



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ENVIRONMENT AND LAND CASE NO. 108 OF 2012**

**(Formerly Nakuru HCCC No. 119 of 2006)**

**REV. MADARA EVANS OKANGA DONDO.....PLAINTIFF**

**VERSUS**

**KIARIE NGANGA .....DEFENDANT**

**RULING**

***(Application for substitution and revival of suit; parties having died; plaintiff having withdrawn suit before his death but defendant having a counterclaim; second suit filed by plaintiff and similar counterclaim made; whether necessary to have this suit proceed in light of the other existing suit; no reason to prejudice defendant on basis that plaintiff filed another suit; application allowed)***

1. The subject matter of this suit is the land parcel Nakuru/ Langa Langa Block 1/330. That land is developed with 4 houses in form of flats. The property was previously registered in the name of Rev Madara Evans Okanga Dondo the original plaintiff. Rev Madara had charged the suit property to Housing Finance Company of Kenya Limited (HFCK) to secure some financial accommodation. It seems as if there was default and the property was put up for sale by way of public auction. In the auction, conducted on 13 December 2005, the original defendant, Kiarie Nganga, was declared the highest bidder and HFCK subsequently transferred the property into his name.
2. In this suit, which was commenced on 9 June 2006, the original plaintiff claimed that the suit property was fraudulently transferred to the defendant and sought the cancellation of his title. Inter alia, it was pleaded that there was no public auction conducted as required by law and that there were no valid charge instruments executed by the original plaintiff.
3. The defendant filed defence and counterclaim, in which he averred that he properly purchased the suit property from HFCK and asked for an eviction order together with mesne profits.
4. On 19 October 2007, counsel for the plaintiff, M/s Kimatta & Company Advocates, wrote a letter to court and applied to withdraw the suit filed by the plaintiff. It seems as if the reason for withdrawal of this suit by the plaintiff was because he had filed another suit, being Nakuru HCCC No. 270 of 2007.
5. On 29 July 2009, the original plaintiff Rev. Madara died. Two persons, namely, Fosca Aboli Dondo and Caleb Otieno Madara Dondo were on 6 December 2010 appointed as administrators of the estate of

Rev. Madara.

6. On 28 July 2010, an application dated 27 July 2010 was filed by M/s R. Ngure & Company Advocates then appearing for the defendant, seeking orders to substitute the deceased plaintiff with his administrators. That application has never been argued.

7. On 5 October 2012, the law firm of M/s Murimi, Ndumia, Mbago & Muchela Advocates, now on record for the defendant, filed an application of even date which is the subject of this ruling. The orders sought in the application are as follows :-

*(a) That the application be certified urgent and be heard on priority basis.*

*(b) That this honourable court be pleased to revive this suit.*

*(c) That this honourable court be pleased to extend time within which the applicants can apply for substitution of the deceased plaintiff and the deceased defendant with the names of the plaintiffs and defendants legal representative.*

*(d) That this honourable court be pleased to substitute the name of the plaintiff, Rev. Madara Evans Okanga Dondo (deceased) with those of Fosca Aboli Dondo and Caleb Otieno Madara Dondo the joint administrators of the estate of the deceased plaintiff.*

*(e) That this honourable court be pleased to substitute the name of the defendant Kiarie Nganga (deceased) with those of John Nganga Kiarie and Patrick Nganga Kiarie the joint administrators of the estate of the deceased defendant.*

*(f) Costs herein be in the cause.*

8. The application is premised on various grounds including the reasons that both the original plaintiff and original defendant are now dead, the defendant having died on 29 September 2011. It is also stated that although the plaintiff had withdrawn his suit, the defendant had a counterclaim which the administrators of the estate of the deceased defendant wish to pursue. The applicants, John Nganga Kiarie and Patrick Nganga Kiarie, annexed a copy of limited grant of letters of administration ad litem, granted to them on 5 June 2012, which grant is aimed at taking over and prosecuting this suit.

9. Fosca Aboli Dondo and Caleb Otieno Madara Dondo, the joint administrators of the estate of Rev. Madara, filed a replying affidavit to oppose the application. They averred that the deceased plaintiff had on 19 October 2007 withdrawn this suit and filed the suit Nakuru HCCC No. 270 of 2007, in which the current defendant is enjoined as 4th defendant. It is stated that all issues in this case are repeated in the newer suit. It is also stated that upon the demise of the plaintiff, the two filed an application for substitution in the suit Nakuru HCCC No. 270 of 2007, on 9 February 2010, which they served upon counsel for the defendant. It is averred that from that time, the defendant knew of the demise of the original plaintiff and ought to have filed an application for substitution within 1 year. It is contended that there has been unreasonable delay in filing this application.

10. At the hearing of the application, Mr. Wekhomba for the applicants urged me to allow the application and pointed out that the defendant still has a counterclaim which the applicants wish to pursue. Mr. Kimatta for the respondents urged me to dismiss the application and argued inter alia that there is no suit in existence, the plaintiff having withdrawn this suit on 19 October 2007. It was his view that the newer suit, Nakuru HCCC NO. 270 of 2007 is sufficient to dispose of all issues in dispute.

11. I have considered the application. What the applicants want is to come into the suit in place of the deceased defendant so that they may pursue the counterclaim that he had filed. There is no contention that the plaintiff had withdrawn his case against the defendant on 19 October 2007, but I do not buy the argument of Mr. Kimatta that because of that withdrawal, there is no suit in existence. The plaintiff's suit may have been withdrawn, but the counterclaim, which is a suit in itself, is still on record and may be

pursued. That is the case that is still existing, i.e the counterclaim filed by the original defendant. In my view, the withdrawal of the suit by the plaintiff does not stop the pursuit of the counterclaim by the defendant. There is therefore in existence a suit which is capable of being revived.

12. The other issue is whether I should exercise my discretion to revive the suit. According to Order 24 Rules 3 and 4, a suit abates after one year of death. The plaintiff predeceased the defendant as he died on 29 July 2009. As mentioned earlier, on 28 July 2010, counsel for the defendant filed an application for substitution of the deceased plaintiff. That application is still pending and was filed within 1 year of the demise of the plaintiff. Strictly, it was not therefore necessary for counsel for the defendant to file a fresh application seeking orders to substitute the deceased plaintiff for that was already covered in the application filed on 28 July 2010. The applicants now only needed to ask for orders to have the deceased defendant substituted, and for convenience, probably apply to argue the two applications together.

13. This application, which includes a prayer to substitute the deceased defendant was filed on 5 October 2012 whereas the defendant died on 29 September 2011. This was a few days after 1 year, which delay I do not consider significant.

14. On its merits I find that this application is merited and on principle I have no problem allowing it.

15. However, should I allow this suit to be continued yet there is in existence the suit Nakuru HCCC No. 207 of 2007 ? I have taken the trouble to peruse that file. I have discovered that the defendant herein is also a defendant in that suit and he has a similar counterclaim. Mr. Kimatta was of opinion that given this position, there is no point in reviving this suit. That may be so, but there are other matters which still have to be dealt with in this suit, such as, who is to bear the cost thereof and who will be liable to pay the same. If I do not allow the application for substitution, the defendant may be left at a loss on who to pursue costs from, considering that the original plaintiff had applied to withdraw this suit and conceded to costs.

16. I also do not want to speculate on how the two matters will proceed in future, and whether the defendant would want to pursue his counterclaim through this suit or in the other suit. I would rather allow this suit to be revived and deal on whether this matter will proceed, or not, in view of the other suit, at a later stage when issuing directions. I find it hard to prejudice the defendant simply because the plaintiff opted to file another suit, which to me was actually not necessary, as he could very well have applied to amend his pleadings in this case. Courts generally do frown on a litigant who files a multiplicity of suits over the same subject matter. Neither do I want to limit the choice of the defendant on how best he wants to prosecute his counterclaim, whether in this suit or in the other suit.

17. The upshot of the above is that I do find merit in this application and allow it. I order this suit to be revived and further order the parties to be substituted as proposed.

18. As to costs, the same shall be costs in the cause.

It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 11th day of June 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In the presence of :-**

Mr. Mwalo holding brief for Mr Murimi for defendant /applicant.

Ms Alwala holding brief for Mr Kimatta for plaintiff/ respondent.

CA: Violet.

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT AT NAKURU**