



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NYERI
ELC MISC. NO. 15 OF 2014
CHARLES MUGUNDA GACHERU APPLICANT
VERSUS
THE HON. ATTORNEY GENERAL 1ST DEFENDANT
MAINA GACHERU 2ND DEFENDANT

RULING

1. The notice of motion dated **1st December, 2014** seeks enlargement of time within which to substitute the plaintiff, Charles Mugunda Gacheru (deceased) with Lawrence Maina Muritu and Rosemary Wangari Muritu.
2. The application is premised on the ground that the plaintiff passed on and limited grant of representation of his estate was issued in favour of the persons sought to be substituted in his place on 27th August, 2014.
3. The application is supported by the affidavit of the advocate for the applicants, **Carolyn Kamende Daudi**, where she has deposed that the plaintiff passed on on 22nd August, 2012 and was survived by his wife, Njeri Muritu Gacheru, and seven children; that after the plaintiff passed on, she advised his wife and her children to apply for letters of administration because the suit survived the deceased plaintiff and that before expiry of the time within which the deceased plaintiff ought to have been substituted, the applicants filed a petition for limited grant of letters of administration being Nyeri High Court Probate and Administration Cause Number 685 of 2014.
4. It is explained that because judges were attending a colloquium, the grant was not issued until 27th August, 2014 after the time within which the plaintiff ought to have been substituted had lapsed; that the applicants are desirous of being substituted for the deceased plaintiff and that the substitution sought is necessary so that further steps can be taken in the suit.
5. In reply and opposition to the application, the advocate for the 2nd defendant, **David Warutere**, filed the replying affidavit sworn on **17th December, 2014** where he contends that the application is an abuse of the court process and that it lacks any legal basis. In this regard, it is pointed out that the 2nd defendant died on 20th August, 2012 way before the death of the plaintiff and that both parties to the suit are dead. It is further submitted that there is no suit pending because the matter was finalized and titles issued before the death of the plaintiff and the 2nd defendant. It is also contended that the suit was withdrawn on 7th December, 2009 and that being the case, the interested parties have no cause of action.

6. When the application came up for hearing, counsel for the applicants urged the court to allow the application so that the issues raised in the suit can be dealt with substantively.

7. Counsel for the 2nd respondent reiterated his contention that the application is misplaced. Because the second defendant passed on without being replaced within the time

stipulated in law, he urged the court to dismiss the application with costs to the respondents.

Analysis and determination:

8. It is not in dispute or in contention that both the plaintiff and the 2nd defendant passed on without being substituted within the time stipulated in law (**Order 24 of the Civil Procedure Rules**) and which effect was to render the suit as having 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.”

9. Also see the case of **Wallace Kinuthia v. Anthony Nd’ung’u Muongi & 3 others (2013) eKLR** where **Pauline Nyamweya J.**, stated:-

“The effect of a suit that has abated is that it ceases to exist in law. Black’s Law Dictionary defines abatement as “the suspension or defeat of a pending action for a reason unrelated to the merits of the claim”. I am also persuaded by the ruling in **Kenya Farmers Cooperative Union Limited vs Charles Murgor (Deceased) T/A Kaptabei Coffee Estate, (2005) eKLR that in such an event the court has no jurisdiction to hear and determine a suit that has abated, until its revival as provided by law. Waweru J. stated as follows in the cited case:**

“But it is really a matter that goes to the jurisdiction of the court. Does the court have jurisdiction to order substitution (except in an application to revive the suit) where the suit has already abated by operation of the law? Obviously not. Does the court have jurisdiction to hear and determine a suit that has already abated by operation of the law? Certainly not. If a suit has abated it has ceased to exist. There is no suit upon which a trial can be

conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time.”

10. And the case of Leonard Mutua Mutevu v. Benson Katela Ole Kantai & Another (2014) eKLR where it was held:-

“There was, therefore, no application for substitution of the 1st defendant in terms of the previous rules or under rule 4 of Order 24 which was made within one year of the death of the 1st defendant and the suit abated. Unless revived, the effects of abatement of suit are dire as provided under Rule 7(1) that:

Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

Revival of abated suit: application and by whom?

[9] The suit having abated, the only remedy in law, was to apply for revival of the abated suit under rule 7(2) of Order 24 of the CPR ...”

11. Being of the view that the cases cited hereinabove capture the right legal position of a suit that has abated and the applicants having failed to apply for revival of the abated suit, I find the current application to be bad in law

for want of substratum. Consequently, I dismiss it with costs to the respondents.

Dated, signed and delivered at Nyeri this 8th day of June, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Warutere for 2nd plaintiff/respondent

MS Masaka for the 1st defendant

Mr. King'ori h/b for MS Kamande for the applicant

Court assistant - Lydia