



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 173 OF 2014**

**JOHN MOSE MICHIRA.....PLAINTIFF/RESPONDENT**

**BARNABA KIPKOSGEI SURTAN...DECEASED/DEFENDANT**

**VERSUS**

**EDWIN KIPKEMBOI KOSGEI.....APPLICANT**

**R U L I N G**

1. The applicant **Edwin Kipkemboi Kosgei** is the holder of limited grant of letters of administration in respect of the estate of the late **Barnaba Kipkosgei Surtan** (deceased). The applicant filed a notice of motion dated **20/4/2016** in which he seeks the following prayers:-

- (a) That Barnaba Kipkosei Surtan (deceased) be substituted with Edwin Kipkemboi Kosgei.**
- (b) That the suit herein be dismissed with costs for want of prosecution.**
- (c) That the plaintiff/respondent his servants and or anyone acting through him be evicted from LR. No.Trans-Nzoia/Sinyererere/219**
- (d) Costs of the suit.**

2. The applicant contends that the respondent filed this claim against the deceased but that he has failed to prosecute the same. That the respondent had filed an originating summons against the deceased in the year 2010 which originating summons has not been prosecuted hence the filing of the present suit is an abuse of the process of the court. That the transaction herein did not receive the consent of the Land Control Board hence the same is null and void and that the respondent should be evicted from the suitland.

3. The application was opposed through grounds of opposition dated **16/5/2016** and filed in court on **17/5/2016**. The respondent contends that the prayer for dismissal of this case for want of prosecution is misconceived and has no basis in law. That this suit is not res judicata as there was no determination of the originating summons which the respondent had filed against the deceased.

4. I have gone through the applicant's application as well as the supporting affidavit and the pleadings. The issues which emerge for determination are firstly whether this suit is ripe for dismissal for want of prosecution and secondly whether the same is res judicata and lastly whether eviction orders can issue against the respondent at interlocutory stage.

5. On the issue as to whether this suit is ripe for dismissal for want of prosecution, a look at the pleadings

show that this suit was filed on **1/12/2014**. A defence and counter-claim was filed on **3/9/2015**. A reply to defence and defence to counter-claim was filed on **9/9/2015**. **Order 17 Rule 2(1) and (3)** provides the manner in which a suit can be dismissed for want of prosecution. One is only allowed to bring an application for dismissal of the suit if there is no step taken for a period of one year. In the instant case, a reply to defence and defence to counter-claim was filed on **9/9/2015**. The deceased who was the defendant died in **January, 2016**. Substitution of the deceased has not yet been made. It is therefore premature to ask for dismissal of this case for want of prosecution.

6. On the issue as to whether this suit is res judicata, it is clear from the plaintiff/respondent's claim that he had filed **Kitale High Court Civil Case No. 73 of 2010 (OS)** against the deceased. This case was withdrawn when it was realised that the suitland was in the name of the Settlement Fund Trustee and there could be no adverse possession against the Government. The originating summons was therefore not determined on merits. A suit can only be res judicata if a previous suit had been finally determined by a competent court. I therefore find that this suit is not res judicata.

7. On the last issue, the applicant seeks eviction orders against the respondent. This prayer has no basis. One cannot obtain orders of eviction before a suit is heard. The applicant is not seeking a mandatory order. Even if he had prayed for a mandatory order, the same would not have been granted as there are no special circumstances shown in the application to warrant the same to be granted.

8. The only prayer which succeeds is the prayer for substitution of the applicant in place of the deceased. This application therefore succeeds to that extent. Costs should abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered at Kitale on this **27th** day of **June, 2016**.

**E. OBAGA**

**JUDGE**

**COURT**

Ruling delivered at 14.53 pm in the absence of parties who were aware of today's ruling.

Court Assistant - Isabellah.

**E. OBAGA**

**JUDGE**

**27/6/2016**