



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Environmental & Land Case 24 of 2010

TABITHA WAITHERA KIMEMIA.....PLAINTIFF/APPLICANT

VERSUS

KINYANJUI KAMOMOEDEFENDNT/RESPONDENT

RULING

1. The Defendant/applicant hereinafter referred to as the applicant has filed a Notice of Motion dated 7th July 2011 pursuant to Order 51(1) & Order 17 Rule 2(4) & Rule 4 of the Civil Procedure Rules 2010 & Section 1A, 1B & 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya, seeking the following orders

- i. That this Honourable Court be pleased to dismiss this suit for non-compliance with the Court's directions
- ii. That the costs of the suit and the application be awarded to the defendants/applicants.

2. The application is based on the grounds stated in the annexed affidavit of Donald O. Owang which he swears that the plaintiff herein passed on January 2011. After her demise, leave was granted to the plaintiff's Advocate to apply to substitute the deceased's plaintiff with his legal representative on 20th January 2011 which was to be mentioned on 29/3/2011 to confirm compliance. This leave was extended to 17th May 2011 but on this day there was no attendance by the plaintiff's counsel to appraise the court. That the matter was again mentioned on 25th

May 2011 when time within which to substitute the deceased plaintiff was again extended to 9th June, 2011. The plaintiff's advocate also failed to attend court neither was there any evidence that steps had been made to apply for substitution.

That since January 2011 the plaintiff's advocates and/or the deceased's plaintiff's representatives have not made any attempts to ensure that the Court's directive given on 20th January 2011 is complied with and the defendants has consequently been prejudiced because of the absence of any representative from the plaintiff to take over the case and therefore the instant suit has no legs to stand on and ought to be dismissed with costs.

3. This application is supported by the affidavit of Donald O. Owang and advocate of the High Court of Kenya dated 8th July 2011. He avers that the plaintiff filed the suit on 25th January 2010 and

simultaneously filed an application for interim injunction dated 25th January 2010 pending the hearing of the substantive suit. The defendant entered appearance on 8th February 2010 filed his statement of defence and replying affidavit to the application on 23rd February 2010. The parties later filed their written submissions. However there was an order from the Court that proceedings in Thika CMCC No.671 of 2001 filed by the defendants against the Plaintiff be typed so the Plaintiff's injunction could not be determined.

He states that the plaintiff passed away when they were to confirm whether the pleadings had been typed at the Thika court. .After her demise, leave was granted to the plaintiff's Advocate to substitute the deceased's plaintiff with his legal representative on 20th January 2011 which was to be mentioned on 29/3/2011 to confirm compliance. This leave was extended to 17th may 2011but on this day there was no attendance by the plaintiff's counsel to appraise the court. That the matter was again mentioned on 25th May 2011 when time within which to substitute the deceased plaintiff was again extended to 9th June, 2011 the plaintiff's advocate also failed to attend court neither was there any evidence to show that steps had been made to apply for substitution. He therefore wants this court to dismiss this suit for non compliance of courts directions.

4. This application was opposed by the Respondent who filed a Replying Affidavit on 11th November 2011.He states in his affidavit that just before the parties set down the application dated 25th January 2011,he was informed by the plaintiffs daughter that the plaintiff had passed on. He informed court and undertook to engage the beneficiaries who currently are in the process of instituting proceeding for substitution of the plaintiff. He stated that the beneficiaries will suffer irreparably if this application is allowed. He also stated that this application was premature and brought to Court in bad faith with an intention to shut out the beneficiaries and dependants of the estate from rightfully prosecuting this case. He further stated that the intention of the applicant was to unlawfully benefit from the judgment in CMCC 671 at Thika Law Court. This was set aside before the defendant eventually withdrawing the suit. He prays that this Court dismisses this application with costs. The Respondent was not present in court during the hearing on 5th July 2012.The Applicants advocate reiterated the contents of the supporting affidavit annexed to the application.

5. I have read the pleadings filed by the parties and the submission of the applicants advocate in court. I note that this suit was filed in 2010. I agree with the applicant has taken some time in Court but in my view we have to appreciate that the subject matter in this suit is about land which should be cautiously dealt with as land is an emotive item. The applicant has not been candid about the suit that was pending at the Thika Law court which also has a bearing to this suit.

The Respondent's counsel has informed this court that the beneficiaries are instituting succession proceedings with a view of getting a substitution of the plaintiff. I will give them another chance to prosecute this suit. I therefore dismiss the application. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 26th day of July 2012

R. OUGO
JUDGE

In the Presence of:-

..... For the plaintiffs

..... For the defendants

..... Court Clerk