



IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 733 OF 2012

DAVID NJOROGE KAMAU

ALIAS DAVID NEWTON NJOROGE PLAINTIFF

VS

ISAAC KIPKERING KUTO 1ST DEFENDANT

EMILIANO ACHINA 2ND DEFENDANT

(The Defendants are sued in their capacity as the Administrators of the Estate of
the late JOSEPH KIBWAMBOK KUTO -DECEASED)

RULING

(Application for substitution of plaintiff; plaintiff having died after institution of suit; time within which an application for substitution needs to be filed; application filed outside the 1 year period; application however allowed in the interests of justice)

This ruling is in respect of an application dated 24 January 2014 filed by one Rose Njambi Njoroge. The applicant wants to be substituted as plaintiff in place of the original plaintiff, David Njoroge Kamau, who died on 24 March 2012. Rose Njambi Njoroge is the widow to the late David Njoroge Kamau, and she also holds a grant of letters of administration ad litem, which was issued by the High Court in Eldoret, on 11 December 2013. In this application, Rose has stated that she wishes to continue this suit on behalf of the Estate of David Njoroge Kamau.

David Njoroge Kamau, the original plaintiff, had filed this suit seeking orders that he be declared to be the owner of two parcels of land, registered as LR NO. 7830/173 and LR No. 7830/134 which are situated in Nandi Hills. The two parcels of land are registered in the name of David Njoroge Kamau and one Joseph Kipkwambok Kuto. It is alleged that the two gentlemen were partners but that the partnership was dissolved, and Joseph Kuto, relinquished his share in the two parcels of land to David Kamau for a consideration of Kshs. 1 million, through a deed that was signed on 18 June 2002. Joseph Kuto died in the year 2005. It is stated that in the year 2008 the plaintiff fled Nandi Hills in the infamous post-election violence of that year. On his return, he found the defendants, who are the children of Joseph Kuto, occupying the suit premises. He asked them to move in vain, hence this suit. The defendants on their part have a counterclaim, in which they have alleged that the agreement of 2002 is a forgery and have asked that it be declared null and void. Before the matter was heard, David Njoroge Kamau, died on 24 March 2012. The applicant is however keen to proceed with the suit, hence this application.

The application as drawn, is said to be brought pursuant to the provisions of Order 23 Rules 1 and 3 of the

Civil Procedure Rules. A perusal of the current Civil Procedure Rules, which are the 2010 Rules, will reveal that Order 23 relates to attachment of debts. It is the current Order 24 which relates to death of parties and substitution. I will take it that the citing of the wrong provisions of the law was an error on the part of counsel, and since it is clear what the application seeks, I will consider it in light of the provisions of Order 24 of the Civil Procedure Rules.

The core provision in my view, is Rule 3 of Order 24, which provides as follows :-

Procedure in case of death of one of several plaintiffs or of sole plaintiff [Order 24, rule 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.

Mr. J.N. Njuguna, for the applicant, urged me to allow the application. I questioned why the application was not brought within one year, before the suit abated, and the answer that Mr. Njuguna provided was that it takes time for bereaved families to organize themselves. Mr. Kibii, for the defendants did not oppose the application although he stated that the applicant needed to have sought extension of time.

I have considered the application. Order 24 Rule 3 requires an application for substitution to be filed within 1 year of death, or else, the suit stands the risk of abatement. The proviso to Rule 3 however allows the court to extend time for good reason on application. When a party files an application for substitution outside the 1 year time frame, then such party needs to ask the court to extend time for the application, and also needs to provide good reason for not having filed the application within the stipulated time. I have perused the application and the supporting affidavit, but I have not seen any prayer for extension of time, and neither have I seen any reason given for not having filed the application for substitution within 1 year. Strictly speaking, the application is liable to be dismissed.

I have however considered the submissions of Mr. Njuguna, though made from the bar, that it takes time for bereaved families to organize themselves. I have also considered the duration of time between death of the plaintiff, which was 24 March 2012; the time that the grant ad litem was issued, which was on 11 December 2013; and the time that this application was filed, which was 30 January 2014. I have also considered the subject matter of the suit. There is some delay in the filing of this application, which delay has not been sufficiently explained, but taking all relevant factors in consideration, I think it will be in the interests of justice that I allow this application so that the parties can have an opportunity to ventilate their respective cases. I think this is a fit case for me to exercise my discretion under Article 159 (2) (b) of the Constitution, and not be too strictly bound by procedural technicalities.

I therefore allow this application and allow Rose Njambi Njoroge to be substituted for David Njoroge Kamau as the plaintiff. I further direct that the plaint be amended to reflect this position and the amended plaint be filed and served within the next 14 days. The defendants are at liberty to amend their defence if need be within 14 days of service of the amended plaint.

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

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF SEPTEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

Delivered in the presence of:

Miss Z.K Maroko holding brief for Mr. Njuguna for the plaintiff/applicant.

Miss. R.C Tum holding brief for M/s Kimaru Kiplagat & Co. for the defendants/respondents.