



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 1200 OF 1995**

**CATALYZER KIRIMA MWANGI .....PLAINFITT**

**VERSUS**

**SALIM ATHAM S.H. EL KINDY.....DEFENDANT**

**RULING**

By a Notice of Motion dated 18<sup>th</sup> February, 2013 and filed on 20<sup>th</sup> February, 2013, the Applicant herein has sought for various prayers. The Notice of Motion is brought under **Order 24 Rule 7(1) of the Civil Procedure Rules, Order 40 rule (1) (a) and 4 and Section 34 of the Civil Procedure Act**. The prayers sought are:-

- i. Pending the hearing and determination of this suit, a Temporary Injunction be issued against the Defendant either by himself or agent, servant, employees, representatives, transferee, and/or any one acting on his behalf or anyone purporting to hold title from entering into, trespassing onto, disposing off, selling, alienating and committing acts of waste in respect of property known as **LR NO/12506/153**.
- ii. That the Court do grant the applicant's leave to take over the conduct of this case on behalf of the estate of the Plaintiff and be made party to this suit as the Plaintiff.
- iii. That an Order be issued to revive this suit which has abated.
- iv. That the Court be pleased to set aside the Order made on the 29<sup>th</sup> September, 2011 dismissing this suit for want of prosecution.
- v. Costs of the application be provided.

The application was based on the grounds on the face of the application notably.

- a. That the Plaintiff Catylizer Kirima Mwangi, died on the 23<sup>rd</sup> November, 2009 and no application to make his legal representatives parties to this case was made within 12 months.
- b. That the case abated on 23<sup>rd</sup> November, 2010.
- c. That since 2009, the Respondent /Defendant has been aware of the demise of the Plaintiff.
- d. That on 29<sup>th</sup> September, 2011, the Defendant/Respondent moved the Court to dismiss the case for want of prosecution and the orders were granted.
- e. That the above Orders were done in error and by concealment of material facts by the Defendant/Respondent.

The application was also supported by the affidavit of **Jackson Waweru Mwangi** who deponed that, he is a brother to the Plaintiff herein who died on 23<sup>rd</sup> November, 2009 as per the annexed death certificate marked **JWM2**. He also stated that he is one of the administrators of the Estate of the Plaintiff herein, as evidenced by letters of administration marked '**JWM1**'. He further alleged that he had met the

Defendant in the year 2010 and had agreed that he was to pay the Defendant **Kshs. 400,000/=** and defendant would surrender the title deed for LR No 12506/153 to the applicant. In an effort to pay up the stated amount, the applicant paid **Kshs.100,000/=** to the Defendant as evidenced by annexure 'JWM3'. However, the Defendant failed to collect the balance of **Kshs.300,000/-** and Defendant has now threatened to dispose off the suit land to a third party. He further averred that the children of deceased (Plaintiff) who are now orphans reside on the said parcel of land.

The application was opposed by the Respondent who filed his Replying Affidavit on 10<sup>th</sup> April, 2013 and deposed that, he has never been aware of the Plaintiff demise and has never agreed to be paid 44,000/= by the applicant's family for release of the Title Deed for the suit land. He also denied ever receiving **Ksh.100,000/=** from the applicant and confirmed that he has already disposed off the suit land as per the annexed **Shashe1**. The Respondent asked the Court to dismiss the applicant's application.

The parties herein filed their written submissions and highlighted them on 11/6/2013. The Court has now considered the pleadings herein and the written submissions and made the following findings:-

It is evident that, the Plaintiff herein, filed the suit on 20<sup>th</sup> April, 1995. An Order for Injunction was issued on 6/10/1995. The suit was pending in Court until 29/11/2011 when it was dismissed for want of prosecution.

I have noted that the Defendant filed for dismissal of the suit for want of prosecution on 11/9/2009. The said application was never prosecuted until 29/11/2011. Meanwhile on 22/11/2010 the applicant herein, **Jackson Waweru Mwangi Kirima** filed a Chamber Summons to be made party to this suit as administrator of the Estate of the Plaintiff.

Again this application was never prosecuted. It is also evident that the Plaintiff herein died on 23/11/2009 as per the Death Certificate attached to the pleadings. It is also not in doubt that the applicant herein Jackson Waweru Mwangi is one of the administrators of the Estate of the Deceased as the per the attached Grant.

When the Plaintiff died, and the administrators did not prosecute the application to be made parties to the suit. The suit herein abated after 12 months.

The Plaintiff died on 23/11/2009. The suit therefore abated in November, 2010. This is provided for by **Order 24 Rule 3(2) of the Civil Procedure Rules**.

Applicant states that the Defendant herein was aware of the death of the Plaintiff and even went to condole with the family of the Plaintiff. However, the Defendant denies that knowledge.

The Defendant however, prosecuted the application for dismissal of the suit on 29/11/2011; one year after the suit had abated. I have noted that the application was served on **Kamau Kinga** advocate who was the advocate for the Plaintiff. He did not appear in Court and the suit was dismissed. Applicant avers that the said Advocate did not inform them of the said application for dismissal of the suit.

The suit herein involves land which land the plaintiff family lives on. The suit has been dismissed but given the circumstances of this matter and invoking the provision of **Section 3A of the Civil Procedure Act**, I find it prudent to set aside these Orders issued on 29/11/2011 dismissing the suit for want of prosecution.

It is evident that the suit has abated. However, Order 24 rule 7 provides that; an applicant may apply to Court for revival of the suit that has already been marked abated. The applicant herein has demonstrated that this is a suit that needs to be revived. For that reason, I allow the applicant's prayer for revival of the suit.

The applicant is one of the administrators of the estate of the Plaintiff herein. There is need for this suit to be determined on merit. I find it necessary to allow the applicant's application to be granted leave

to take over the conduct of this case on behalf of the estate of the Plaintiff and is therefore made party to the suit.

Having now considered the Notice of Motion dated 18/2/2013 in totality, the Court allows the applicant's application in terms of prayer No.4, 5, and 6. Costs in the cause. It is so ordered.

Dated, Signed and delivered at Nairobi this **19<sup>TH</sup>** day of **July, 2013.**

**L .N. GACHERU**

**JUDGE**

**19/7/2013**

**Coram: Before Gacheru Judge**

**Court Clerk Anne**

**None attendance for the Plaintiff**

**None Attendance for the Defendant**

**Court:**

**Ruling Read in open Court in the absence of counsels though notified.**

**L. N .GACHERU**

**JUDGE**

**Later,**

**Mr Matheka walks in.**

**L N GACHERU**

**JUDGE**

**19/7/2013**