



# REPUBLIC OF KENYA

## IN THE HIGH COURT OF KENYA AT N AIROBI

### LAND AND ENVIRONMENTAL DIVISION

NAOMI WAIRIMU KIBUGI.....APPLICANT

PETER NJUGUNA KIBUGI (Sued as personal Representative of the Estate of Njeri Kibugi).....RESPONDENT

#### RULING

The above stated grounds are detailed out by the Respondent in his supporting affidavit sworn on 13<sup>th</sup> September 2011, as well as in submissions by the Respondent's Advocate during the hearing of the application on 14<sup>th</sup> February 2012. The Respondent states that the suit property belonged to Njeri Kibugi (Deceased) who was his mother, and that he is one of the beneficiaries of the Estate of Njeri Kibugi *vide* this court's grant made on 25<sup>th</sup> February 2011. Further, that the present application is an abuse of the court process meant to vex the Respondent, as the Applicant has filed numerous suits in respect of the suit property and all have been determined by the Court. The Respondent avers that a claim of adverse possession is not maintainable where there is active litigation in a matter and where the Applicant's stay is in contravention of an express court order. Further, that the Applicant being a trespasser cannot maintain this application before a court of law and that the suit herein is *res judicata*.

The Respondent annexed as evidence a copy of the title deed issued on 9<sup>th</sup> August 1985 showing Njeri Kibugi to be the registered proprietor of the suit property, a copy of the Certificate of Confirmation of Grant issued to the Respondent on 8<sup>th</sup> February 2010, and copies of the pleadings and court orders in HCCC 3274 of 1994 and Thika CMCC No. 310 of 2010, as well as copies of the pleadings in Succession Cause No. 44 of 2006 at the Chief Magistrates Court in Thika.

The Applicant's Advocate during the hearing of the application submitted that the HCCC 3274 of 2004 is based on a different cause of action namely trust, and that the parties were different, as was the subject matter of the suit which was Ngenda/ Nyamangara/657. Further, that the prayer for adverse possession was in the alternative. The Advocate also submitted that that under Section 159(2) (c) of the Constitution, justice should be done without undue regard to procedural technicalities and that the Applicant is not a vexatious litigant but is diligently and persistently pursued her rightful claim and has a Constitutional right to be heard. Further, that the Court should not be guided by Order 24 of the Civil Procedure Rules on abatement of suits, as the order was made in the former constitutional order.

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(b) it is scandalous, frivolous or vexatious; or

(d) it is otherwise an abuse of the process of the court,

**It is also settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated in D.T.Dobie & Company (Kenya) Ltd. v. Muchina[1982] KLR 1 at p. 9 by Madan, J.A.as follows:-**

The two reasons given by the Respondents as to why the Originating Summons herein is frivolous and vexatious and an abuse of the process of court, are that firstly, the Applicant has no *locus standi* to institute any application/claim regarding the suit property as she is a trespasser on the same piece of land, and secondly, that the Originating Summons is *res judicata*.

On the second reason given by the Respondent that the Originating Summons is *res judicata*, the Respondent in the suit herein is sued as the Personal Representative of Njeri Kibugi (Deceased), which Deceased was the 1<sup>st</sup> Defendant in HCCC No. 3274 of 1994 and is therefore the same party in the two suits. It is also the case that the Applicant was claiming as against the Respondent and additional Defendants in HCCC No. 3274 of 1994 for adverse possession, which was an alternative prayer in the said suit. I however do not find the suit herein to be *res judicata* for the reason that the issues between the parties were not substantively heard and determined in HCCC No. 3274 of 1994. The Court of Appeal in Caneland Ltd and Others v Delphis Bank Civil Appeal No 20 of 2000 held that for *res judicata* to arise the issues must have been heard and decided on the merits.

**Order 24 Rule 7 of the Civil Procedure Rules is clear as to the effect of a suit which has abated against a Defendant and provides as follows:**

**(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.**

“In the alternative the Plaintiff contends that she is entitled to claim 1.21 hectares out of Land Parcel No. NGENDA/NYAMANGARA/132, 1322 and 1323 by way of adverse possession as she has always resided in the said lands since her marriage to the deceased KIBUGI KIMEMIA in 1962”

The Respondent's application dated 13<sup>th</sup> September 2011 is therefore allowed and it is also hereby ordered that the Originating Summons dated 11<sup>th</sup> May 2011 be struck out. The Applicant shall bear the costs of the application and suit.

**P. NYAMWEYA**