



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 322 OF 2013

WAMBUI MUNENE.....1ST PLAINTIFF

TERESIAH WAIRIMU2ND PLAINTIFF

VERSUS

MICHAEL NDICHU MWARUA (being sued as the legal

representative of the Estate of JOSEPH NDICHU MWAURA

(deceased).....1ST DEFENDANT

THE COMMISSIONER FOR LANDS.....2ND DEFENDANT

THE ATTORNEY GENERAL3RD DEFENDANT

RULING

(Application for substitution; deceased defendant having been sued in his capacity as legal representative of estate of first deceased person; applicant having taken out letters of administration for deceased defendant; whether he can be substituted for deceased defendant; applicant cannot be substituted for deceased defendant as he is not representative of the estate of the first deceased person; applicant needed representation not for deceased defendant but for first deceased person; application dismissed)

1. This suit was commenced by way of plaint filed on 24 April 2013. In the plaint, the 1st defendant is one Michael Ndichu Mwaura who was being sued as the legal representative of the Estate of Joseph Ndichu Mwaura. The 2nd defendant is the Commissioner of Lands and the 3rd defendant is the Attorney General. The plaintiff's claim in a nutshell is that around the year 1971, she was allocated the Plot No. 24 in Elburgon which plot is now known as Elburgon Township/532 (the suit land). She built a house and has been occupying the land since the year 1971. It is claimed that Joseph Ndichu Mwaura (deceased) fraudulently obtained title to the suit land. In the suit, the plaintiff wants the title of the said Joseph Ndichu Mwaura cancelled and she be declared the lawful owner of the suit property. The 1st defendant filed defence vide which he pleaded inter alia that the property was lawfully acquired.

2. On 9 June 2013, Michael Ndichu Mwaura, the 1st defendant, died.

3. Through an application dated 6 October 2014, brought under the provisions of Order 24 Rule 14, one Stephen Njoroge Mwaura, has applied to be substituted for the said Michael Ndichu Mwaura and for the suit to be revived. He has averred that the cause of action survives the demise of the deceased and that he holds letters of administration ad litem in respect of the deceased's estate.

4. The application has not been opposed by the plaintiff but that does not mean that I must automatically allow it. I need to be satisfied on the merits of the application.

5. It will be observed that the application is said to be brought under Order 24 Rule 14. There is no order 24 Rule 14. Probably the applicant meant Order 24 Rule 4 which provides as follows :-

Order 24 Rule 4 : Procedure in case of death of one of several defendants or of sole defendant.

(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.

6. In this suit, there are more than one defendants and it is apparent to me that the suit against the 1st defendant does not continue against the surviving defendants. It is therefore a suitable case for substitution. It will be further observed that Sub-Rule 3 above, requires that the application be made within one year or else the suit against the defendant shall abate. The application herein was filed outside the one year period when the suit against the 1st defendant had already abated. In his supporting affidavit, the applicant has explained that the failure to file the application herein within one year was occasioned by the delay in obtaining letters of administration. I have my doubts as to the explanation offered, as I can see that the letters of administration displayed were signed on 24 August 2014, and in my view no good explanation has been offered as to why the application was filed on 6 October, close to 2 months later. Be as it may, I have no serious problem with reviving the abated suit, subject to being satisfied that the applicant is the proper holder of letters of administration.

7. The applicant herein holds letters of administration ad litem, issued in Nakuru High Court Succession Cause No. 245 of 2014. The estate named therein is the estate of Michael Mwaura Ndichu. The cause under which the grant of letters ad litem were obtained therefore relate to the estate of Michael Mwaura Ndichu. However, it will be observed that Michael Mwaura Ndichu was not sued in his own capacity but as the legal representative of the estate of Joseph Ndichu Mwaura. The estate that is being sued is therefore that of Joseph Ndichu Mwaura and not Michael Mwaura Ndichu. The land in issue never vested on Michael Mwaura Ndichu and the same does not form part of his estate. It falls within the estate of Joseph Ndichu Mwaura.

8. The only person who can be sued must hold letters of administration for the estate of Joseph Ndichu Mwaura. But that is not what the applicant herein holds. He represents the estate of Michael Mwaura Ndichu and he does not pretend to hold any grant of letters of administration of any sort for the estate of Joseph Ndichu Mwaura. As I mentioned above, it is not the estate of Michael Mwaura Ndichu which is on trial. Before being made a party to this case, the applicant needs to hold letters of administration for the estate of Joseph Ndichu Mwaura. It is immaterial that he holds letters of administration for the estate of Michael Mwaura Ndichu for it is not Michael's estate which is on trial. The fact that he holds letters of administration on behalf of the estate of Michael Mwaura Ndichu does not automatically mean that he has permission to represent the estate of Joseph Ndichu Mwaura. The two estates are distinct.

9. The Succession Act, CAP 160, does provide for the procedure to substitute a deceased holder of letters of administration. It is that procedure which the applicant must follow. Once he is administrator, whether wholly or ad litem, of the estate of Joseph Ndichu Mwaura, he can then apply to be enjoined to this suit.

10. Owing to my reasoning above, I am unable to allow this application and it is dismissed with costs.

Dated, signed and delivered in open court at Nakuru this 17th day of March, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr Mbiyu present for plaintiff/respondent

Ms. Merciline Njoroge for 1st defendant and applicant

N/A on part of State Law Office for 2nd & 3rd defendants .

Court Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU