REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 93 OF 2012

Formerly HCC 44 OF 2002

ROTICH CHERUTICH..1ST PLAINTIFF

KIPLAGAT CHERUIYOT..2ND PLAINTIFF

KIPRONO KIMETO..3RD PLAINTIFF

DAUDI EGO...4TH PLAINTIFF

VS

THE DIRECTOR OF SURVEYORS …...1ST DEFENDANT

THE CHAIRMAN NYARU FARM …...2ND DEFENDANT

(Application seeking leave to extend time to be susbstituted as parties in place of deceased person; principles upon which the court will act on such application; 1st and 4th plaintiffs having died; whether suit still subsists irrespective of the death and can be continued by the surviving plaintiff; abatement of suits; good reason must be provided to extend time for substitution; whether good reason has been provided; whether application ought to be allowed; application disallowed as suit can be continued by the surviving plaintiff and no good reason has been provided to extend time)

RULING

The application before me is the Motion dated 12 April 2013 filed by Rose Jerono Rotich and Charles Kosgei Langat. The application is brought under the provisions of Order 1 Rule 10 of the Civil Procedure Rules, and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act.

The applicants are asking that time be enlarged to enable them come into the suit as the 1st and 4th plaintiffs in place of the original 1st and 4th plaintiffs who are deceased. The grounds upon which the application is based are inter alia that the 1st and 4th plaintiffs died on 6th October 2011 and 1st May 2008 respectively and that the applicants have each obtained a grant of letters of administration *ad litem* for the estate of the original 1st and 4th plaintiffs.

The defendants have contested the application.

The application is supported by two affidavits each filed by the applicants. The first affidavit is of Rose Jerono Rotich. She is the widow to Rotich Cherutich the 1st plaintiff. She has deponed that the 1st plaintiff died on 6 October 2011 and has annexed a Certificate of Death. She has averred that the family had to consult and agree who would take out letters of administration ad litem but due to family

disagreements they were caught up by time. Eventually, an application was filed and a grant ad litem was issued on 21st March 2013. She now wants to be enjoined as the 1st plaintiff to this suit in place of the deceased.

The second affidavit is that of Charles Kosgei Lagat who is a son of the 4th plaintiff. He has stated that the 4th plaintiff died on 1st May 2008. The family had to consult before taking out letters of administration but owing to numerous ailments and bereavement within, there was delay. A consensus was eventually reached within the family and the applicant took out letters of administration ad litem which were issued on 21 May 2013. Charles now wants to be enjoined as the 4th plaintiff in place of the deceased.

The 2nd defendant opposed this application through Grounds of Objection. It is averred that the application is bad in law as the suit abated a long time ago. It is also stated that the reasons for the delay are insufficient, that the application will not serve the interests of any of the parties, and that the application is incompetent as the suit sought to be revived is equally bad in law.

Mr. H.K Ngeno for the applicants urged me to allow the application. He stated that good reason had been adduced to enable the court in its discretion extend the time provided for substitution.

I permitted Mr. D.O. Wabwire learned counsel for the State for the 1st defendants to make submissions on points of law although he had not filed a reply to the application. His view was that the delay of 5 years on the part of the defendants has not been adequately explained. He also averred that the entire suit is in any event incompetent.

Mr. R.K. Limo for the 2nd defendant was also of the view that no good reason had been adduced to enable the court allow the application. He averred that both affidavits cite family differences and he wondered whether it was a coincidence that both families had differences or whether this is a mere paper excuse. He wondered how there could be disagreement merely on who is to continue with a suit. He averred that no proof had been availed of any family differences. He was also of the view that the entire suit is incompetent and there would be no point in allowing this application.

I have considered the application. This suit was instituted by four persons in the year 2002. The plaintiffs pleaded that they are members of Nyaru Farm. The 2nd defendant is the Chairman of Nyaru Farm. The plaintiffs pleaded that a survey plan for the subdivision of Nyaru Farm had been approved in the year 1991 but that the defendants in the year 1994 prepared a new sub-division which did not accord to the original map and proceeded to sub-divide the farm. They have pleaded that the sub-division has reduced their rights. The suit seeks a declaration that the sub-division done on the basis of the map of 1994 is null and void and further seeks the cancellation of all title deeds issued on the basis of that sub-division. The plaintiffs have also sought to be issued with title deeds based on the 1991 sub-division map.

In the course of time, the 2nd plaintiff died on 17th December 2003 and an application for substitution was filed on 23 February 2005. This application was however abandoned when it came up for hearing on 22 June 2005. A new application for substitution of the 2nd defendant dated 11 April 2006 was then filed. This application was again withdrawn by counsel when it came up for hearing on 14 March 2007. No other application has been made for the substitution of the 2nd plaintiff.

It has now happened that the 1st and 4th plaintiffs are dead and the applicants now seek to be substituted in their place. Although the application as drawn is stated to have been made under Order 1 rule 10, which relates to the addition and removal of parties to a suit, I am of the view that this application falls squarely within the provisions of Order 24 Rules 2 and 3. The same provide as follows :-

Rule 2. Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

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.

The gist of the objections by counsels for the respondents is that no good reason has been given to enable the court extend time for substitution, and secondly that the suit is incompetent and therefore there would be no point to allow a substitution. Let me deal with this second point first.

Counsels for the respondents urged me to dismiss this application because , in their view, the suit is incompetent. I am afraid that I cannot disallow the application for this reason because this is not a suitable forum upon which to properly interrogate the merits or demerits of the suit. I will say no more.

Let me now interrogate the application on the basis of Order 24 Rules 2 and 3.

There are several plaintiffs in this suit and the first thing I need to determine is whether the cause of action survives or continues to the surviving plaintiff. If it does, the matter is to proceed at the instance of the surviving plaintiff in accordance with Order 24 rule 2. If the course of action does not survive then I can entertain an application for substitution from the legal representatives of the deceased plaintiffs.

The cause of action herein is that the plaintiffs want the sub-division of a farm in L.R No. 4051 declared void because to them, it is based on an illegal sub-division of the year 1994. They want title deeds to be issued based on a sub-division of the year 1991. Does this cause of action survive irrespective of the death of the 1st and 4th plaintiffs ? My view is that the cause of action survives. It does not follow that because the 1st and 4th plaintiffs are dead, the prayers sought cannot be urged by the surviving plaintiff, who is the 3rd plaintiff. I can still declare the sub-division of 1994 to have been illegal, and if I declare it illegal, it automatically follows that I will have to make an order either for the land to be sub-divided according to the survey of the year 1991 or another survey. If I am to so order, new title deeds will inevitably be issued in accordance with the survey that I will declare to be the correct survey, or in accordance with a new survey. These prayers are not affected by the death of some of the plaintiffs and for as long as there is a surviving plaintiff who can agitate the prayers, then there would be no need to make a substitution.

Where there are several plaintiffs and some die, a substitution will only be allowed if the cause of action cannot be carried forward by the surviving plaintiff/s. For example, it could happen that two or more people suffer injuries arising from a road traffic accident. These two people can enjoin in one suit because the cause of action is the same. If one dies, his cause of action cannot be carried forth by the surviving plaintiff because the claim for damages is a personal claim that does not affect any other person. In this instance, in order to continue the suit, the personal representatives of the deceased plaintiff must make an application for substitution, otherwise the suit of the deceased plaintiff will abate. The death of the first plaintiff will however not affect the suit of the surviving plaintiff who is at liberty to prove his claim separately.

In our instance, I am of the view that the suit survives and can be carried forward by the surviving plaintiff thus there is no need for a substitution.

Assuming I am wrong on this, I would still not have allowed the application for substitution. Strictly, a suit abates after one year of death unless an application for substitution is made. The court is at liberty to extend time for good reason in accordance with the proviso in Order 24 Rule 3.

Good reason must be provided. It cannot be said that good reason has been provided where general sweeping statements that are unsupported by any evidence are made. In our case, the 1st applicant has stated very generally that they had "family disagreements". The nature of these disagreements is not disclosed; no minutes of meetings held have been disclosed; and no date when these disagreements were resolved has been given. There are no specifics to these very general statements. The 2nd applicant has stated that there were delays caused by "numerous ailments and bereavement within". Again, there are no specifics as to who was unwell and when they may have recovered. Neither is it stated who died, and when, and how this could impact on the decision to substitute.

The discretion of court to extend time is not granted as a matter of course. It ought not to be assumed that the discretion of the court to extend time will be given without good reason, and in my view, it cannot be said that good reason has been demonstrated when no specific details are provided. I agree with Mr. Limo that it could very well be that the so called "family disagreements" did not exist, and that the applicants were merely looking for an excuse to seek the sympathy of the court to allow them an extension of time.

It is therefore my view that this application must fail, first because the death of some of the plaintiffs does not affect the continuance of the suit by the surviving plaintiff, and secondly, that even if the death of some of the plaintiffs did affect the continuance of the suit by the surviving plaintiff, no good reason has been given to enable me extend time for substitution, the application coming beyond the one year allowed for substitution.

I therefore dismiss this application but make no orders as to costs.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JUNE 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Miss S.W. Karuga holding brief for Mr. Ngeno for the Plaintiffs/applicant

Miss L.M. Lung'u of the state Law Office for the 1st defendant/respondent

Mr. R.K. Limo for the 2nd defendant/respondent