



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 1090 OF 2003

REPUBLIC.....APPLICANT

VERSUS

MAKUYU LAND DISPUTES TRIBUNAL COMMITTEE.....RESPONDENT

AND

RUEL W. WAHINYA.....INTERESTED PARTY

EX PARTE

JOSEPH KIMANI PETER

RULING

This ruling pertains to the Notice of Motion dated 5th February, 2014 and filed on 18th March, 2014. The application is filed by the firm of J. K. Ngaruiya Advocates and is purported to be filed on behalf of the Interested Party, Ruel W. Wahinya.

I did not have the benefit of hearing the ex-parte Applicant, Joseph Kimani Peter and the Respondent, Makuyu Land Disputes Tribunal as they did not file any reply to the application.

The application seeks to have the matter dismissed, with costs, for want of prosecution. The Applicant lists the grounds in support of the application as:

- “a) The suit against the interested party has abated.**
- b) That no application for substitution of the deceased party who is deceased was made within the stipulated period.**
- c) That the plaintiff has never taken any step to set the matter down for hearing.**
- d) That the matter was last in court on 29th September 2004.”**

The application is supported by the affidavit of John Kirori Ngaruiya, under which it is deposed *inter alia*:

- “1. That I am an Advocate of the High Court of Kenya practicing in the name and style of J.K. Ngaruiya and Co. Advocates and in conduct of this court on behalf of the**

interested party hence competent to swear this affidavit.

2. That the interested party herein passed away on 6th August 2004 and letters of administration granted on 20th March 2006. (Annexed herewith and marked “JKN1”, “JKN2” are a copy of the death certificate and letters of administration.)”

A glaring issue with respect to audience has arisen demanding my earliest attention. In one paragraph, Mr. Ngaruiya informs the Court that he is acting for the Interested Party. In the next, he states that his client passed away in 2004. The question is whether a deceased client can instruct an advocate. Nowhere in the affidavit is it deposed that the said advocate has been instructed by Faith Wambui Wahinya who, according to the letters of administration, is the administratrix of the estate of the deceased Interested Party.

The Law of Succession Act, Cap. 160 provides at Section 82 that:

“82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;**
- b.”**

That means that only a legal representative of the estate of a deceased can enforce a cause of action on behalf of the estate of a deceased person. The responsibility to conduct the matter devolved to the personal representative of the deceased when letters of administration were issued. Only Faith Wambui Wahinya could have made a request for the dismissal of the ex-parte Applicant’s case. She could only do this after applying to come on board in the place of the deceased.

In **LEONARD MUTUA MUTEVU v BENSON KATELA OLE KANTAI & ANOTHER [2014] eKLR**, Gikonyo, J observed that a personal representative of a deceased person ought to be made a party to a case touching on the estate of the deceased.

This position was also reiterated by Majanja, J in **Misc. Civil Application No. 103B of 2013 REPUBLIC v NAIROBI CITY COUNCIL** when he stated:

“The capacity to agitate any suit on behalf of the estate of the deceased inheres in the administrators duly appointed by the court.”

Musyoka, J enumerated the powers of an administrator in **RE THE ESTATE OF THIONG’O NGINYAYU MUTHIORA (DECEASED)**, Nairobi High Court Succession Cause Number 2131 of 2011 as follows:

“..... He is the person to be sued by third parties over the estate or to sue such third parties to protect the estate. He is the person with power to enter into contracts on behalf of the estate and to enforce contracts that exist between the estate and third parties. He has the power to sell assets, to convert them into money, to invest estate funds, to compromise suits on behalf of the estate, among others. He has these powers, given to him by Section 79 and 82 of the Law of Succession Act, and by various provisions of the Trustee Act, Cap 167 Laws of Kenya.”

It is therefore evident that the application before this Court has no owner. No party can step forward and tell the Court: “This is my application.” The personal representative of the estate of the deceased Interested Party has not formally joined this matter. An advocate cannot purport to step into the shoes of a litigant and apply for orders against the opposite party. The advocate is not a party to the matter but simply an agent of the client who is the party to the case. Where an advocate purports to act for a deceased client without substitution having been made, he becomes an agent without instructions.

The only conclusion is that the Notice of Motion dated 5th February, 2014 is rudderless. The application fails and the same is dismissed with no orders as to costs.

I note that the matter has remained unprosecuted for too long and I therefore direct the Deputy Registrar to issue notice to the ex-parte Applicant, on a date to be fixed by the Registry, to show cause why the case should not be dismissed for want of prosecution. The dismissal notice should also be served upon the Respondent and the advocate for the Interested Party. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 24th day of July, 2014

W. KORIR,

JUDGE OF THE HIGH COURT