



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA**

**AT MILIMANI**

**ELC CASE NO. 45 OF 2017**

**MARY GATHONI MACHARIA .....APPLICANT**

**=VERSUS=**

**ELIZABETH WAITHERA KIMANI.....DEFENDANT**

**RULING**

1. The applicant John Macharia holds a limited grant of letters ad litem in respect of the estate of his late mother Mary Gathoni Macharia who was the Plaintiff in this case. The applicant brought a chamber summons dated 15<sup>th</sup> September 2016 in which he seeks that the Court's order dismissing this suit be set aside and the suit be allowed to proceed to determination on merits. He also seeks to be substituted in place of his late mother. Finally the applicant seeks injunctive orders against the respondent in respect of LR No. Dagoretti/Mutuini/T 35.

2. The suit herein had been filed by Mary Gathoni Macharia (deceased) on 27<sup>th</sup> June 2006. The deceased died on 8<sup>th</sup> October 2007. The applicant obtained limited grant of letters of administration ad litem in respect of the deceased's estate on 6<sup>th</sup> June 2008. The applicant tried to prosecute this suit but his efforts were hampered by the court file which went missing. The applicant made an application for reconstruction of the file but this application was not prosecuted as the file seems to have surfaced.

3. The applicant contends that he had to engage the services of a firm of advocates known as GG Wanjie & Co. Advocates to take up the matter. He kept paying the advocates whom he thought were following up the matter only to learn later that the case had been dismissed for want of prosecution prompting him to file the present application.

4. The applicant contends that the respondent is intending to sell the suitland to a third party. That in September 2016, the respondent and her agents went to the suitland and caused serious damage in an attempt to evict him and his family. He states that the respondent will not suffer any prejudice if the suit is reinstated and he is allowed to substitute the deceased.

5. The respondent has opposed the applicant's application through a replying affidavit sworn on 7<sup>th</sup> February 2017. The respondent contends that the applicant's application is an abuse of the process of the court and that the suit land has since been sold to a third party. That the applicant has not explained why he did not file the application for substitution yet he obtained limited grant in respect of the estate of the deceased in 2008.

6. I have considered the applicant's application as well as the opposition thereto by the respondent. I have

also considered the written submissions by the parties herein. The applicant's counsel has abandoned the prayer for injunction and rightly so because the property has already been sold to a third party who is not party to this suit. I therefore do not wish to say anything more on this.

7. As regards the issue of reinstatement of this suit, the record shows that prior to the dismissal of the suit on 16<sup>th</sup> June 2016, the matter was last in court on 7<sup>th</sup> April 2011 when the same was stood over generally. The reason for this was that the applicant had not substituted the deceased. The applicant just as the deceased were acting in person. The record shows that it is the applicant who took the hearing date of 7<sup>th</sup> April 2011 on 10<sup>th</sup> December 2010. As a layman, he may have thought that as he had taken out limited grant, he had full authority to proceed. This turned out to be the case and the Judge who dealt with the matter on 7<sup>th</sup> April 2011 adjourned the case because there had been no substitution.

8. The applicant goes on to state that he had to seek legal assistance from the firm of GG Wanjie & Co. Advocates who kept on telling him that all was well. This was of course not true as the record shows that the said firm never filed notice of appointment of advocates as required. The advocates appear to have only written correspondence to the chief of Mutuini location regarding the suitland. In the applicant's further affidavit sworn on 21<sup>st</sup> April 2017, the applicant has demonstrated that he kept sending money through Mpesa to this advocates and this is as late as 16<sup>th</sup> march 2016 after the case had already been dismissed for want of prosecution.

9. The applicant had shown willingness to go on with his case. This is demonstrated by his efforts to file an application for re-construction which did not go on as the file re-appeared. The applicant was let down by his lawyers who seemed to receive money yet they did not assist him. The applicant cannot be blamed for the mistake of his lawyer. Prior to his engaging the lawyer, he appears to be a person who was keen on proceeding with his case as the record would attest. I therefore find that this is a clear case where I should exercise my discretion in favour of the applicant and proceed to set aside the order of 16<sup>th</sup> June 2016 and reinstate this suit for hearing on merits.

10. On the issue of substitution, I have said hereinabove that the applicant and his late mother were acting in person. The applicant obtained a limited grant in respect of the estate of the deceased on 6<sup>th</sup> June 2008. He did not file an application for substitution perhaps out of ignorance. I am fortified in this because as late as 2011, he was confidently running up in the corridors of justice assuming that he was now in a position to proceed on behalf of the deceased. He did not know that there were other procedures required.

11. The respondent and the applicant are related. The claim herein is for adverse possession or in the alternative declaration of a trust. It does not matter whether the property has changed hands to a third party. The applicant can still pursue his claim. If the pleadings are anything to go by, the applicant and his family have been on the suitland for over half a century. Neither the reinstatement nor substitution will prejudice the respondent. This suit has already abated. There has been sufficient explanation why there was no substitution done within the required time. I order that this suit be revived and the applicant substituted in place of the deceased. In summary thereof, I grant the following reliefs:-

***a) The order dismissing this suit for want of prosecution made on 16<sup>th</sup> June 2016, is hereby set aside and this suit is reinstated for hearing on merits.***

***b) The suit herein is hereby revived and John Kamau Macharia is hereby substituted in place of the deceased Mary Gathoni Macharia.***

***c) Costs of this application to be paid to the applicant by the respondent.***

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **26<sup>th</sup>** day of **September, 2017**.

**E.O.OBAGA**

**JUDGE**

In the absence of parties who were aware of date and time of delivery of Ruling.

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**