REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC NO.54 OF 2003

JANE KAVINGUKA KIJUSA...PLAINTIFF

VERSUS

AGGREY DUGAYA KIJUSA

SHATNAND CONSTRUCTION CO. LTD..............................DEFENDANTS

RULING

1. This is a ruling on an application filed here under a certificate of urgency on 5/10/2012. The application is brought under Sections 1A, 1B and 3A of Civil procedure Act (Cap 21) and order 50 Rule 6 of Civil Procedure rules, 2010 and all other enabling provisions of law. The applicant is **JANE KAVINGUHA** while the respondents are **AGGREY ALUGAYA KIJUSA and SHAJANARD CONSTRUCTION CO. LTD.**

2. The prayers sought at this stage are that the intended dismissal of the suit for want of prosecution be called off and the suit proceeds to hearing; that the plaintiff be granted leave to amend the plaint out of time and then file and serve it; that such amendment include, but not be confined, enjoining the Attorney General on behalf of District Land Registrar, Kisumu; that the Court be pleased to enlarge time for application to enjoin one **SHEILA KAGEHA** as legal representative of 1st defendant; and that costs be in the cause.

3. The grounds upon which the application is premised stipulate, interalia, that the 1st defendant passed on when the suit was pending; that the suit survives the 1st defendant and the time to make application to enjoin 1st defendants legal representative has ran out; that what the instant application is seeking can not be achieved without leave of court or enlargement of time; that the delay manifest in this suit is excusable as the plaintiff was struggling with issues concerning legal representation of 1st defendant; and that the plaintiff has been eager to have the suit heard on merit and will suffer if the suit is dismissed.

4. The application is accompanied by the supporting affidavit of the applicant which avers, interalia, that the applicant claims proprietary interest to land to parcel

> No. **KISUMU/MUNICIPALITY/BLOCK 4/126** currently registered in 2nd defendants name; that such registration was secured through fraud; that 1st defendant passed on when the suit was pending and the cause of action survived him; that **SHEILA KAGEHA** who is the administrator should take the place of 1st defendant; that delay in making the application was caused by uncertainty in legal representation as the plaintiffs former counsel was found unsuitable to represent her owing to possible conflict of interest; and that dismissal would hut her given that she has always wanted to proceed but legal technicalities were holding her back.

5. The court does not have the response of the 1st defendant or intended representative but there is a replying affidavit by the 2nd defendant/respondent. The 2nd respondent says interalia, that the case has been pending for 11 years; that 1st defendant died way back on 26/3/2004 but the applicant has never taken steps to prosecute it; that 2nd respondent bought the suit parcel of land without notice of applicant's interests and has extensively developed it thus enhancing its value; that the law should not come to the aid of the applicant who has been indolent for over 10 years; that the applicant lacks locus and the application itself is defective; and that the application is an abuse of the court process.

6. This application never went for hearing; submissions were filed instead. The applicant's submissions were filed on 29/10/2013. They are largely a re-statement of what the application, the grounds advanced in support of the application, and the applicant's supporting affidavit, contain. The applicant sought reliance on provisions of order 24 of Civil Procedure Rules, 2010, which in essence talks about revival of abated or dismissed suits.

7. The 2nd respondent's submissions were also filed on 29/10/2013. The submissions reiterate that the applicant's delay in prosecuting the suit is unjustifiable. The intended amendment was also opposed on grounds that no amended plaint is annexed to the application; amendments are not avenues for enjoining parties to the suits; and that the proper procedure for joining the A.G has not been followed or invoked.

8. The 2nd respondent is of the view that the intended claim against the AG is time- barred and the applicant is also deemed out of order to think that she is the one to revive an abated suit while the law envisages the legal representative to do so. Also averred is that the **SHEILA KAGEHA** has not been shown to be the administratrix of the 1st defendant's estate.

9. I have carefully read and considered the material laid before me. The suit herein was filed way back in year 2003. About an year later, the 1st defendant died. The 2nd respondent faults the applicant for not availing letters of administration and it is true that no such letters are annexed to the present application. But I have read the court records and I note that there is an earlier application where such letter was annexed. It would appear that such letters were obtained sometime in year 2005. That obviously must have been one legal hurdle to the plaintiff.

10. But another legal hurdle arose. The applicant's counsel on record then could not proceed with the matter for her. He was found unsuitable because of possible conflict of interest.

11. The notice that intended to have the applicant's case dismissed is dated 4/7/12 and required that cause be shown to Court's satisfaction as to why the suit should not be dismissed. It is not the 2nd Respondent therefore who initiated the process; it is the court itself. It would appear that to forestal possible dismissal, the applicant filed the present application. The 2nd Respondent then saw an opportunity to deal a death blow to the applicant's suit.

12. Technicalities of procedure are often the bane of substantive justice. That is why article 159(d) of the Constitution of Kenya, Sections 1A,1B, 3A and 63(e) of Civil Procedure Act (Cap 21) and Section 19(1) of Environment and Land Court Act, No.19 of 2011, all seem to de-emphasize strict adherence to such technicalities. That is the spirit I embrace in deciding this application.

13. I note that the Court had invited the applicant to show cause why the case should not be dismissed. The reasons given vide the application which is the subject of this ruling are enough. It is clear that the applicant had legal hurdles to surmount and no such hurdle was of her own making.

14. I also note that the 2nd respondent had waited patiently all along. Evidently, the 2nd Respondent had not become tired of waiting. It had not filed an application to dismiss the case for want of prosecution. When the court made its first move, the 2nd Respondent was still waiting. When the applicant's application came, the 2nd Respondent saw the opportunity to sort out the applicant with finality.

15. It is a draconian measure to deny a party his or her day in Court. It is more so when such party has been beset with problems beyond his or her control. That is precisely what the applicant in this case

seems to have faced. I have considered the law cited by the 2nd Respondent. The fact of the matter is that the court has a wide discretion to enlarge time and allow amendments. The circumstances of this case clearly favour such enlargement of time and amendment of pleadings.

16. The upshot is that I allow the application herein with costs in the cause.

A.K. KANIARU – JUDGE

29/5/2014

29/5/2014

A.K. Kaniaru – Judge

Diang'a – C/C

No party present

Interpretation: English/Kiswahili

COURT: Plaintiff has now come. She is marked present.

Otieno Njoga for Odeny for 2nd defendant

Musiega (absent) for plaintiff

COURT: Ruling on application filed on 5/10/2012 read and delivered in open **COURT.** Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

29/5/2014

AKK/vaa