



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 1354 OF 1993

CHARLES REUBEN GITAU.....1ST PLAINTIFF/APPLICANT

ESTHER WAMBUI GITAU.....2ND PLAINTIFF/APPLICANT

VERSUS

HIRAM BERE KINUTHIA.....1ST DEFENDANT/RESPONDENT

ESTHER WANJIRU NGIG.....) 2ND DEFENDANT/RESPONDENT

ROBERT MATATHIA NGIGL.....)

(As the legal representatives of the Estate of Francis Ngigi Matathia)

RULING

1. The application dated 24th June, 2019 seeks orders that:

1. Spent

2. That the *ex-parte* proceedings of 15th June 2016 and the resultant ruling and order dismissing the suit for want of prosecution be set aside and/or reviewed and that the honourable court be pleased to reinstate the suit.

3. That in the alternative the honourable court be pleased to declare all the proceedings and consequential orders thereof in the skeleton file of this suit illegal, null and void *ab initio*.

4. That the honourable court be pleased to give its directions on the fate of the skeleton file vis-à-vis the original file which had been forwarded (presumably) to the court of Appeal registry.

5. That costs of this application be borne by the Defendant/ Respondent.

2. It is stated in the grounds and the affidavit in support of the application that the suit herein was dismissed on 15th June, 2016 through the skeleton file herein. That the court was moved to open the skeleton file by an advocate who came on record for the 2nd Defendant and without disclosure of material facts moved the court to have the suit against the 2nd Defendant abated.

3. It is contended that the original file was before the Court of Appeal where the 2nd Defendant had already been substituted and the judgment of the Court of Appeal delivered on 11th December, 2015 wherein orders were made for the High Court to hear the suit and determine the issue of assessment of damages. It is averred that when the suit herein was dismissed on 15th June, 2016 for want of prosecution, the Applicant was not served with the Notice to show Cause. That the suit was also dismissed prematurely as one year had not lapsed from the last date of appearance before the Court of Appeal.

4. The 1st Defendant opposed the application as per the grounds of opposition dated 22nd July, 2019 which state as follows:

1. The first defendant died on 24th December, 2017.

2. The suit was dismissed on 15th June, 2016.

3. If the suit was still in existence the suit would have abated one year after the first defendant's death.

4. It would be unfair to revive the suit in such circumstances and in light of the inordinate delay by the plaintiffs.

5. The 1st Defendant's side also filed a replying affidavit and exhibited the Grant of Letters of Administration and the Certificate of Death in respect of the 1st Defendant, Hiram Bere Kinuthia.

6. The application is opposed by the 2nd Defendant as per the grounds of opposition dated 29th July, 2019 which state as follows:

1. The suit was dismissed on 15th June, 2016.

2. The Applicants are guilty of laches and/or inordinate delay with no plausible explanation.

3. The Application is incompetent, bad in law and fatally defective.

4. It is mischievous, incoherent and deceptive.

5. No order sought to be set aside and or reviewed has been attached to the application.

6. This court lacks jurisdiction to hear and entertain the application as this would amount to upturning the Court of Appeal judgment on 11th December, 2015.

7. In a replying affidavit sworn by counsel for the 2nd Respondent, it is deponed that the judgment of the High Court was delivered on 29th June, 2005 and that the application for the reconstruction of the file was merited. That there were no orders for stay of execution pending the hearing of the appeal but there were other miscellaneous proceedings to preserve the caveat on the parcel of land the subject of the suit herein.

8. I have considered the application, the responses to the same and the oral submissions made by the counsel for the respective parties.

9. A perusal of the court file herein clearly reflects that this is a skeleton file that was opened following an application herein filed on 5th July, 2011 by counsel for the 2nd Defendant. The suit was dismissed vide the skeleton file herein on 15th June, 2016. It is apparent that the dismissal orders were made in error as the court was not aware that the original court file was before the Court of Appeal where judgment had already been delivered on 11th December, 2015.

10. The suit was also dismissed prematurely before the lapse of one year from the date the last step was taken in the matter on 11th December, 2015 when the judgment of the Court of Appeal was delivered. The mode of service of the Notice to Show cause is also not reflected herein.

11. The only orders made herein prior to the dismissal of the suit were the orders for the reconstruction of the file. Consequently, I allow the application in terms of prayer No. 2 and set aside the orders given on 15th June, 2016 which dismissed the suit herein. The suit having been reinstated, the original file to be availed and both the original and the skeleton file to be put together. Costs in cause.

Date, signed and delivered at Nairobi this 28th day of Nov., 2019

B. THURANIRA JADEN

JUDGE