REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 30 OF 2018

AGGREY SWAKA WASWA.....APPLICANT

VERSUS

PATRICK OMONGE KHAEMBA.....DECEASED DEFENDANT

THOMAS MESHACK OMONGE)

FRANCIS ABURI OMONGE)

DANIEL KHAEMBA OMONGE)

PASCAL ORENGO OMONGE) ....PROPOSED RESPONDENTS

RULING

The proposed defendants/respondents raised a preliminary objection on the application herein dated 11th March, 2020, to the effect that:-

1. That the suit has abated by virtue of Order 24 rule 4 (3) of the Civil Procedure Rules since the deceased defendant passed on in 2018 and therefore there is no valid suit before this honourable court for the proposed defendants to be substituted.

2. That the proposed defendants/respondents lack locus standi to defend the suit as they are not legal administrators of the deceased defendant's estate.

The proposed defendants applied for the court to dismiss the application dated 11th March, 2020 with costs to them.

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

"…… consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit"

In the same case, Sir Charles Newbold said:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion".

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja [2005] e KLR had the following to state regarding a 'Preliminary Objection'.

"I think the principle is abundantly clear. A "preliminary objection", correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement …….. that, "where a court needs to investigate facts, a matter cannot be raised as a preliminary point.".

The issue as to whether or not this suit has abated and or the applicants have locus standi is therefore properly raised as a Preliminary Objection.

This court has considered the preliminary objection and submissions therein. Order 24 rule 4 (4) of the Civil Procedure Rules provides that;

"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) ……

(3) Where within one year no application is made under subrule (1), the suit *shall abate as against the deceased Defendant.*

This means that upon death of a defendant and on application the court has the discretion to substitute the deceased defendant and that after one year with no application the suit abates. In this matter it cannot be denied that the suit has abated. The deceased defendant died in 2018 and this application has been filed in 2020. An abated suit is non-existent prior to it being revived. For a suit to be revived an appropriate application must be presented to court and the court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement. In the case of **Said Sweilem Gheithan Saanum –v- Commissioner of Lands** (being sued through **the Attorney General) & 5 Others (2015) eKLR,** the Court of Appeal explained the provisions of Order 24 of the Civil Procedure as follows:

"There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "sufficient cause" from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff. "

In the case of **Titus Kiragu – v- Jackson Mugo Mathai (2015)eKLR** it was held that:

“It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law.”

Charles Mugunda Gacheru vs. Attorney General & Another (2015) eKLR, it was held that for a court to exercise the discretion vested in it in favour of a person seeking to revive a suit that has abated, it must be satisfied that the applicant was prevented by a sufficient cause from continuing the suit. In the case of **Rukwaro Waweru vs. Kinyutho Ritho & Another (2015) eKLR**, the court held that the court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown.

Be that as it may, when one of the defendants dies and the cause of action survives or continues and upon an application made, the Court shall cause the legal representative of the deceased to be made a party or to be substituted in place of the deceased party to proceed with the case. Section 2 of the Civil Procedure Act defines legal representative as follows;

“means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.

Therefore one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. The Act provides the procedure to be followed in the application for such a grant, and the various forms a grant may take including letters of administration. Section 54 of the Act provides that a Court may limit a grant of representation which it has jurisdiction to make in any of the forms described in the Fifth Schedule. The Applicant can also cite the intended substitute as per the provisions provided in the Succession Act for the purposes of the pending proceedings. No evidence has been adduced before me to show that the respondents are the legal representative of the deceased defendant or whether the Applicant has filed citation proceedings. All the applicant has said is that they are sons of the deceased defendants. I find that the proposed defendants have no locus and I uphold the preliminary objection and strike out the application. There will be no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 15TH DECEMBER 2020.

N.A. MATHEKA

JUDGE