



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

MISCELLANEOUS CIVIL APPLICATION NO. 45 OF 2006

REPUBLIC APPLICANT

VERSUS

1. WAITALUK L. D. T. COMPRISING OF:

JOHN KAHENGURA.....}

BOAZ N. OWOUR.....}

DAVID KIPTANUI} 1ST RESPONDENT

2. SPM'S COURT KITALE.....} 2ND RESPONDENT

3. DINAH JEPKOECH} INT. PARTY

EX-PARTE: MUSA KIPRONO MAIYO (DECEASED)

R U L I N G

The Applicant Miriam Sote Rono brought a Notice of Motion under the provisions of Section 1A, 1B, 3, 3A of the Civil Procedure Act and Articles 22, 23 and 165 of the Constitution seeking the following orders:-

- 1. That the Honourable Court be pleased to revive and or review or set aside the dismissal order of the Notice of Motion application dated 13/04/2006.*
- 2. That the Honourable Court be pleased to allow Miriam Sote Rono the Applicant to substitute Musa Maiyo Kiprono, the deceased ex-parte Applicant and be made a party to this matter and represent the deceased herein.*
- 3. Costs of this application be in the cause.*

The application is supported by the Affidavit of the Applicant sworn on 02/05/2013. The Applicant depones in her Affidavit that the ex-parte Applicant Moses Kiprono Maiyo who is her husband died on 12/10/2010. She contends that she was not aware of the matter herein until November 2012 when she was served with a letter from the District Surveyor who informed her that he was coming to implement an order arising from Kitale Chief Magistrate's Court Land Case No. 64 of 2005. She went to Kitale Law Courts where she was informed that her deceased husband was being represented by the firm of S. Juma Saenyi & Co. She proceeded to enquire about the whereabouts of the said law firm and was referred to the firm of M. S. Wafula & Co. Advocates who informed her they had taken over the matter from M/S S. Juma Saenyi & Co. Advocates and that their efforts to carry on were hindered by non availability of the Court file. When the file was finally traced, M/S Wafula & Co. informed her that they had discovered that the ex-parte Applicant's application had been dismissed for want of prosecution. M/S

Wafula & Co. Advocates informed her that they had filed an application seeking to set aside the dismissal order. When she informed M/S M. S. Wafula & Co. Advocates that her husband had passed on, they advised her to apply for letters of administration. She has letters of administration in respect of the estate of her deceased husband. She prays that she be substituted in his place and that the dismissal order be set aside.

The application is opposed by the Respondent based on the Replying Affidavit of Dinah Jepkoech sworn on 18/06/2013. The Respondent contends that the Applicant's application is brought in bad faith and is solely meant to deny her the fruits of her judgment.

The Applicant herein is wife of Musa Kiprono Maiyo who was brother to the Respondent Dinah Jepkoech. Dinah Jepkoech filed a claim before Waitaluk Land Disputes Tribunal in which she was claiming 10 acres out of 79 acres. The Tribunal ruled in her favour and granted her 10 acres. Musa Kiprono Maiyo was aggrieved with the decision of the Tribunal and moved to the High Court Kitale where he filed a Judicial Review application on 18/04/2006. He did not prosecute the application for a period of over three years and the Court dismissed his application on 29/07/2009. Musa Kiprono Maiyo did not take any step to have the order dismissing his application set aside until his demise on 12/10/2010. After the demise of Musa Kiprono Maiyo, his Advocate Mr. Wafula filed an application dated 18/11/2010 seeking to set aside the dismissal order. This application remains unprosecuted to date.

The present Applicant filed an application on 21/01/2013 seeking to be substituted in place of her late husband. The application was later dismissed as the Applicant had not sought to revive the application which had already abated her husband having died on 12/10/2010. The Applicant then filed the present application in which she seeks the orders mentioned hereinabove.

I have considered the Applicant's application herein as well as the opposition to the same. The issue which arises for determination is whether the Applicant has met the criteria for revival of the suit herein and secondly whether the dismissal order should be set aside and she be substituted in place of her husband. The Applicant has not explained what prevented her from pursuing the application by her husband after his demise. The Applicant simply says that she was not aware of this suit until November, 2012 when she received a letter from the District Surveyor who wanted to enforce decree in Kitale Chief Magistrate Land Case No. 64 of 2005. This cannot be true. When the Respondent herein Dinah Jepkoech filed a claim against the Applicant's husband at Waitaluk Land Disputes Tribunal, the Applicant was a witness and she in fact stated that according to the meeting held by elders, it had been resolved that the Respondent herein and her sister be given 10 acres each but her husband Musa Kiprono Maiyo did not accept the resolution. She cannot therefore turn round and claim that she was not aware of the application filed by her husband. There was no attempt to explain why her husband did not prosecute the application for over three years since filing and why he did not bother to apply for reinstatement of the dismissed application for over one year after its dismissal until his demise.

There is no convincing explanation given why the Applicant could continue with the suit and therefore the same cannot be revived. It is clear that the ex-parte Applicant was not interested in pursuing the judicial review application and reviving the same and bringing the Applicant on board will greatly prejudice the Respondent who has gone ahead to have the 10 acres carved out of the 79 acres owned by her late brother. The land belonged to the father of both the deceased ex-parte Applicant and the present Respondent and the 10 acres were given to her by her father particularly on grounds that she had children and was unmarried. This Court cannot assist indolent parties. I find that this application lacks merit. The same is dismissed with no order as to costs as the parties herein are family members.

It is so ordered.

Dated, signed and delivered in Open Court on this 21st day of August, 2013.

E. OBAGA

JUDGE

In the presence of Mr. Ndarwa for the interested party and Mr. Bungei for Mr. Ingosi for ex-parte Applicant.

Court Clerk: Lobolia.

E. OBAGA

JUDGE

21/08/2013