



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC NO 164 OF 2014

JOSEPH K. KARANJA.....PLAINTIFF

VERSUS

JAMES GACHERU MUGO.....1ST DEFENDANT

JOHN KARANJA KAHORA.....2ND DEFENDANT

JESSEE MAINA NDUATI.....3RD DEFENDANT

ISAAC K MBUGUA.....4TH DEFENDANT

LEONARD KIRUI.....5TH DEFENDANT

JOSHUA MURIITHI MUIGA.....6TH DEFENDANT

MUNENE JANE.....7TH DEFENDANT

NJUGU MUGO.....8TH DEFENDANT

HIRAM MACHARIA.....9TH DEFENDANT

PETER MUCHIRI NDERU.....10TH DEFENDANT

RULING

Application

1. The application before me is dated 20/8/2021. It has been brought under **Order 9 Rule 9, Order 12 Rule 7, Order 24 Rule 1 and 2 of the Civil Procedure Rules and Sections 1A, 1B, 3A of the Civil Procedure Act, Section 54 of the Law of Succession Act and the 5th Schedule Paragraph 14 and Article 159 (d) of the Constitution of Kenya**. It seeks the following orders:

- 1. That this honourable court does allow Messrs. John Mwariri Advocate C/O Kituo cha Sheria to come on record for the plaintiff/applicant in this matter.**
- 2. That this honourable court be pleased to set aside and vary the dismissal order of 6th February 2020 dismissing the plaintiff's case.**
- 3. That the honourable court be pleased to substitute the plaintiff, Joseph K. Karanja with his personal representative, Peter Karanja Kariuki;**
- 4. The honourable court be pleased to allow the amendment of the plaint to reflect the substitution;**
- 5. The cost of this application be costs in the cause.**

2. The application is supported by the grounds at the foot thereof and also by the affidavit of **Peter Karanja Kariuki** sworn on **20/8/2021**. In that affidavit, he deposes that **Joseph Kariuki Karanja** is his father, now deceased; that the title to the suit land is still in the deceased's name; that after his demise the family lodged **CM Succession Cause No E 97 of 2020- In The Estate Of Joseph Kariuki Karanja** and a grant of letters of administration was issued on **19/11/2020**; that the family then followed up with the deceased's erstwhile advocates for information regarding the instant suit but in vain leading them to seek help from Kituo Cha Sheria; that they then obtained the file record and the new advocate from Kituo filed an application for substitution, oblivious of the fact that the suit had been dismissed; that they later found that the suit had been dismissed and they also learned that the deceased's former advocate had not been served with any notice to show cause, which was instead served on Messrs Mugambi Nguthari & Co Advocates; that they verily believe that the mistakes of their erstwhile advocate should not be visited on them as they are keen to follow up on the case; that a setting aside the dismissal order, if granted, may enable all the parties to ventilate their respective cases, noting that the defendants do not have title to the suit land. It is stated that a year has not lapsed since the demise of the deponent's father and a substitution order and an amendment order may properly issue to serve the ends of justice. In his supplementary affidavit dated **25th November 2021** the deponent, attaching advocates' fees receipts, stated that his father was keen on prosecuting the case save for the fact that his advocates let him down. He states that since the defendants aver that they have constructed a permanent structure for a school, there is a substantive dispute to be resolved on whether the structure is unlawful or not in view of the fact that the plaintiff holds title to the land.

Response

3. The respondents who had filed appearance and defence did not file any response despite service of the application upon them.

Submissions

4. Upon perusal of the file, I have found that the applicant filed his submissions on **14/2/2022** while the respondents did not file any submissions.

Determination

5. The main issue that arises for determination in the instant motion is whether the court ought to set aside the dismissal order to pave the way for the hearing of the suit on its merits.

6. This is an application brought by an administrator of the estate of the deceased original plaintiff. He has narrated the travails that his family went through after the demise of his father in order to be able to make the instant application. The application is unopposed despite service upon the respondents.

7. After considering the contents of the application and the submissions I am persuaded that there are good reasons for setting aside the dismissal order. One is that no notice of intention to dismiss the suit was served upon the advocate said to be on record for the deceased, Messrs Mwangi Mukira & Co Advocates; instead the same was served upon Messrs Mugambi Nguthari & Co. Advocates. I have perused the copy of plaint in the record and found that there is a further conundrum as to whether it was indeed Messrs Mukira Mwangi & Co Advocates who acted for the deceased or Gulenywa Jonathan & Co Advocates who are expressly named in the plaint. It would appear that for some reason the Attorney General's Office included Messrs Mugambi Nguthari & Co Advocates in their documents deeming them active in these proceedings albeit erroneously so and the court, taking cue served the notice of intention to dismiss the suit on both the Attorney General and that firm. However, it would also appear that that firm declined service on the basis that they are not on record in this matter. Without more I find that the failure to serve the deceased's erstwhile advocates is a serious omission that warrants the setting aside of the dismissal order, for no one could then appear and make representations to the court as to why the suit should not be dismissed.

8. I therefore find that the application has merit and I therefore grant it in the following terms:

- a. Messrs John Mwariri Advocate, C/O Kituo Cha Sheria is allowed to come on record for the applicant in this matter;**
- b. The dismissal order issued by this court on 6th February 2020 dismissing the plaintiff's case is hereby set aside;**
- c. The plaintiff, JOSEPH KARIUKI KARANJA is hereby substituted with his personal representative PETER KARANJA KARIUKI;**
- d. The applicant shall cause the amendment of the plaint to reflect the substitution and the amended plaint shall be served on the respondents who have entered appearance or filed defence within 14 days of this order;**
- e. The costs of this application shall be costs in the cause.**

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF MARCH, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU