



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC ASE NO.76 OF 2010

TITUS GETHI NDWIGA.....PLAINTIFF

VERSUS

JAMES NJORGE GITHU.....1ST DEFENDANT

JUANCO GROUP LIMITED.....2ND DEFENDANT

RULING

1. There are three (3) applications pending determination in this matter. It is prudent to first determine the application dated 29th June 2021.
2. It is brought under Order 24 Rule 7(2) and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B, and 3A of the Civil Procedure Act, Article 159(2) (c) (d) and (e) of the Constitution of Kenya 2010 and all enabling provisions of the law.
3. It seeks orders:-
 - a) *Spent.*
 - b) *This Honourable Court be pleased to set aside the Ruling delivered on 19th December 2019 dismissing the Plaintiff/Applicant's Notice of Motion application dated 11th August 2016.*
 - c) *That the order for substitution of the 1st Defendant issued on 27th November 2014 be extended for a further 60 days from the date of the order hereto.*
 - d) *That costs of the application be in the cause.*
4. The grounds in support are on the face of the application and are set out in paragraphs 1 to 13.
5. The application is supported by the Plaintiff's affidavit sworn on 29th June 2021. He deponed that by an agreement of sale dated 27th August 2009 and made between himself and the 1st Defendant, he agreed to sell to the 1st Defendant and the 1st Defendant agreed to buy 39 acres being plot **Kajiado /Kitengela 29415** (14.4 acres), **Kajiado / Kitengela/ 29410** (13.3 acres), **Kajiado /Kitengela /29412** (10 acres) and **Kajiado /Kitengela/29413** (3.3 acres) at the agreed price of Kshs.850,000/= per acre.
6. He further deponed that in breach of the sale agreement, the 1st Defendant transferred the entire 41 acres to himself instead of 39 and subsequently transferred the said 41 acres to the 2nd Defendant.
7. He deponed that his claim is for 2 acres fraudulently transferred to the 1st Defendant and sold to the 2nd Defendant. The 1st Defendant passed away on 20th December 2013 before the hearing and determination of this suit.
8. He further deponed that on 27th November 2014, the court ordered substitution of the 1st Defendant with his personal representative within 60 days of the order but the Grant of Letters of Administration of the estate of the 1st Defendant was issued on 9th November 2015, over a year after the said orders and only forwarded to the 1st Defendant's advocates on 24th February 2016.
9. He deponed that he subsequently filed the Notice of Motion application dated 11th August 2016 seeking orders substituting the 1st

Defendant with his personal representatives but it was dismissed on 19th December 2019.

10. He also deponed that the delay in filing the application for substitution of the 1st Defendant was occasioned by delays in obtaining the Letters of Administration which were obtained over three (3) years after the demise of the 1st Defendant.

11. He deponed that the court order of 27th November 2014 for substitution of the 1st Defendant was directed at the Defendants who failed to comply with the strict timelines given by the court and delayed in obtaining letters of administration thus occasioning the delay in prosecuting the suit which has prejudiced his right to have the suit heard and determined expeditiously. He urged the court to not to pay undue attention to procedural requirements at the expense of substantive justice and allow the application as prayed.

12. The application is opposed by the 2nd Defendant by way of the replying affidavit sworn on 18th October 2021 by Junghae Wainaina; the 2nd Defendant's Chief Executive officer.

13. He deponed that the 2nd Defendant is the legitimate owner of the suit properties and that on 27th November 2011, the court ordered for the substitution of the 1st Defendant with his personal representatives by the Plaintiff but the said orders were not executed by the Plaintiff.

14. He further deponed that although the Plaintiff claims that failure to substitute was a result of the delay in issuance of the Grant of Letters of Administration, he nonetheless failed to seek an extension of the time from this court to substitute the deceased 1st Defendant from this court.

15. He deponed that the suit abated as a result of non-substitution of the 1st Defendant and the Plaintiff has failed to establish any valid reason why this suit should be revived seeing as at all times to this suit he has not been diligent/vigilant enough to prosecute the matter.

The Plaintiff's submissions

16. They are dated 20th September 2021. The Plaintiff identified the following issues for determination: -

a) Whether the suit against the 1st Defendant should be revived.

b) Whether the ruling delivered on 19th December 2019 dismissing the Plaintiff's Notice of Motion application dated 11th August 2016 should be set aside.

c) Whether the order for substitution of the 1st Defendant issued on 27th November 2014 should be extended for a further 60 days from the date of the order hereto.

17. The defendant submitted that he has established sufficient cause to warrant revival of the suit under Order 24 Rule 7(2) of the Civil Procedure Rules by explaining the reasons why he failed to pursue the suit before it abated.

18. He relied on the case of **Mbaya Nzulwa v Kenya Power & Lightining Co.Ltd [2018] e KLR** to urge the court to sustain the suit for hearing on merit without paying undue attention to procedural requirements.

19. On whether the ruling delivered on 19th December 2019 dismissing the Plaintiff's Notice of Motion application dated 11th August 2016 should be set aside, he submitted that by dismissing the motion application seeking substitution of the 1st Defendant, the Court blocked him from prosecuting his case which has merits. He implored the court to be guided by the case of **James Mwangi Gathara v Officer Commanding Station, Loitoktok & 2 Others [2018]e KLR** and its discretion to set aside the said ruling.

20. On the issue of the extension of the orders issued on 27th November 2014, he prayed for a further 60 days extension relying on order 24 Rule 4 of the Civil Procedure Rules. He also submitted that there is a good reason to warrant extension of time because there was delay in obtaining Grant of Letters of Administration of the estate of the 1st Defendant. The delay was occasioned by the Defendants. He put forward the case of **Mathenge Ngatia Ngari (Suing for himself and on behalf of his deceased brothers represented by their wives) v Christopher Wangombe Ngatia & Another [2020]e KLR**.

The 2nd Defendant's submissions

21. They are dated 18th October 2021. The Defendant identified the following issues for determination: -

a) Should the suit against the 1st Defendant be revived?

b) Is there a nexus between the Plaintiff and the 2nd Defendant?

c) Costs of the suit.

22. It submitted that it would be justifiable to argue that the Applicant is guilty of laches having waited too long to assert his rights owing to the fact that this court granted it 60 days within which to substitute the 1st Defendant on 27th November 2014. It added that 3 years after the

orders were issued, the Plaintiff filed an application dated 11th August 2016 seeking leave for the 1st Defendant to be substituted by a personal representative and the said application was dismissed on 19th November 2019 only for the Plaintiff to file this application over a year after dismissal of the application dated 11th August 2016.

23. It cited the Court of Appeal's decision in **Kenya Commercial Bank v Kenya Planters Co-operative Union [2010] eKLR** and the case of **Leonard Mutua Mutevu v Benson Kalela Ole Kantai & Another [2014]e KLR** to submit that while substantive justice should not be denied due to procedural technicalities, it is a litigant's duty to ensure they do not utterly disregard the procedure.

24. It also submitted that it is the current proprietor of the suit properties with title documents as proof thus the Plaintiff has no registrable or legal interest over the suit properties.

25. It urged the court to award it costs as it is an innocent purchaser for value without notice being defrauded of its rights to enjoyment of the suit property legally acquired by an outsider with no enforceable claim to the suit property.

26. I have considered the notice of motion, the affidavit in support and response thereto. I have considered the rival submissions and the authorities cited. The issues for determination are:-

a) Whether the suit against the 1st Defendant ought to be revived.

b) Are the orders issued on 27th November 2013 capable of being extended?

27. The 1st Defendant's died on 20th December 2013. The 1st Defendant was not substituted. Essentially, the suit should have abated by 30th December 2014 as per provisions of Order 24 Rule 4 of The Civil Procedure Rules.

28. However, the suit was given a lifeline by the court orders issued on 27th November 2014, which directed that the 1st Defendant be substituted within 60 days. The 1st Defendant was not substituted within the period directed by the court. Neither did the Plaintiff bother to extend the said orders. Vide his application dated 11th August 2016, the Plaintiff sought orders to substitute the 1st Defendant and the said application was dismissed on 19th December 2019.

29. The Plaintiff then waited another one and a half years to bring this application to revive the suit. The application is brought seven (7) years after the 1st Defendant's death. The explanation in his replying affidavit does not constitute sufficient cause to warrant this court's discretion to revive this suit or to set aside its ruling dated 19th December 2019.

30. While this court has discretion to extend its orders, the Plaintiff has not demonstrated sufficient cause to warrant extension of the orders issued on 27th November 2014.

31. The 2nd application for determination is dated 7th December 2016. It is brought by the 2nd Defendant seeking orders:-

a) That the Plaintiff's suit /claim against the 2nd Defendant be dismissed for lack of a justiciable cause of action against the 2nd Defendant and in the alternative as the claim against the 1st Defendant has abated.

b) That the 2nd Defendant be granted leave to amend its counter claim as per the annexed draft defence and counter claim.

c) That the 2nd Defendant be at liberty to prosecute its counterclaim against the Plaintiff.

d) That the costs of this application be in the cause.

32. The grounds in support are on the face of the application. They are set out in paragraphs 1 to 10 of the application.

33. The application is supported by the affidavit sworn on 7th December 2016 by Junghae Kamau, the 2nd Defendant's chief executive officer. He deponed that this suit was filed on 18th February 2010 by the Plaintiff seeking for orders that the transfer of the entire 41 acres of **Kajiado /Kitengela /29415, 29410, 29412 and 29413** respectively to the 1st Defendant and then to the 2nd Defendant was in breach of the sale agreement dated 27th August 2009 and that the 2 acres of land adjacent to the road be carved out of **Kajiado/Kitengela/29415** and be transferred back to the Plaintiff at the cost of the 1st Defendant.

34. He further deponed that the 2nd Defendant filed a counter claim against the Plaintiff as the legitimate purchaser for value without notice of the suit property and sought damages for the loss incurred due to impediment of intended development and destructive actions of the Plaintiff.

35. He also deponed that the 2nd Defendant has never dealt with the Plaintiff and there was and has never been privity of contract between them and as such, the Plaintiff does not have any claim against the 2nd Defendant who was an innocent purchaser for value.

36. He deponed that the 1st Defendant passed away on 20th December 2013 and the court granted the Plaintiff leave to substitute him on 18th September 2014 which lapsed on 27th January 2015 marking the Plaintiff's case against the 1st Defendant as abated and consequently any

claim the Plaintiff had against the 2nd Defendant also abated.

37. He added that it is in the interest of justice that the Plaintiff's claim be deemed to have abated against the 2nd Defendant and the 2nd Defendant be deemed to be at liberty to prosecute its counterclaim and be granted leave to amend its counterclaim to include special damages as outlined in the draft defence.

38. The Plaintiff opposed the application by way of his replying affidavit sworn on 21st September 2021. He deponed that the Plaintiff's application is brought after inordinate delay and it is now stale and no longer competent for determination having been unprosecuted for 4 years. He added that it is time barred as it offends Section 4(2) of the Limitation of Actions Act which provides that an action founded on tort may not be brought after the end of 3 years from the date on which the cause of action arose.

39. He further deponed that the nature of the proposed amendments is so extensive and changes the entire nature and tenor of the original counterclaim entirely by raising totally new issues of happenings of 2016 which he is not aware of thus if the amendments are allowed, he will be greatly prejudiced on his right to be heard and have the suit determined expeditiously under Article 47 and 159 of the Constitution of Kenya.

40. He deponed that his claim is for 2 acres of the suit land that are with the 2nd Defendant therefore the 2nd Defendant has a case to answer.

The Plaintiff's submissions

41. They are dated 20th September 2021. The Plaintiff submitted on the following issues:-

a) Whether the Plaintiff's suit against the 2nd Defendant should be dismissed.

b) Whether the 2nd Defendant should be granted leave to amend its counterclaim.

42. He submitted that his suit against the 2nd Defendant should not be struck out because he has a cause of action against the Defendants. He put forward the case of **DT Dobie & Co.(K) Ltd v Muchina [1982] KLR**.

43. He also submitted that the proposed amendments to the counterclaim arise from a cause of action in the nature of a tort which accrued in 2016 thus it is time barred under Section 4 (2) of the Limitation of Actions Act.

44. He added that the 2nd Defendant is guilty of inordinate delay in bringing the instant application six (6) years after filing suit. He put forward the case of **Dhanesvar v Manila M. Shah [1965] E.A 321**.

45. It was also his submission that the application does not meet the mandate of order 8 Rule 5 of the Civil Procedure Rules 2010 as far as amendment of pleadings is concerned for being extensive and changing the entire nature and tenor of the original counterclaim.

The 2nd Defendant's submissions

46. They are dated 4th August 2021. The 2nd Defendant submitted on the following issues:-

a) Has the Plaintiff's suit against the 2nd Defendant abated?

b) Does the 2nd Defendant deserve the orders sought?

c) Who should be awarded costs?

47. The 2nd Defendant submitted that the nexus of this suit as against the 2nd Defendant arose from the Plaintiff's cause of action as against the 1st Defendant as that is whom the initial sale of land agreement was contracted.

48. It added that the Plaintiff can have no valid claim against the 2nd Defendant as there is no relationship between them. It was the 2nd Defendant's submission that the Plaintiff's suit as against the 2nd Defendant completely abated, therefore the suit against the 2nd Defendant should also collapse as the cause of action does not exist against the 2nd Defendant.

49. I have considered the notice of motion and the affidavit in support. I have also considered the affidavit in response, the rival submissions and the authorities cited. The issues for determination are:-

(i) Whether the case against the 2nd Defendant is sustainable.

(ii) Whether the amendments sought ought to be granted.

50. As held before, the case against the 1st Defendant abated. In **Jacob Githinji Kamau v Patrick Rerimoi & another [2019] eKLR**, the court held; "When a case abates because of death, it simply means that the other party can no longer sustain an action against the person who

has died”.

51. The case against 2nd defendant is so much interwoven with that of the 1st defendant, that the fate of one is the fate of the other. The Plaintiff's claim against the 1st Defendant was for 2 acres that he allegedly fraudulently transferred to himself in breach of the sale agreement dated 27th August 2019. The said 2 acres were allegedly transferred to the 2nd Defendant. The 2nd Defendant was not privy to the contract dated 27th August 2009 between the Plaintiff and the 1st Defendant. The Plaintiff would therefore have to prove his case against the 1st Defendant but that case abated. In my view, the case against the 2nd Defendant also fails.

52. On the issue of amendment of the 2nd Defendant's counterclaim, this court has power to amend pleadings under Section 100 of the Civil Procedure Act as read with Order 8 Rule 3 of the Civil Rules.

53. The intended amendments in the counterclaim seek to introduce prayers for special damages and mesne profits. It is to be noted that the 1st and 2nd Defendants had mounted a joint defence. While amendments sought are brought 6 years after the initial defence was filed, they do not derogate from the original defence nor do they change the character of the previous pleadings as the amendments are still grounded on the initial defence that the suit land was not put to the intended commercial use.

However, having found that the Plaintiff's suit against the 1st Defendant has abated, the 2nd defendant's counterclaim would have no legs to stand on. This application fails as the amendments would serve no purpose.

54. There is also Chamber summons dated 18th February 2020. It is brought under Section 8 and 9 of the Law Reform Act, cap 26 Order 53 of the Civil Procedure Rules, 2010.

55. It seeks orders:-

a) Spent.

b) That leave be granted to the ex-parte Applicant to institute judicial review proceedings to apply for an order of mandamus to compel the Respondents herein to remove or cause to be removed the restriction placed on land title numbers: Kajiado /Kitengela 29415, Kajiado/Kitengela/ 29413, Kajiado /Kitengela /29412 and Kajiado /Kitengela/29410.

c) That costs of this application be provided for.

d) Any other and further relief that this Honourable court may deem fit and just to grant in the circumstance.

56. The grounds in support of the summons are on the face of the application and are set out in paragraphs 1 to

57. The summons are also based on the grounds set out in the statutory statement in support of the application for leave and the verifying affidavit sworn by on 18th February 2020 by Junghae Wainaina; the chief executive officer of the Ex-parte Applicant.

58. He deponed that the Ex-parte Applicant is the legitimate purchaser of the suit properties. He further deponed that the Interested Party through his advocate caused a restriction on the suit property without notice as required under Section 77(1) of the Land Registration Act.

59. He deponed that the Ex-parte Applicant wrote to the 1st Respondent requesting to be heard as per the requirement of Section 78(1) of the Land Registration Act and which the 2nd Respondent has failed to grant the Ex-parte Applicant a hearing or cause the restriction to be removed.

60. He also deponed that the Ex -parte Applicant has suffered and continues to suffer violations of its rights to ownership and fair administrative rights due to inactions of the Respondents and pleaded with the court to grant the orders sought.

61. The Ex-parte Applicant filed submissions dated 29th July 2021.

62. The issue for determination is whether the Ex-parte Applicant should be granted leave to file judicial review proceedings.

In *Republic v National Social Security Fund & 2 others Ex Parte Real Appraisal Limited* [2015] eKLR, the court stated....
“The Applicant for leave is under an obligation to show to the court that he has a prima facie arguable case for grant of leave. Whereas he is not required at that stage to go into the depth of the application, he has to show that he has not come to court after an inordinate delay and that the application is not frivolous, malicious and futile. The grant of leave being an exercise of discretion the conduct of the Applicant must also be considered.”

63. According to the searches produced in evidence, the restrictions allegedly placed on the suit properties by the 1st and 2nd Respondents on the behest of the Interested Parties were registered in the year 2012. This application was brought over 10 years after the decision to place the caveats was made by the 1st and 2nd Respondents. A period of ten (10) years is long and inordinate.

64. As long as the restrictions are in place the 2nd Defendant would not be able to utilize the suit properties. The Court notes that the restrictions were placed in the year 2012 during the pendency of this suit. The period has not been inordinate. I hereby grant leave to the Ex

parte Applicant (2nd Defendant herein) to institute Judicial Review Proceedings against the Respondents. The Ex parte Applicant is hereby granted twenty-one (21) days to file and serve substantive motion. Alternatively, the 2nd Defendant can serve the 1st and 2nd Respondents with a copy of this Ruling and urge that the restriction be removed.

65. In essence the notice of motion dated 29th June 2021 and 7th December 2016 are hereby dismissed. Each party do bear own costs. Mention for the directions on 26th April 2022.

DATED, SIGNED AND DELIVERED NAIROBI THIS 24TH DAY OF FEBRUARY 2022.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Ms Mutinda for the Plaintiff

No appearance for the Defendants

Steve - Court Assistant