and cannot survive the deceased. The respondents argue that the deceased's rights have to be determined before the question of compensation can be addressed and therefore it is clear that the applicant cannot seek to take over what was personal to the deceased.
6. The respondents in the alternative argue that even if the civil procedure rules were to apply, the application offends the provisions of the Civil Procedure rules which relate to abatement of claims.

7. I have considered the applicant's application as well as the grounds of opposition by the 1st to 4th respondents. There are two main issues which emerge for determination. The first one is whether the provisions of the Civil Procedure Act and rules thereunder are applicable in constitutional petitions. The second issue is whether a constitutional petition filed by a sole petitioner survives upon the death of the Petitioner.
8. On the first issue, the respondents counsel argued that constitutional petitions are guided by Constitution of Kenya (Protection of Rights and Fundamental Freedoms) practice and Procedure Rules 2013 contained in Legal Notice No.117 of 28.6.2013 commonly referred to as Mutunga Rules. Mr. Odongo state counsel argued that the Mutunga Rules are the only ones guiding the filing of Constitutional Petitions and any applications thereunder and as such there is no need to invoke the provisions of the Civil Procedure Act or Rules. I agree with Mr. Odongo that the Mutunga Rules provide the manner in which constitutional petitions and applications are supposed to be filed. In the case of applications, an application is supposed to be made by way of Notice of Motion as set out in Form D in the Schedule. This is what Rule 19 of the Mutunga Rules states. The question which then arises is whether an application which is filed based on Provisions of the Civil Procedure Rules and Act can be defeated solely on the ground that it has been brought under rules other than the manner provided. I do not think that an application can be defeated just because it has cited wrong provisions of the law. The main concern of the court is to do substantive justice as opposed to technical justice. This is why even the Mutnga Rules provide that the courts should give an interpretation of rules in a manner which furthers the overriding objective of the court with regard to article 259(1) of the constitution. I therefore find that there is nothing wrong in the applicant citing provisions of the civil Procedure Rules and the Act.
9. The next issue for determination is whether a constitutional petition filed by a sole petitioner can survive his death. To answer this question a look at the prayers in the petition is necessary. Firstly the deceased petitioner had sought a declaration that his constitutional rights under Article 21, 21(3) and 27 of the constitution had been violated. Secondly he sought a declaration that the decision of the respondents to forcefully evict him from some thirteen parcels of land and distributing the same violated his rights under Article 40 (1) of the constitution.
10. Basically the deceased was seeking a declaration as to his rights which he alleged had been violated. These rights had not been ascertained and were personal to him. Black's Law Dictionary 8th Edition, defines the terms "declaration of rights" as an action in which a litigant requests a court's assistance not because any rights have been violated but because those rights are uncertain. The deceased's rights were yet to be determined as at the time of his demise. There is therefore nothing to be taken over by the applicant. The moment the deceased died before his rights could be ascertained, he died with those unascertained rights which were personal in nature. The unascertained rights of the deceased were not a chose in action which could be assigned to someone else.
11. Mr. Odongo submitted that the Mututnga Rules are silent when it comes to death of a sole Petitioner. I respectively agree with him. The Mutunga rules seem to address the issue of substitution in case where the proceedings are brought in the name of a wrong person. They do not say what happens in the case of death of a sole Petitioner. Mr. Odongo urged me to follow the decision from the constitutional court of Uganda in Petition No. 11 of 2002 between Philip Karugaba -vs- The Attorney General.
12. In Uganda there are rules guiding the filing and prosecution of constitutional petitions. These rules are the equivalent of mutunga rules only that in the Uganda case, Rule 15 of those rules provide that where a sole petitioner dies, the petition automatically abates. In the above petition, the petitioner had petitioned the constitutional court of Uganda seeking that Rule 15 of of the Rules of the constitutional court (petition for Declaration under Article 137 of the constitution) Directions 1996 is in consistent with Article 26(2) the constitution and therefore unconstitutional. In dismissing the petition, the judges held that rule 15 complained of was not unconstitutional. They held that a petition brought under Article 137 of the constitution was not a chose in action which could be assigned to someone else upon death of a sole Petitioner.
13. In the absence of what happens to a Petition by a person who dies before his petition is heard in Kenya, I am persuaded to go the Uganda way which holds that such petition abates. There is need for us in Kenya to expressly state what happens in such situations. The estate of the deceased Petitioner is not left without a remedy. They can file a claim for what may have survived the

deceased but of course subject to the law of limitation of actions Act. In as far as the petition by the deceased is concerned, there can be no substitution. I therefore dismiss the notice of motion dated 24.10.2014 with no order as to costs.

It is so ordered.

Dated, signed and delivered at Kitale on this 2nd day of February,2016.

E. OBAGA

JUDGE

In the presence of Mr. Wabwire for respondents and Mr. Kisa for Mr. Gicheru for applicant. Court Assistant - Isabellah.

E. OBAGA

JUDGE

2/2/2016