



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO.853 OF 2012 (OS)

PETER MBUGUA MUKORA.....PLAINITFF

VERSUS

**DAVID M GATHAIYA (Sued as the Legal Representative of
Rachel Wairimu Mbugua – Deceased).....DEFENDANT**

RULING

This is an application made by Anna Njeri Mbugua on behalf of the Plaintiff dated 19/11/2013. The Applicant seeks and order that the court be pleased to issue an order of substitution of the Plaintiff who is now deceased. The application is founded on grounds outlined in the application and supported by an affidavit sworn by the Applicant on 18/11/2013. She deposes that the deceased Plaintiff was her husband who died on 25/5/2013 and was appointed as a legal representative of his estate on 2/8/2013. The Applicant deposes further that the cause of action subject matter of this suit did survive the deceased and that there are interim orders on record. It is her disposition that the orders sought are not prejudicial to any party to the proceedings and that it is just and expedient that the application be allowed to enable her continue with the suit.

The application is opposed by the Defendant who swore a Replying Affidavit on 21/2/2014. The Defendant deposed that a claim of adverse possession is personal in nature hence extinguishes upon his death and thus there is nothing that is passed on to his estate. It is his deposition that the Applicant has not shown that she was in adverse possession of the suit property so as to be substitute as a claimant and that in any event the deceased Plaintiff had no valid claim over the suit property. It was his deposition that the suit property was owned by the Plaintiff's step mother, **Rachel Wairimu Mbugua** who died intestate on 8/4/1998. Further that the Plaintiff's affidavit sworn on 17/11/2012 confirms that the Plaintiff had been residing in the suit property with his parents. Consequently, the Plaintiff's possession cannot be said to be hostile as he was a family member and as such his occupation is deemed to be with consent from the registered family members.

The Defendant stated that upon the demise of **Rachel Wairimu Mbugua** he became the legal representative of the estate pursuant to a Judgment of the Court of Appeal dated 9/11/2012. He deposed that he filed suit seeking eviction orders against the Plaintiff and thus interrupting possession and therefore the deceased had not attained the limitation period of 12 years to initiate a valid claim of adverse possession. The Defendant urged the court to dismiss the application with costs deposing that the same lacked.

The application was canvassed by way of written submissions. P.K. Njoroge & Co. Advocates for the Applicant filed submissions dated 16/6/2014 wherein counsel reiterated that it is just and reasonable that the deceased be substituted to facilitate the case to be heard and determined on its merit. It was counsel's submission that the Defendant's Grounds of Opposition addressed the issues touching on the merits of the case whereas the application is in respect to substitution of a deceased. Counsel urged the court to allow the application submitting that there would no prejudice that would be occasioned to the Defendant.

Mwangi Chege & Co. Advocates for the Defendant filed submissions dated 16/6/2014 wherein counsel reiterated that the Plaintiff's claim extinguished upon his death and having not proved the claim, there was no right, proprietary or otherwise that could be passed to the estate capable of founding a suit. Counsel further submitted that it is trite that an application for substitution must be filed within 1 year of the demise of a party to the suit, else the suit automatically abates on expiration of 1 year. Counsel referred to the Applicant's annexures comprising of the Plaintiff's Certificate of death which indicates that he died on 25/5/2013 hence the suit abated on 25/5/2014 by operation of the law.

The application herein has been brought under Order 40 Rules 1(a), 2(1) (2), 3(1), 4(1) (2) (3) of the Civil Procedure Rules. These are clearly the wrong provisions of the law in an application such as this. The correct procedure is under Order 24 Rule 3(1). Counsel for the Applicant admits fault and this court opts to pardon him for the same. The application has been brought by the widow of the deceased who has availed a copy of a **Limited Grant Ad Litem** for purposes of prosecuting this suit. Counsel for the Defendant submitted at length that the Plaintiff had not established his claim and that his claim was a non-starter because the limitation period of 12 years had not been attained. Further that his possession was not hostile and that a suit was filed for eviction hence interrupting the possession. On the basis of these grounds, the Defendant urged the Court to dismiss the application.

The application before court is not one to determine the viability of the Plaintiff's claim for adverse possession, but one of substitution to facilitate the continuous the suit. On that basis, the court shall not delve on to the merits of the case until an appropriate time, that is, upon hearing.

From the foregoing, there are two issues for determination. First, is whether the application is statute barred for having been filed out of the 1 year period prescribed following the death of a party to the suit. According to the Defendant, the application is barred in that the same abated on 25/5/2014. The **Order 24 Rule 3(2) of the Civil Procedure Rules** provides that the suit shall abate at the end of 1 year where no application for substitution has been made. On perusal of the court record, however, this application was filed 6 months after the demise of the Plaintiff and as such the same is within the 1 year period prescribed by statute. In any event, even where an application of this nature is filed after the lapse of 1 year, Rule 3 thereof gives the Court discretion to extend time. This ground of the application therefore fails.

The second issue is whether a claim for adverse possession can survive a deceased Plaintiff. It is argued for the Defendant that such a claim is personal and extinguishes with the demise of a claimant. **Part II of the Law Reform Act, Cap 26 Laws of Kenya provides for Survival of Causes of Action. Section 2 (1)** thereunder provides *that on the death of any person, all causes of action subsisting or vesting under him shall survive against or for the benefit of his estate save for causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.* In view of the statutory provision, the Defendant's submission is unfounded.

Having now carefully considered the applicants Notice of Motion dated 19th November and the submissions therein, the Court finds the same is merited. Consequently, the Court allows the said application in terms of prayer No.2.

Costs shall be in the cause.

It is so ordered.

Dated, signed and delivered this 3rd day of **October** 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Applicant

.....For the Defendant

.....Court Clerk