



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 427 OF 1974

WAITHIRA GICHINO.....PLAINTIFF

-VERSUS-

KAMAU KABURU.....1ST DEFENDANT

NG'ANG'A KABURU.....2ND DEFENDANT

R U L I N G

1. Before me are two applications for determination as follows. The first application is the Defendants' Notice of Motion dated **22nd October 2013** and filed in Court on **19th February 2014** (herein the "Defendants' Application"). The second is the Plaintiff's Notice of Motion dated **7th March 2014** (herein "the Plaintiff's application").
2. The Defendants' application is taken out under **Order 24 rule 2** and **rule 4(3)** of the **Civil Procedure Rules** as well as **sections 1B** and **3A** of the Civil Procedure Act. It is seeking for orders that the stay of execution granted on **8th May 2012** be vacated and the defendants to be at liberty to execute the ruling delivered on **4th November 2011**.
3. The application is based on the grounds stated on the face of the application and is further supported by the affidavit of **DAVID NJERU NYAGA** sworn on **22nd October 2013**.
4. It is the Defendants' case that since **8th May 2012** when the stay of execution was granted the Plaintiff has never taken steps to lodge the intended appeal. It is stated in the supporting affidavit that the Plaintiff died on **14th September 2012** and to date she has not been substituted. Therefore, it is the Defendants' position that the orders of stay have since abated and that they are at liberty to execute the ruling delivered on **4th November 2011**. It is also the Defendants' case that this is a very old case and it's only fair that the same be concluded.
5. The Plaintiff's application is expressed to be brought under **Order 24 Rule 3 (2)** and **Rule 4 (1), Order 50 Rule 6** of the **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act**. It is seeking for one main order that the Court be pleased to order that **FRANCIS WAMBIRU KIBIRO** be added as the Plaintiff in place of **WAITHIRA GICHINO** (deceased) in this suit.
6. The application is based on the grounds stated in the application and is supported by the affidavit of **FRANCIS WAMBIRU KIBIRO** sworn on **7th March 2014**.
7. The deponent is the intended Plaintiff in this matter. He avers that he has been granted letters of administration therefore competent to swear the affidavit. He further avers that **Wambui Gachino**, the Plaintiff in this matter, died intestate on **14th September, 2012**.
8. It is the deponent's assertion that he could not apply for letters of administration in time as the Local Chief had adamantly refused to issue the family with the necessary letter for filing in Court. The deponent also states that they had financial constraints in filing the said letters of administration, as their deceased mother was the sole bread winner of the family.
9. The deceased had filed a Notice of Appeal against a ruling delivered by this Honourable Court on **4th November 2011**. It is the intended plaintiff's position that he will be greatly prejudiced if this suit proceeds for hearing without the deceased's estate being represented. For this reason, the deponent urges this Court to allow the application to substitute the Plaintiff.

10. The Defendants' application is opposed vide the Replying affidavit of the intended plaintiff, FRANCIS WAMBIRU KIBIRO, sworn on 5th May 2014. In the said affidavit, the deponent essentially reiterates the Application dated 7th May 2014 together with the contents of his supporting affidavit which I have already replicated in this ruling.

11. The Plaintiff has also filed a Grounds of Opposition dated 28th April 2014. The Plaintiff has opposed the Defendants' Application on grounds that they have not been supplied with the copies of the proceedings and Judgment by the Court to enable them to file the appeal. It is also stated for the Plaintiff that they are ready and willing to prosecute the appeal which will raise serious and triable legal issues as a land matter. It is the Plaintiff's case that vacating the order of stay of execution issued by the Court will render the intended appeal nugatory.

12. The Plaintiff's application is also opposed. The Defendants have filed a replying affidavit sworn by the 1st Defendant which is undated. The same was filed on 30th April 2014. It is averred by the 1st Defendant that the Plaintiff's application is another move to delay the conclusion of this case which is a very old case. According to the deponent the suit hereon has abated and therefore this Court cannot grant the orders sought by the intended Plaintiff in his application.

13. It is the 1st Defendant's position that the intended Plaintiff has not demonstrated sufficient cause as to why he was prevented from continuing with the suit. The 1st Defendant states that the intended Plaintiff did not require to petition for the letters of administration since a Petition for Ad-colligenda would have sufficed herein.

14. It is the Defendants' case that The Plaintiff has had the habit of taking them round in circles with the aim of delaying the matter and preventing them from enjoying the fruits of their judgment. It is also the Defendants' case that the Plaintiff having lost the right of appeal, the Plaintiff's current application would serve no purpose. The Defendants therefore urge this Court to dismiss the application with costs.

15. The application was prosecuted by way of written submissions. Counsel for the Plaintiff filed their submissions on 29th May 2014 while the Defendants filed their reply on 3rd June 2014.

ANALYSIS

16. I have considered the two applications, the affidavits on record as well as the written submissions by Counsel. Having done so, I take the following view of the matter.

17. The main issues for determination are whether the intended Plaintiff's application for substitution should be allowed and whether the Defendants are entitled to the orders of vacating the stay of execution granted by this Court on 8th May 2012.

18. With regard to the first issue it has been established that the Plaintiff died on 14th September 2012. It is not in dispute that the intended Plaintiff was issued with the Letters of Administration on 12th September 2013. Now the intended Plaintiff has filed their application dated 7th March 2014 seeking to substitute the Plaintiff under Order 24 Rule 3 of the Civil Procedure Rules. I have looked at the said Order which provides that an application for substitution where the Plaintiff is deceased should be made within one year, failure to which the suit shall abate. The same order also provides that the Court may for good reason extend time. therefore whether or not to allow the intended Plaintiff herein to substitute the deceased calls for the exercise of discretion of this Court.

19. It is evident that the application herein was filed out of time. The intended Plaintiff's reasons for filing this application at the time they did is that the local chief had adamantly refused to issue the dependents of the deceased with the letter required from him to file the letters of administration. That may be the case. However the letters of administration were issued on 12th September 2013 which is within one year of the death of the Plaintiff. I do not see any reason why the intended Plaintiff did not make the application for substitution immediately or at least within reasonable time.

20. It is also the Plaintiff's position that they had faced financial constraints in filing the said letters of Administration, paying the fees for the application and Advocate's costs for the case hence the delay. There is no evidence of the financial constraints and I am in doubt as to whether the Advocate's costs should be considered before a matter is complete. I have perused the Court records and noted that the Plaintiff's application cost Kshs. 880/= to file. I am not persuaded by the reasons advanced by the intended Plaintiff in filing the current application late. The application was filed on 12th March 2014. This is exactly six (6) months from the date the letters of administration was issued. The delay herein has not been sufficiently explained and therefore the same is unreasonable.

21. In any case, I am alive to the fact that the intended Plaintiff had the option of obtaining grant of letters of administration ad litem for purposes of continuing with the suit but they did not. That would have taken a shorter time compared to obtaining the letters of administration. I am not sure whether Counsel informed the Intended Plaintiff of the said option.

22. I have perused the authorities referred to by the Plaintiff in their submissions and I must say the same are distinguishable be distinguished. Each case should be determined on its own circumstances. In the said cases the common thread seems to be that the Advocates failed in representing their clients and the Court did not want to penalize the Applicants for the errors made by their Advocates. Therefore in the said cases the Courts had sufficient reasons to exercise discretion in favour of the applicants. In the current case the intended Plaintiff is represented by an Advocate, the same one who has been appearing in this matter, I believe. There is nothing to show that the Advocate acted in error or has failed to represent the Plaintiff appropriately.

23. In light of the foregoing, I am not inclined to exercise my discretion in favour of the intended Plaintiff especially considering that this matter is a very old one.

24. As regards the second issue, it is the Defendants' case that the stay of execution granted on 8th May 2012 should be vacated and they be at liberty to execute the Ruling delivered on 4th November 2011. I will not belabour on this issue having dismissed the Plaintiff's application.

25. The Plaintiff passed away on 14th September 2012, about four months after the said orders were given. That aside, the current application was filed on 12th March 2014. This is almost two years since the Plaintiff passed on. The reasons for the said delay, which have not persuaded this court, have already been stated above.

26. It is also the Plaintiff's case that they were unable to proceed with the appeal as they had not been supplied with the copies of proceedings and Judgment by the Court. The procedure as I know it is that the party seeking to appeal should apply for proceedings from the Court. There is no evidence on record that the Plaintiff applied for proceedings and the same were not forthcoming.

27. This Court has the responsibility under **Section 1A** of the Civil Procedure Act to facilitate the just, expeditious, proportionate and affordable resolution of disputes. To entertain unreasonable delays in prosecuting disputes will not be in furtherance of the overriding objective envisaged under the said Section. Litigation must come to an end someday, and for this case, I think that day has arrived.

28. In the upshot, I make the following orders:-

a. The Defendants' Notice of Motion dated 22nd October 2013 and filed in Court on 19th February 2014 is hereby allowed with costs.

b. The Plaintiff's Notice of Motion dated 7th March 2014 and filed in Court on 12th March 2014 is hereby dismissed with no orders as to costs.

DATED, READ AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Mureithi holding brief for Kingori Plaintiff

Akelo holding brief for Nyagah for 1st Defendants

Teresia – Court Clerk