REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 614 OF 2014

MBUGUA WANGIGE

DAVID NJUGUNA ..... PLAINTIFFS

VERSUS

MUTHANJI WANGIGE ..... DEFENDANT

AND

NANCY WANJIRU NJUGUNA .....INTENDED SUBSTITUTE OF MBUGUA WANGIGE

MARY WAMBUI NJUGUNA ..... INTENDED SUBSTITUTE OF DAVID NJUGUNA

JOSEPH GICHUHI MUTHANJI &

JAMES M. MUTHANJI ..... INTENDED SUBSTITUTE OF MUTHANJI WANGIGE

RULING

1. This ruling is in respect of two notices of motion filed in this matter to wit, the notice of motion dated **11th February, 2015** and the notice of motion dated **4th March, 2015.**

2. The notice of motion dated 11th February, 2015 seeks a declaration that the suit herein (being original case No.150 of 1974) has abated and is no longer legally tenable. The appicant, Joseph Gachuhi Muthanji, also prays that the prohibitory order or caution or any other restriction placed on the land parcel number Kabete/Kibichiku/208 by the deceased plaintiffs or any other person be removed and/or vacated forthwith.

3. The application is premised on the grounds that the original suit abated following the demise of the plaintiffs without being substituted as by law required and that the application for substitution of the deceased plaintiffs was dismissed by the Court of Appeal in a ruling delivered on 25th November, 2014.

4. The application is supported by the supporting affidavit sworn by the applicant, Joseph Gichuhi Muthanji and a supplementary affidavit sworn by James Mbugua Muthanji. In the affidavits sworn in

support of the application, the grounds on the face of the application are reiterated and the following documents annexed in support of the averments therein:-

a) Copy of grant issued to the applicant in respect of the estate of the defendant in this suit, marked **JGM-1**;

b) Search in respect of the suit property (Kabete/Kibichiku/208) marked **JGM-2**;

c) Copy of the prohibitory order issued in favour of the plaintiffs marked **JGM-2A**;

d) Plaint filed in original suit, marked **JGM-3**;

e) Copies of death certificates confirming death of the plaintiffs, marked **JGM-4 and 5**;

f) Application for substitution of 2nd plaintiff, marked **JGM-6**;

g) Copy of the ruling allowing the application for substitution; marked **JGM-7;**

h) Copy of the decision of the Court of Appeal dismissing the decision of the High Court to allow the application of substitution of the 2nd plaintiff, marked **JGM-8**.

5. It is the applicant's case that since the plaintiffs' suit has abated and there is no other suit pending in respect of the suit property, the application should be allowed as prayed.

6. The application is opposed vide the grounds of opposition dated **6th May, 2015**. In those grounds of opposition, it is contended that the application is bad in law and untenable, that the applicant has no locus to bring the application and that there is a pending application for revival of the abated suit.

7. The second notice of motion, dated **4th March, 2015** seeks:-

1. The extension of time within which Nancy Wanjiru Njuguna and Mary Wambui Njuguna (the persons proposed to be substituted with the deceased plaintiffs) ought to have been substituted with the deceased plaintiffs;
2. The extention of time within which Joseph Gachuhi Muthanji and James Mbugua Muthanji (the persons proposed to be substituted with the deceased defendant) ought to have been substituted with the deceased defendant.
3. Revival of the Plaintiffs' abated suit;
4. Revival of the suit against the defendant;
5. Cost of the application be provided for.

8. The application is premised on the ground that the orders sought are necessary in order to ensure that the long standing dispute is heard to its logical conclusion; that the suit survived the original parties and that no party will suffer prejudice if the orders sought are granted.

9. The Application is supported by the affidavits of the persons intended to be substituted in place of the plaintiffs, in which the grounds on the face of the application are reiterated. In support of the averments contained in the application, the following documents are annexed to the affidavits:-

a) Death Certificate in respect of the 1st plaintiff, marked **NWN-1;**

b) Letter from the chief dated 15th September, 2014, marked **NWN-2;**

c) Grant issued to her on 25th November, 2014, marked **NWN-3**;

d) Copies of the ruling and judgment in respect of her application for substitution marked **NWN-4**;

e) Certificate of death in respect of 2nd Plaintiff, Marked **MWN-1**;

f) Grant of Letters of administration issued to Mary Wambui Njuguna on 7th July, 2014, marked **MWN-2**;

g) Copies of the ruling and judgment in respect of her application for substitution marked **MWN-3**.

10. It is contended that in the circumstances of this case, it is mete and just that the orders sought be granted.

11. In reply and opposition to the application (2nd application) the applicant in the 1st application, Joseph Gachuhi Muthanji swore the replying affidavit on **30th April, 2015**. In that affidavit, he reiterates that the suit abated following the death of all the parties to the suit without substitution as by law required; that the application of the applicants' substitution having been dismissed by the Court of Appeal, no similar application for substitution can be entertained by this court as it would be *res judicata*; that no reasons have been given for the delay in obtaining the chief's letter; that the application is defective for want of leave of the court to bring the application and that the wrong procedure has been adopted in bringing the application.

12. When the applications came up for hearing, counsel for the applicants in the application dated 11th February, 2015 maintained that the suit herein has abated and that being the case, there is no suit on which the grounds of oppositions filed in respect of the application can be premised.

13. With regard to the application dated 4th March, 2015 he submitted that the orders sought in that application were subject of determination by the Court of Appeal and therefore could not be reintroduced through the said application.

14. Counsel for the applicants' in the motion dated 4th March, 2015 submitted that the persons seeking a declaration that the suit has abated are not parties to the suit. He submitted that the applicants in the motion dated 11th February, 2015 ought to have applied for substitution under **Order 24** before filing such an application.

15. With regard to the contention that the prayers sought in the application dated 4th March, 2015 cannot issue owing to the decision of the Court of Appeal, it was submitted that the orders sought in the application that was the subject of the decision of the Court of Appeal are different from those sought in the impugned application.

16. He maintained that the cause of action survived the parties. He further submitted that the Court of Appeal only faulted the procedure used in bringing the dismissed application.

17. In a rejoinder, counsel for the applicants in the application dated 11th February, 2015 pointed out that his client had letters of administration empowering him to bring the application.

18. Concerning the application for substitution and revival of the abated suits, he submitted that there has been inordinate delay in bringing the application and that no explanation has been offered in respect thereof.

Analysis and determination:

19. It is not in dispute or in contention that both the plaintiffs and the defendant passed on without being substituted within the time stipulated in law (**Order 24** of the Civil Procedure Rules).

20. The effect of failure to substitute the deceased parties with the time stipulated in law, was to render the suits abated. See **Order 24 Rule 3(2)** and **4 (3)** which provides as follows:-

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.

4. (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."

21. In the circumstances of this case, despite there being an application for revival of the abated suit, it is submitted that the application is *res judicata* the decision of the Court of Appeal in Nyeri Court of Appeal, Civil Appeal No. 34 of 2014. In that appeal the appellant, who is one of the respondents in the 2nd application herein had appealed against the decision of the High Court, **Sergon J.,** allowing one of the applicants in the 2nd application (Mary Wambui Njuguna) to be substituted with the 2nd plaintiff and substitution of the Defendant in the abated suit with the appellant (Joseph Gachuhi Muthanji). In the application, that was subject of Appeal to the Court of Appeal, the appellant contended that the application was incompetent and bad in law having been filed out of time.

22. After considering the case presented before the Trial Court,the Court of Appeal had this to say about the application for substitution of the 2nd plaintiff and the defendant:-

"We take note that the 2nd plaintiff died on 5th October, 1998; the respondent obtained letters of administration over the 2nd plaintiff's estate on 7th July, 2004; the application for substitution and revival of the suit dated 28th February, 2011 was filed on 1st March, 2011. Perhaps, the delay of filing the application for application for substitution from the date of the 2nd plaintiff's death to 7th July, 2004 could be attributed to the delay in obtaining letters of administration. However, we note that the respondent did not give any explanation as to the delay from 7th july, 2007 to 28th February, 2011, a period of 7 years. That being the case we find that there was no reasonable cause upon which the learned judge (Sergon, J,) exercised his discretion in favour of the Respondent. We find that the learned Judge misdirected himself in this case by allowing the application for substitution. Further the Respondent conceded that an application for extension of time to revive the abated had never in fact been made.

The upshot of the foregoing is that the appeal herein has merit and is hereby allowed."

23. From the above decision of the Court of Appeal, it is clear that some of the issues raised in the current application were raised in a similar application and denied by a court of competent jurisdiction. Those issues include:-

a. Whether Mary could be allowed to substitute the 2nd plaintiff deceased?
b. Whether Joseph Gachuhi Muthanji should be substituted with the deceased defendant?

24. By bringing the said issues in the current suit, the applicant in the 2nd application clearly breached the rule of *res judicata* which under **Section 7** of the Civil Procedure Act provides;

''No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating

under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.''

25. As pointed above, the Court of Appeal was categorical that there was no reasonable cause upon which the learned judge could have exercised his discretion in favour of the respondent. The decision of the court of appeal was partially informed by the failure of the respondent in that appeal to give any explanation as to the delay from 7th July, 2007 to 28th February, 2011, a period of 7 years.

26. Since the said decision of the Court of Appeal is binding on this court, I find the 2nd application which, in my view is calculated to circumvent the said order of the court of appeal, to be bad in law.

27. As far as the first application is concerned, I agree with the submission in respect thereof to the effect that the suit having abated, is no longer legally tenable and that the prohibitory order or caution or any other restriction placed on the land parcel number Kabete/Kibichiku/208 by the deceased plaintiffs or any other person should be removed and/or vacated forthwith. Consequently, I dismiss the 2nd application dated 4th March, 2015 and allow the 1st application dated 11th February, 2015 with costs to the applicant.

Dated, signed and delivered at Nyeri this 18th day of June, 2015.

L N WAITHAKA

JUDGE

<u>In the presence of:</u>

Mr. Gichuki h/b for Mr. Mahan for the applicant

Mr. King'ori h/b for Mr. Muhoho for the intended substitutes

Court assistant - Lydia