



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 5530 of 1990

NJONJO NJUBI.....PLAINTIFF

VERSUS

NJUBI KARUNGARI.....DEFENDANT

RULING

1. These are the applicant's separate notices of motion dated 26th April 2012 and 12th July 2012. The former primarily craves leave to substitute the applicant Mary Wanjiru Njonjo as plaintiff in place of Njonjo Njubi, now deceased. It also seeks to amend the originating summons and to enjoin Samuel Ndungu Kinge as a second defendant in the suit. The latter notice of motion, on the other hand, prays for an order to revive the abated suit. On 10th October 2012, I directed that both motions be heard together.
2. The motions are contested. There are two replying affidavits by Njumbi Karungari sworn on 18th June 2012 and 29th August 2012 opposing the two motions respectively. Both parties have also filed written submissions. Because of the nature of the suit, counsels for both parties addressed me at length on 21st November 2012 on the matter.
3. I have considered the pleadings, depositions and the submissions by the parties. I am of the following considered opinion. It is common ground that the plaintiff died on 1st July 2001. The death certificate is annexed marked "MWN 3" to the original motion. It is not also disputed that the applicant is the widow of the deceased. Doubt is removed by the attached certificate of marriage. I have also seen a grant *ad colligenda bona* to the estate issued by the High Court to the applicant on 15th June 2011.
4. The application for substitution dated 26th April 2012 has been made with laches. It was presented nearly 10 years after the death of the plaintiff. The suit had thus abated under the old order 24 of the repealed Civil Procedure Rules. That order is *pari materia* with the present order 25 of the Civil Procedure Rules 2010. It is thus instructive that the applicant has prayed for an order to enlarge the time within which to make that application. I agree with the defendant that the applicant knew of this suit but delayed in bringing suitable proceedings. I have for instance seen the ruling made on 29th March 2012 in High Court case ELC 341 of 2011 Mary Wanjiru Njonjo suing as representative of the estate of John Njonjo Njubi Vs Njubi Njonjo and another. She was there seeking an injunction against the defendant and Simon Ndungu Kinge, the person she now seeks to enjoin into this suit. It related to properties owned by the deceased. So, the applicant, instead of pursuing revival of the present suit or her substitution as a party was pursuing other proceedings. I have also noted that the court had directed that an application for substitution be made within 30 days. Whereas the first application was made in good time, the application dated 12th July 2012 to revive the suit fell outside the prescribed time.

5. The motion dated 26th April 2012 was also on a quicksand as the suit had abated and there was no prayer for its revival. Can the latter motion dated 12th July 2012 seeking to revive the suit cure that defect? In the supporting affidavit to the latest motion, the applicant depones at paragraph 6 that failure to seek revival of the suit was an inadvertent mistake by her counsel. She says she is a widow with three children and two grand daughters who rely entirely on the land. She claims that her and her late husband occupied the land for over 34 years. It was their matrimonial home.

6. From a legal standpoint, the latter application is fraught with serious procedural difficulties. The former application dated 26th April 2012 would be rendered impotent unless considered with the latter motion. It has been stated often that procedural rules are handmaidens and not mistresses of justice. It is not lost on me that this suit revolves around an interest in land. The applicant claims to have been in possession for over 3 decades. There is then a sense in which the court should encourage a fair determination of the suit on the merits. See Issa Masudi Mwabuma Vs Alice Kavenya Mutunga and others Court of Appeal, Mombasa, Civil Appeal 287 of 2006 [2012] e KLR, Kenya Anti-corruption Commission Vs Major General Gichuru and another Nairobi, High Court ELC case 253 of 2007 [2012] e KLR.

7. This court is now enjoined to do substantial justice to the parties: it must disregard technical procedure and aim at the settling the root of the dispute. That is the spirit and letter of article 159 of the constitution as read together with sections 1A and 1B of the Civil Procedure Act. This overriding principle is a guiding beacon for the court:

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing”.

Harit Sheth Advocate Vs Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] e KLR. See also Miraflowers Apartments Limited Vs Caleb Akwera and another Nairobi, High Court ELC case 633 of 2011 [2012] e KLR.

8. So much so that unless the defect in the two motions is so fundamental, or there is no alternative cure, I should not sustain the defendant’s protestations. I do not see the prejudice to the defendant if the matter is heard on merits. The defendant can also be compensated by costs. And I am prepared to do so. I am guided there by the Court of Appeal in Kenya Commercial Finance Company Limited Vs Richard Akwesera Onditi, Nairobi, Civil Application No Nai 329 of 2009 (unreported). I am thus inclined to overlook the delay in presenting the two motions to court. In the interests of justice and considering that this is a land matter, I would extend the time within which the application for revival of suit and substitution of the parties should have been made.

9. It is alleged in the depositions of the applicant that the defendant has disinherited the beneficiaries of the estate of the deceased of their share of the suit land and subdivided it and disposed off part of it. If the suit is not revived, those matters will be swept under the carpet. The subdivisions known as LR Kabete/Lower Kabete/2778 and 2850 are alleged to have been sold to Simon Ndungu Kinge. That is the person the applicant seeks to enjoin into the suit. An injunction has already been granted by another court in the case I mentioned earlier ELC 341 of 2011 involving the same parties and properties. As a result of the alleged subdivisions and sale, the applicant craves leave to amend the originating summons to reflect the current status of the suit land.

10. Order 1 rules 1 and 10 confer power on the court, either *suo moto* or an application by a party, to enjoin new parties to the suit. The test laid is whether the joinder is necessary to effectually and completely adjudicate the dispute. See Kingori Vs Chege and 3 others [2002] KLR 243. I find that Simon Ndungu Kinge is a necessary party for effectual and complete adjudication of this suit. It will save costs, time and avoid multiplicity of suits. He may be, as urged by the defendant, an innocent purchaser for value without notice. It will be for the trial court to determine. The key consideration now is that the applicant may be looking up to him for redress.

11. For all the above reasons, I find that the applicant's motions have merit. I order as follows:

- a) **THAT** High Court Civil suit No 5530 of 1990 (O.S) Njonjo Njubi Vs Njubi Karungari be and is hereby revived and reinstated for hearing.
- b) **THAT** time be and is hereby extended within which applications to revive the suit and for substitution of Mary Wanjiru Njonjo as plaintiff are to be made to the extent that the motions dated 26th April 2012 and 12th July 2012 are both deemed to have been filed within time.
- c) **THAT** Mary Wanjiru Njonjo be and is hereby substituted as plaintiff in the place of John Njonjo Njubi, deceased.
- d) **THAT** Samuel Ndungu Kinge is enjoined into this suit as a necessary party and is to be described as the 2nd defendant.
- e) **THAT** the applicant Mary Wanjiru Njonjo is granted leave to amend the originating summons in this suit and to serve the defendants within 14 days. The defendants shall enter appearance and reply as the case may be within the prescribed time.
- f) The present defendant shall have costs of both notices of motion to be paid by the plaintiff.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 22nd day of January 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mrs. Muigai for the Plaintiff

Mr. Kyalo for Mr. Njau for the Defendant