



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 2269 of 1997

KITHAKA NTHIGA

NJERU MUTI

NGARI CHINGANO.....PLAINTIFFS

-VERSUS-

NYAGA MATUMBIDEFENDANT

RULING

There are two applications before this court for determination. The first application dated 11th August 2011 is brought by the 2nd Plaintiff under sections 80 and 3A of the Civil Procedure Act and Order 45 Rules 1(1), (2) and (3) of the Civil Procedure Act, and is seeking the following substantive orders:

1. That the orders of Honourable Justice Mugo made on 16th November 2005, dismissing HCCC No. 2269 of 1997 (the instant case) for non-attendance by the Plaintiff and the orders of Honourable Justice Mwera, (as he then was) made on 6th June 2011, reverting the position of the suit to the status it was as at 16th November 2005 be reviewed, varied and/or set aside.
2. That this Honourable Court do reinstate this suit and fix it for full hearing so that the matters herein may be determined on their merit.

The application is supported by an affidavit sworn by the 2nd Plaintiff on 11th August 2011.

The second application for consideration is a Notice of Motion dated 27th September 2011 by two Applicants, namely Patrick Mugo Kithaka and Boniface Njeru Ngari, who are seeking the following orders:-

1. That the Court be pleased to extend or enlarge time to allow the making of the application out of time.
2. That Mr. Patrick Mugo Kithaka substitutes Mr. Kithaka Nthiga, now deceased as the 1st Plaintiff herein as his legal representative.
3. That Mr. Boniface Njeru Ngari substitutes Mr. Ngari Chingano, now deceased as the 3rd Plaintiff in this suit as his legal representative.

The application is supported by the affidavit sworn by Patrick Mugo Kithaka on 27th September 2011.

The orders sought to be reviewed in the first application by the 2nd Plaintiff were given by Mugo J. on 16th November 2005 where the instant suit was dismissed for want of attendance during the hearing date. The orders by Mwera J. (as he then was) of 6th June 2011 were issued after an *inter partes* hearing of an application by the 2nd Plaintiff dated 9th February 2011 seeking to set aside the orders of Mugo J. The application was dismissed by Mwera J. (as he then was) for reasons that the 2nd Plaintiff's Advocate was not properly on record, and the Judge directed that the state of the suit revert to the position it was on 16th November 2005 when dismissal orders were given.

The 2nd Plaintiff attributes the dismissal of the suit to his erstwhile advocate, Mr. Kiraithe Wandugi, against whom he took out disciplinary proceedings with the Advocates Complaints Commission in Disciplinary Cause No. 100 of 2008. The 2nd Plaintiff stated that he resided at Ishiara some 250 kilometers from Nairobi, and relied totally on communication from the above mentioned Advocates to know the progress of the case. Further that he only came to learn of the dismissal of the case late in 2006, yet he had not been informed of hearing dates. The 2nd Plaintiff has annexed a bundle of documents on the complaint he made to the Advocates Complaints Commission in this regard.

The 2nd Plaintiff further depones that efforts to have the suit reinstated were unsuccessful owing to the loss of the court file immediately after the ruling for dismissal was delivered. The 2nd Plaintiff's erstwhile advocate is said to have failed in filing an application for reconstruction of the file or reinstatement of the suit as directed by the Advocates Complaints Commission, prompting the 2nd Plaintiff to seek assistance from the advocate in record.

The 2nd Plaintiff's Counsel in written submissions dated 14th December 2011 contended that the delay in reinstating the suit was not as inordinately long and inexcusable as to render the door of justice shut in the 2nd Plaintiff's face. It was further submitted that the court has the discretion to reinstate the suit as justice would be better served where the matter is heard and determined based on the parties arguments. Counsel for the 2nd Plaintiff relied on the case of **Abdikadir Salar -vs- Adur Dubow Nairobi HCCC No. 916 of 2001** where the court found that it would be in the interest of justice to allow an application for reinstatement of a suit dismissed for non-attendance, so that the matter could be heard and determined on merit.

The Defendant did not file any replying affidavit or grounds of opposition to the application. When the matter came up for highlighting of submissions on 10th December 2012, counsel for the Defendant informed the court that he had filed submissions dated 18th January 2012 on issues of law opposing the application. The counsel for the Defendant submitted that the application is an abuse of the court process for reasons that the application retains the names of the 1st and 3rd Plaintiffs who are deceased and have not been substituted.

It was further submitted on behalf of the Defendant that the prayer for review lacked merit for reasons that the 2nd Plaintiff had not satisfied the court that there is new and important matter that was not known at the time the decree was made even after exercising due diligence; that there is a mistake or error apparent on the face of the record; that there is sufficient reason to review and finally, that the application for review has been made without unreasonable delay.

The Counsel for the Defendant further submitted that the 2nd Plaintiff had been indolent, and that the Defendant has already acted upon the dismissal orders which have been given effect by the County Council of Mbeere and therefore, that it would be prejudicial to the Defendant to review the said orders. Counsel for the Defendant relied on the case of **Peter Njogu Mbachu -vs- Hannah Mukuhi Murigu (2006)eKLR** where the court found that the applicant had not been diligent and where the application had not been brought without undue delay.

The facts of the second application dated 27th September 2011 arise from the death of Mr. Kithaka Nthiga, the 1st Plaintiff, on 19th May 2008, and that of Ngari Chigano, the 3rd Plaintiff on 14th January

2001. The applicants have annexed with letters of administration issued to them, with Patrick Mugo Kithaka being issued with a limited grant of letters of administration *ad litem* on 25th July 2011 with respect to the estate of the 1st Plaintiff. Boniface Njeru Ngari was also issued with limited grants of letters of administration *ad litem* on 25th July 2011 with respect to the estate of the 3rd Plaintiff.

The Applicants state that they have good reasons for bringing the application out of the statutory 12 months and reiterated the facts given by the 2nd Plaintiff in the first application, as regards the events that took place after the suit herein was dismissed for non-attendance on 16th November 2005. Supporting evidence was also annexed.

The Applicants' counsel filed written submissions dated 14th December 2011 wherein he averred that the Court has discretion to enlarge time where the period originally granted may have expired under section 95 of the Civil Procedure Act. Counsel also relied on Order 24 Rule 3 which provides that the court may for good reason extend time for substitution. It was further submitted that the Applicants had satisfied the court that there are good and valid reasons for the delay in bringing the application.

It was submitted for the Applicants that the Defendant would not be prejudiced if the application was allowed, as he had not made an application to terminate the Applicants' claim by moving the court for an award of costs incurred in defending the suit under Order 24 Rule 2. Finally, the court was urged to exercise its discretion and inherent powers to do justice and the cases of **Evanson Nguti Kamanda -vs- Peter Gicharu Ngige (2006) eKLR** and **Ngambi Muthira Meme -vs- Patrick Musunga and Another (2006) eKLR** were relied upon in this regard.

The Defendant did not file any replying affidavit or grounds of opposition to the application dated 27th September 2011. His counsel however filed written submissions dated 18th January 2012, and contended that it is now over three and ten years respectively since the 1st and 3rd Plaintiffs died. Further, that even at the time of lodging the complaint with the Advocates Complaints Commission, the 3rd Plaintiff was still deceased and no attempt was made to regularize the position.

The Defendant's Counsel further submitted that discretion for extension of time has to be exercised for reason and not caprice, and it must not be arbitrary or oppressive. He argued that the Court should have regard to the importance of compliance with time limits, and the counsel cited the Court of Appeal decision in **Republic v District Land Registrar Kiambu & Another ex parte Grace Waithira Njenga, Civ App. Nai 208 of 2005** in this regard. It was also submitted that the Defendant would be prejudiced as he had acted upon the dismissal orders.

The first application by the 2nd Plaintiff dated 11th August 2011 will of necessity have to be decided first, as the orders sought in the second application of 27th September 2011 are dependent on a reinstatement of the suit herein. The main issue to be decided in the first application dated 11th August 2011 is whether the orders given herein on 16th November 2005 and 6th June 2011 are amenable to review. I am guided in this regard by Order 45 rule 1 of the Civil Procedure Rules which provides the circumstances under which an order can be reviewed. The said provisions state that:

“ any person considering himself aggrieved by:

a. a decree or order from which an appeal is allowed but from which no appeal has been preferred or

b. a decree or order from no appeal is hereby allowed

and from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree or order my

apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

This court is also now enjoined by Article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to dispense substantive justice without undue regard to procedural technicalities. It is my opinion that the non-attendance by a party on a hearing date, and the fact that an Advocate was not properly on record are procedural technicalities that should not outweigh the overriding objective of providing substantive justice to the parties.

The 2nd Plaintiff has in addition given a detailed account of the reasons for his non-appearance for the hearing of the suit on the material date that led to its dismissal on 16th November 2005, and of the events that transpired between the dismissal of the suit and the first application for reinstatement of the suit dated 9th February 2011. It is evident that the dismissal of the suit herein and the delay in bringing the application for its reinstatement was as a result of factors outside the 2nd Plaintiff's control. These were firstly the non-appearance by his Advocate in court on the hearing date; secondly, the subsequent disappearance of the court file; and thirdly the failure by his former Advocate to apply for reconstruction of the court file.

The Plaintiff has brought evidence in this regard, and has also shown the disciplinary actions he took against his former Advocate with the Advocates Complaints Commission. I note that the 2nd Plaintiff did act with alacrity in filing the second application for review and/or setting aside of the orders, which was filed without delay on 11th August 2011, following the orders by Mwera J. (as he then was) of 6th June 2011.

It is thus my finding that there are sufficient reasons to set aside the orders made on 16th November 2005 and 6th June 2011, and the 2nd Plaintiff's application dated 11th August 2011 is allowed. The orders of Honourable Justice Mugo made on 16th November 2005 dismissing HCCC No. 2269 of 1997 for non-attendance by the Plaintiff, and the orders of Honourable Justice Mwera (as he then was) of 6th June 2011 reverting the suit to the status it was at 16th November 2005 are hereby set aside, and the suit herein is reinstated and shall proceed to full hearing on its merits.

On the orders sought in the second application dated 27th September 2011, Order 24, Rule 3 of the Civil Procedure Rules provides the procedure to be followed in the case of death of one or several Plaintiffs. It states that:

“3. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

Further, Order 24, Rule 7 states that:

“(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has

abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”

From the foregoing provisions it is clear that the Court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. The Court of Appeal decision in **Republic v District Land Registrar Kiambu & Another ex parte Grace Waithira Njenga, Civ App. Nai 208 of 2005** cited by the Defendant is distinguished on this ground, and also on the ground that the application in that case was for filing an appeal of time, not for the substitution of parties.

It is not disputed that the suit herein was dismissed for non-attendance by Mugo J. on 16th November 2005. As at the date of the 1st Plaintiff’s death on 19th May 2008, there was no suit or cause of action in existence which could therefore have abated. Time can therefore only start to run after the reinstatement of the suit herein, with respect to the substitution of the 1st Plaintiff. However, to the extent that an application for substitution needs to be made within one year of the death of a Plaintiff, this court can extend the time for the avoidance of any doubt, and for the reasons given by the Applicant for the delay in applying for reinstatement of the suit. This Court has already found these reasons to be sufficient and it would be unjust to penalize the Applicant for the errors made by the Plaintiffs’ previous Advocate.

As regards the orders sought with regard to the substitution of the 3rd Plaintiff, as at the date of his death on 14th January 2001 the cause of action and suit herein were still in existence. No reasons have been given for the delay in making the application for substitution before the dismissal of the suit on 16th November 2005. I however note from the Plaint filed herein dated 12th September 1997 that the deceased 3rd Plaintiff’s case is closely connected with that of the other Plaintiffs, and is based on the same facts. It would therefore be unjust to exclude him as a party to this suit pursuant to the overriding principles provided by Article 159 (2) of the Constitution and sections 1A and 1B of the Civil Procedure Act.

The Applicants have produced evidence to show that they are the legal representative of the deceased 1st and 3rd Plaintiffs by virtue of the limited letters of administration issued to them on 25th July 2011 by the High Court of Kenya at Nairobi. The Defendant has not controverted this evidence, nor has he shown any evidence of the actions that he alleges have been taken with regard to the suit property, that will make the orders sought in the applications herein prejudicial to him. His counsel cannot give evidence from the bar in this regard.

The application dated 27th September 2011 is therefore allowed for the foregoing reasons, and the time for making the application for the substitution of the 1st and 3rd Plaintiffs is hereby extended, and it is hereby ordered that Patrick Mugo Kithaka shall substitute Kithaka Nthiga as the 1st Plaintiff, and Boniface Njeru Ngari shall substitute Ngari Chingano as the 3rd Plaintiff.

Lastly, pursuant to the provisions of sections 3A, 1A, and 1B of the Civil Procedure Act, and of Order 11 of the Civil Procedure Rules, the Plaintiffs are also hereby ordered to take the necessary steps to set this matter down for pre-trial conference within sixty (60) days of the date of this ruling.

The Plaintiffs shall meet the costs of the applications dated 11th August 2011 and 27th September 2011.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____25th____ day of ____February____, 2013.

P. NYAMWEYA

JUDGE