



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 735 OF 2007

JOSEPH MUTUKU MWANTHI.....1ST PLAINTIFF

ESTHER MUKULU MUTUKU2ND PLAINTIFF

VERSUS

RAHAB M'KIAMA.....1ST DEFENDANT

METRA INVESTMENT LIMITED.....2ND DEFENDANT

DIANA RACHEL KAVEDZA.....3RD DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 28th August 2014 in which Esther Mukulu Mutuku seeks for orders allowing her to substitute the late Joseph Mutuku Mwanthi as the Plaintiff in this suit.

The Application is premised on the grounds appearing on the face of it together with her Supporting Affidavit sworn on 8th August 2014 in which she averred that she is the registered proprietor of the parcel of land known as L.R. No. 209/12397, the suit property herein, that this suit was initially filed and has this far been prosecuted by her husband Joseph Mutuku Mwanthi, now deceased, that the late Joseph Mutuku Mwanthi filed this suit by virtue of a Power of Attorney Number 49544/1 which she had donated to him as the registered proprietor of the suit property, that the said Joseph Mutuku Mwanthi died before this suit could be heard and determined and that she wishes to substitute the deceased plaintiff and prosecute this case to its conclusion since the cause of action continues. She further averred that she is also a co-Defendant in the counterclaim in Nairobi **ELC No. 735 of 2007** which has been consolidated with this suit and further that the intended substitution will not affect or change the substantive issues in the current suit in any way.

The Application is contested. The 1st and 2nd Defendants filed their Grounds of Opposition dated 30th September 2014 in which they raised the following grounds:

1. That it was incompetent for the plaintiff, now deceased, to institute this suit in his name if the same was based on a Power of Attorney from the said Esther Mukulu Mutuku.

2. That the suit having been incompetent *ab initio*, the same has now abated with the death of the plaintiff on 2nd January 2014.
3. That the plaintiff had conceded this legal point and in fact withdrawn **HCCC No. 735 of 2007** on the ground of having been incompetent to institute the same in his name while the donor of the Power of Attorney was available.

Only the Applicant filed her written submissions dated 17th February 2015.

The instructive legal provision that is applicable on the question of substitution of a deceased sole Plaintiff is Order 24 Rule 3(1) of the Civil Procedure Rules, 2010 which provides as follows:

“Where ... a sole 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.”

In this matter, the Applicant, Esther Mukulu Mutuku, is not the legal representative of her late husband who was the Plaintiff in this matter. However, Esther Mukulu Mutuku has not requested to substitute her late husband on the ground that she is his legal representative. She seeks to substitute her late husband as the plaintiff by virtue of the fact that the suit was in the first place filed on her behalf as the registered proprietor of the suit property by virtue of a Power of Attorney in which she donated to her late husband the authority to do so. She is now desirous of taking over the suit in her own name. The 1st and 2nd Defendants main ground of opposition to this request is that the suit should not, in the first place, have been instituted by the late Joseph Muthuku Manthi on the strength of a power of attorney. They argue that for this reason, this suit was incompetent *ab initio* and abated upon his death. The 1st and 2nd Defendants did not cite any legal provision upon which they were relying and did not file any written submissions. To my mind, even if the 1st and 2nd Defendants were right, the instructive legal provision is Order 1 Rule 10(1) of the Civil Procedure Rules, 2010 which provides as follows:

“Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.”

I think the operative words in this legal provision are “it is necessary for the determination of the real matter in dispute”. Upon consideration of this matter, I consider that allowing the Applicant herein, Esther Mukulu Mutuku, to substitute her late husband in this suit is necessary for the determination of the real matter in dispute in this suit. This is because she asserts that she is the registered proprietor of the suit property herein and that her late husband filed this suit on her behalf on the strength of a power of attorney. Therefore, there is no question that she is the main claimant herein and her presence in this suit is critical for the prosecution of that claim. Secondly, she is a co-defendant in **ELC No. 735 of 2007** which was consolidated with this suit therefore she is not a completely new party in the consolidated suit. In the circumstances, I am convinced that the Applicant should be allowed to take over this suit as the plaintiff in place of her late husband, Joseph Mutuku Manthi.

Arising from the foregoing, I hereby allow this Application. Costs shall be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 22ND DAY OF MAY 2015.

MARY M. GITUMBI

JUDGE