



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 1535 OF 1989 (OS)

JOHN GITHERU KIARIE

JEREMIAH KIOI

JAMES F. NJENGA.....PLAINTIFFS

VERSUS

KAHIHU KINYANJUI.....DEFENDANT

RULING

The Plaintiffs filed an application dated 26/8/2013 seeking orders that, first, court be pleased to enlarge time within which the Moses Thiongo Kioi and Hannah Waitherero the personal representatives of the estate of Jeremiah Kioi Kanene and Helen Njenga and Anne Njenga the personal representatives of the estate of James Francis Njenga can apply for substitution in the place of the 2nd and 3rd Plaintiffs who are since deceased. Secondly, the said representatives be made parties to the suit in place of the deceased. Thirdly, that the amended originating summons be further amended as per the draft Further Amended Originating Summons annexed to the application. Lastly, costs of the application be in the cause. The application is premised on grounds that the 2nd and 3rd Plaintiffs are since deceased and their personal representatives are desirous of continuing and concluding the present matter.

The application is supported by two affidavits, one sworn by Moses Thiongo Kioi and the other by Anne Njenga both sworn on 26/8/2013. Moses Thiongo Kioi deposes that his father, the 2nd Plaintiff died on 25/2/2011 and subsequently that he and his mother petitioned the Chief Magistrate Kiambu Law Courts for letters of administration intestate which was granted on 16/7/2013. Anne Njenga deposes that her father, the 3rd Plaintiff, died on 2/11/2011 and that her and her mother petitioner the High Court of Nairobi to obtain letters of administration intestate which were issues on 1/10/2012. Both deponents annexed copies of the deceased's death certificates and Grant of Letters of Administration Intestate.

In the submissions filed on behalf of the Plaintiffs dated 13/3/2014 counsel for the Plaintiff submitted that the court has jurisdiction under Order 24 Rule 3(2) of the Civil Procedure Rules to extend time within which an application to substitute a deceased person can be filed, in the event that the same is brought one year after the demise of the deceased. Counsel submitted that Order 50 Rule 6 also donates powers to the court to extend time for doing any act even where such time, as prescribed by the rules, has lapsed. It is counsel's submission that the suit has been actively in progress with the 1st Plaintiff representing the

parties in the past two years during which time the 2nd and 3rd Plaintiffs passed on. Further that the application was brought within 2 months of obtaining letters of administration and therefore the Plaintiffs are not guilty of any delay. Counsel submits that there will be no prejudice occasioned to the Defendant where the court grants the prayers sought in the application.

The application is opposed by the Defendant who swore a Replying Affidavit on 28/10/2013. In his submissions dated 18/3/2014 it is the Defendant's contention that the Plaintiffs are vexatious and frivolous litigants in view of the numerous applications filed before court. In respect to this application, it is submitted for the Defendant that the same suffers from unexplained inordinate delay considering that the application has been filed 2 years after the demise of the said plaintiffs. It is urged for the Defendant that the application ought to fail with costs.

Having now considered the written submissions and the relevant laws, the Court makes the following findings;-

Order 24 of the Civil Procedure Rules provides that where a cause of action survives or continues after the death of either the Plaintiff or Defendant, their demise shall not cause the suit to abate. Rule 3(1) thereto provides an avenue for the Representatives of the deceased to be made party to the suit. Sub-rule (2) requires that such application be made within 1 year of the demise of the Party, else the suit shall abate. However, the court discretion under said rule to extend time, for good reason, in the event the application is made after the lapse of the prescribed time. The Defendant contends that there has been inordinate delay in filing the application in view of the demise of the 2nd and 3rd Plaintiffs 2011. Further that there has been no reason advanced to explain the delay. Counsel for the Applicants submits that, this application has been brought at a relatively short time, 2 months, after the Applicants obtained a grant of letters of administration intestate. Further that the 1st Plaintiff has been prosecuting the claim and thus the file has not been lying idle.

Letters of administration vests upon the Representatives of a deceased the authority to act on behalf the estate. Section 45 of the Law of Succession Act expressly provides that unless authorized by the Act or any written law or by a grant of the representation under the Act, no person shall for any purpose interfere with any free property of the deceased. I have perused the Grant of Letters of Administration Intestate for estates of the 2nd and 3rd Plaintiffs annexed to the Applicant's affidavits. The same was issued on 16/7/2013 for the 2nd Plaintiff and 1/10/2012 for the 3rd Plaintiff whereas this application is dated 26/8/2013. The Applicants have not advanced any reason as to why the application was filed 2 years after the demise of the deceased persons. I am therefore left to speculate that the delay could be attributed to the time spent in obtaining the said grants. Consequently, I am not prepared to fault the Applicants as they were in observing the law by obtaining authority to act on behalf of the estate of the deceased.

Having said so, I would like to point out the provisions of Section 54 of the Succession Act. The provision allows the court to issue a grant of representation but limited to a particular form described in the 5th Schedule of the Act. Section 14 of the 5th Schedule - Grant for Special Purposes, provides for administration limited to suit. This provision allows the court to grant representation to a person to be made party to a pending suit for the purposes of representing the deceased in the said suit until the final decree is made. This provision, in my view, envisages a situation where the representation is required as a matter of urgency and for a limited purpose but without going through the rigorous procedures on Grants outlined under Section 67 of the Act. The special grant, being limited in nature, is obtained within a short period of time so as not to occasion any delay to a pending suit. This, in my view, is what the Applicants needed to have obtained for the purposes of being made party the suit and subsequently proceeded to make an application for a full grant of letters of administration.

Nevertheless, the application for substitution is now before court. I have already stated earlier that the Applicants will not be faulted for obtaining full grants. The issue is whether there is any prejudice occasioned to Defendants. It is noteworthy that despite the demise of the 2 Plaintiffs, the file has not been lying idle at the registry. It is also important to note that the dead cannot sue or be sued, and thus to disallow the application for substitution will be to deny the representatives the right to protect the

interests of the deceased.

The upshot is that the instant application is allowed as prayed entirely. The Applicants shall file and serve the Further Amended Originating Summons within 7 days from the date of this ruling. The Defendant also has leave to respond thereto, if need be. Costs of the application be in the cause.

Dated, signed and delivered this **25th** day of **July 2014**.

L.N. GACHERU

JUDGE

In the Presence of:-

Mrs. Githanga holding brief Mr.Muturi for the Plaintiffs

None attendance for the Defendant

Kamau: Court Clerk

L.N GACHERU

JUDGE