



Waruburu (Suing as the administrator ad Litem of the Estate of Francis Wabururu Njau Deceased) v Kagia & 2 others (Environment & Land Case 750A of 2017) [2022] KEELC 25 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KEELC 25 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 750A OF 2017**

**JG KEMEL, J
APRIL 28, 2022**

BETWEEN

**JAMES NJAU WARUBURU APPLICANT
SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF FRANCIS
WABURURU NJAU DECEASED**

AND

**FLORENCE WAMBUA KAGIA 1ST RESPONDENT
MUIGAI PHARES THUMBI 2ND RESPONDENT
LAND REGISTRAR 3RD RESPONDENT**

RULING

1. The Plaintiff/Applicant filed the instant Notice of Motion dated 20th May 2021 under sections 3A and 6 of the [Civil Procedure Act](#); Order 8 Rule 3, 4, 5 & 7, Order 51 Rule 1 *Civil Procedure Rules* seeking orders THAT;
 - a. This Honorable Court be pleased to reinstate the suit herein for hearing.
 - b. The Plaintiff be allowed to amend his Plaint dated 26th September 2017 and filed on even date, as per the draft annexed hereto.
 - c. The Amended Plaint annexed hereto be deemed as having been duly filed upon payment of requisite fees.
 - d. The Defendants be at liberty to amend their Defences within 14 days after service, if they so wish.



- e. The Applicant be at liberty to file a Reply to the Defence(s) within 7 days of service of the said Defence(s).
 - f. The costs of this application be in the cause.
2. The application is based on the grounds thereto and the Supporting Affidavit of the Plaintiff, James Njau Wabururu of even date. He deponed that vide this Court's Ruling delivered on 27/9/2017, the instant suit was stayed pending the hearing and determination of Milimani ELC No. 751 of 2003; Bernard Kagia Njuguna vs. Francis Wabururu on account of sub judice. That on November 11, 2020, the Milimani ELC Court declared the aforesaid ELC No. 751 of 2003 as abated and accordingly closed the file. That therefore ELC No. 751 of 2003 having been closed in finality, this suit is fit for reinstatement.
 3. The Plaintiff further averred that he has been able to obtain certified copies of pleadings, proceedings and decisions in Nairobi HCCA No. 49 of 1982; Mbutia Njoroge vs. Benard Kagia and is in the process of obtaining copies of Nbi Court of Appeal C.A No. 70 of 1984. That the said matters touched on the distribution of Karai/Karai/340 from where Karai/Karai/1373, the suit property, was subdivided from. That those files' contents are crucial in shedding light the proprietary history of the suit property and thus amend the plaint to assist the court reach a fair determination. The Plaintiff urged the Court to allow the application as the proposed amendments would not occasion any prejudice to the Defendants. Copies of this Court's Ruling, Milimani ELC Court Order dated 14/10/2020, NBI HCCA No. 49 of 1982 proceedings and the draft amended plaint were annexed as JN1 – JN5.
 4. Opposing the application, the 1st Defendant, Florence Wambui Kagia swore a Replying Affidavit dated 29/11/2021. She stated that there was a similar suit filed by her father, Bernard Kagia Njuguna against the Plaintiff's father, Francis Wabururu and the matters mentioned in the instant Application were among many other court suits all touching on the same subject matter. She impugned the application as raising issues that are sub judice and that the decree issued in Nbi ELC No. 715 of 2003 ordered the eviction of the plaintiff from the suit premises. Further that she has been in peaceful occupation of the suit premises; the High Court decision granting her father, Bernard Kagia Njuguna, letters of administration has never been challenged or set aside and that all matters filed since 1975 have been settled through various court forums and the plaintiff should not be allowed to re-open the same through back door. Terming the application vexatious, an afterthought and abuse of court process, the 1st Defendant urged the Court to dismiss the Application with costs.
 5. Equally, the 2nd Defendant Muigai Phares Thumbi in his replying affidavit dated the 1/12/2021 and stated that the trial court in Kikuyu Principal Magistrate's Court Criminal Case No. 1034 of 2017 ordered him to transfer L.R Karai/Karai/1373 back to the 1st defendant subject to her refunding the entire deposit of Kshs. 4.2M to the 2nd defendant. That they duly complied with the said and therefore he is wrongly sued in the instant suit. Copies of the Court order and land transfer documents were annexed as MPT1 & MPT2. He urged the Court to dismiss the application with costs.
 6. Despite service, the 3rd Defendant did not file any response.
 7. In reply to the replying affidavits aforesaid, the Plaintiff filed a further Affidavit dated 14/12/2021. He denied that Milimani ELC Case No. 751 of 2003 was dismissed in the 1st Defendant's favour and maintained that it abated as shown by JN2. He refuted the existence of Court of Appeal Application in Civil Application NAI. 3/1985 and NAI. 59 of 1984 for want of proof and averred that he was a stranger to them. He also denied the alleged ELC No 715 OF 2003 that ordered



his eviction. That the 2nd defendant is a necessary party having been once a registered proprietor of the suit premises and in any event if his plea is merited, he can formally move the Court.

8. Directions were taken to canvass the Application by way of written submissions.
9. On behalf of the Plaintiff, the firm of J.M Waiganjo & Co. Advocates filed submissions dated 8/2/2022 and drew three issues for determination; whether the suit is fit for reinstatement; whether an order for amendment of the plaint can be allowed and lastly who bears the costs of the Application.
10. On the first issue, it was submitted that the suit is ripe for reinstatement having been stayed awaiting the outcome of Milimani ELC No. 751 of 2003 which has since abated.
11. Secondly, that it is in the interests of justice that the prayer for amendment be allowed to inform the Court of accurate facts in relation to the dispute at hand. That Order 8 Rule 3 of the Civil Procedure Rules empowers the Court to allow amendment of pleadings at any stage of the proceedings. Reliance was also placed on the Court of Appeal decision in *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR in support of the amendments.
12. Lastly, that it is trite that costs follow the event as elaborated by the SC in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR.
13. The 1st Defendant through Maingi Kamau & Co. Advocates filed submissions dated 26/1/2022. Reiterating the rival parties' cases, the 1st Defendant drew a single issue for determination; whether the instant Application is res judicata. That this Application is res judicata as stipulated under Section 7 CPA and underscored by the English case of *Henderson vs Henderson* (1843-60) ALL E.R 378 and ought to be dismissed with costs.
14. The 2nd and 3rd Defendants did not file any submissions.

Analysis and Determination

15. The singular issue for determination is whether the instant application is merited.
16. In so doing, I will first address the issue of reinstatement of the suit. The Court record shows that on 2/11/2018, this Court delivered its Ruling that stayed the hearing of this suit pending the determination of Milimani ELC 751 of 2003. The next activity was filing of the instant Application on 12/8/2021. According to the Plaintiff, the Court in Milimani ELC Case No. 751 of 2003 declared the suit as abated on 11/11/2020 – see annexure JN-2. That is a period of nine months before filing this Application. The 1st Defendant at para. 6 of his RA averred that the Milimani suit is still pending. He also termed the Application as res judicata.
17. I understand reinstatement of suit to presuppose a suit that was initially before Court and later dismissed by the court for various reasons. For example failure to prosecute the suit, plaintiff's non-attendance on the hearing day, failure to substitute a deceased party etc. None of the said scenarios have been demonstrated herein. There is evidence that the suit was simply stayed pending the outcome of the Milimani ELC Case No. 751 of 2003. The abatement order according to JN-2, was made by Mr. Justice Okong'o in the presence of the plaintiff's counsel therein but in the absence of the defendant's counsel on 14/10/2020.
18. The Civil Procedure Rules does not envisage reinstatement of a suit in the present context. Order 12 Rule 6 [Civil Procedure Rules](#) provides;
6. Effect of dismissal [Order 12, rule 6.]



- (1) Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit or may apply to the court to reinstate the suit.
 - (2) When a suit has been dismissed under rule 3 no fresh suit may be brought in respect of the same cause of action.
19. The Court's power to reinstate a suit is discretionary which partly springs from Section 3A of the Civil Procedure Act that;
- “3A. Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
20. The Court cannot exercise its powers in vain. There is no suit herein capable of reinstatement as prayed and therefore that prayer fails. The instant suit is in existence and this prayer is not necessary.
21. The other prayer was for amendment of the plaint. A draft amended plaint was annexed as JN-5. It is trite that under Order 8 of the Civil Procedure Rules, amendments of pleadings can be done at any time before Judgment is delivered. The Plaintiff herein is suing in his capacity as the Administrator of the estate of Francis Wabururu Njau who was the Defendant in Milimani ELC Case No. 751 of 2003. A glean on the Ruling of this Court delivered on 2/11/2018 specifically at para. 2 of page 10, the Court noted that the issues raised by the plaintiff herein could very well be canvassed in Milimani case.
22. Section 100 of the Civil Procedure Act gives the Court inherent powers to amend pleadings at any time in the proceedings in a suit as long as such amendments are necessary and are aimed on determining the real issue or question raised in

the proceedings.

23. Order 8 Rule 3 *Civil Procedure Rules* gives the Court Powers at any stage of the proceedings on such terms as to costs or otherwise as may be just to allow any party to amend his pleadings. Under Order 8 Rule 5, the Court on its own volition or on application of a party may Order an amendment for the purpose of determining the real question in controversy between the parties or of correcting any defect or error in any proceedings. The above provisions show that the amendment of pleadings is allowed liberally so as not to shut out a party and also so as to afford the Court the opportunity to determine the real issues in the controversy to meet the ends of justice.
24. Given that the ELC Milimani suit has abated, I see no reason why the Plaintiff cannot amend his Plaint. To level the playing field, I shall allow the Defendants corresponding leave to so amend their pleadings if need be.
25. In the upshot the application is merited. It is allowed in terms of prayers 2 – 5.
26. I make no order as to costs.
27. It is so ordered.

DELIVERED, SIGNED & DATED AT THIKA THIS 28TH DAY OF APRIL 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;



Mburu for Plaintiff/Applicant

Kamau for 1st Respondent

Ms Fatma for 3rd Respondent

Court Assistant: Phyllis

