IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 2269 OF 1997

KITHAKA NTHIGA & 3 OTHERS ……..……. PLAINTIFFS

VERSUS

NYAGA MATUMBI ……. DEFENDANT

RULING

Coram: Mwera J.
Njue for plaintiff
Kariuki for Defendant
Court clerk Kajuju

By the notice of motion dated 9/2/11 the 2nd plaintiff proceeded under sections 80, 3A of the Civil Procedure Act and the now repealed Order 1xB rule 8 and order XLIV rules 1, 2, 3 of Civil Procedure Rules, seeking orders:

i) that the orders of 16.11.05 dismissing the suit herein for non-attendance be reviewed, varied or set aside;
ii) that the suit be reinstated for hearing on its merits
iii) that the defendant be restrained from evicting applicants from PLOT No. 28 Ishiara Market and
iv) "That this Honourable court be pleased to reinstate, rewrite and/or include the plaintiff names into the register of plot 28 Ishiara market, expunged by the Council of Mbeere pursuant to the defendant's counsel (sic) advice."

The last prayer is put in parenthesis because it was not entirely clear why such a prayer was sought at this point. Probably it could feature in the principal pleadings, followed by evidence that such an order should be made at the end of a trial in the event the suit herein is reinstated and heard on its merits (prayer (ii) above).

The grounds stated that the dismissal order of 16.11.05 was due to the error of the applicant's lawyer Mr. Wandugi Kiraithe and not the applicant. The applicant's lawyer had been subjected to the Disciplinary Committee cause, DC 100/08 for not keeping the applicant informed of the progress of this case, ending in his being condemned to a fine of sh. 20,000/=. He was also ordered to reinstate this case – a thing he had failed to do to date. However, following the orders of 16.11.05 and contrary to the same the defendant had illegally caused the names of the applicant (with co-plaintiffs) to be removed from the register of plot 28 above. When the case was dismissed the two plaintiffs – Kithaka Nthiga and Ngari Chingano died, and then the file went missing from the registry, compounding the whole thing

negatively. So there has been no inordinate delay in bringing this application which, if granted will see justice being done in the case, desirably during the lifetime of the 70 year old 2nd plaintiff/applicant, Njeru Muti.

The 2nd plaintiff deponed in the supporting affidavit that he, the 2 other plaintiffs (said to be dead) and the respondent once co-owned the suit plot no. 28 at Ishiara. It was agreed that the respondent would develop that plot on condition that he give his own plot parcel EVURORE/NGUTHI/1662 to the contractor who would develop plot no. 28 or a part thereof, with his own resources. After the development the respondent would have 3 years to use a portion of the built plot 28 after which he would hand it back to the group. The respondent failed to honour that agreement. He stuck in the building and a complaint laid before the local market committee was heard with the conclusion that the respondent was in the wrong. He was directed to hand over the building to the plaintiffs. He did not do so and the plaintiffs filed this cause through Mr. Kiraithe Wandugi, of Nairobi as their lawyer. The plaintiffs lived over 250 km from Nairobi and their lawyer did not keep them informed of the progress in their case. They then learnt in 2006 that it was dismissed. When instructed to have the suit reinstated the plaintiffs' lawyer (above) told them that the case file had gone missing. The letter of 23.1.07 that lawyer wrote to the deputy registrar was exhibited. Then the plaintiffs caused one Ephantus Njeru, Advocate, to file a complaint on their behalf with the Complaints Commission on 7.5.07. That elicited a demand for an explanation from Mr. Wandugi, advocate for the plaintiffs, as per the letter of 31.1.08 from the State Law Office. This was followed by a Disciplinary Case No. 100/08 wherein Mr. Wandugi was found guilty and fined sh. 20,000/- (sh. 10,000/= to each complainant), with a further order that he proceeds to reconstruct the file with a view to have the suit reinstated (ann. NM 3, 4). The lawyer, Mr. Wandugi did pay the fine but did not apply to reconstruct the file. Instead he intimated that he would apply to cease acting for the plaintiffs. So the applicant(s) retained their current lawyers to reconstruct the file and seek reinstatement of the case. In the meantime the respondent's lawyers wrote to Mbeere County Council on 17.11.10 instructing the council to remove the names of the plaintiffs from the register of Plot 28, a thing which the plaintiff's lawyer resisted (NM 6). But on 21.1.11 the defendant's lawyers warned the applicant from trespassing on plot 28 (NM7). The applicant holds the view that the suit herein was not determined on merit but was dismissed on a technicality. It warrants reinstatement. That the defendant did not prove his counter-claim on the day the suit was dismissed. It is still pending. And the 1st and 3rd plaintiffs have since died (NM 10). There appears to be no replying affidavit on record but each side submitted.

On behalf of the applicant/2nd plaintiff the court was taken through the history (above) once more with emphasis that the respondent did not refute the facts as deponed in the supporting affidavit, with a replying affidavit. And if it may be added no grounds of opposition were filed either. On that account the applicant saw his application as unopposed. It was repeated that the cause had not been dismissed on merit and the defendant/respondent did not testify on his counterclaim. Accordingly, the court could not on its own find for the defendant. It was due to the absence of the applicant's lawyer on the 16.11.05 – not the applicant himself, that the suit was dismissed. Also repeated was the complaint laid before the Complaints Commission, the proceedings before the Disciplinary Committee against Mr. Wandugi Advocate and all the rest as set out in the supporting affidavit above. While conceding that there had been delay in bringing this application, all was said to be because of the disciplinary proceedings that took place from 2007 to 2011. And that at some stage the file went missing from the registry. Then when it was retrieved, the applicant instructed its present lawyers to move. Therefore, the delay herein was not deliberate as to deny the applicant the discretion to set aside the orders in question. It was in the interest of justice to reinstate this case so that it is heard on merit ***(see HCCC 916/2001 Abdikadir Salah Vs Adur Dubow)***.

On the respondent's part it was submitted that the applicant was all along represented by M/s Wandugi & Co. Advocates and at no time did that firm cease to act for him and so filing the notice of change of advocate on 22/10/10, which was not served on the defendant, is not valid and the present firm M/s Mwathi Njue & Co is not properly on record and/or should not bring these proceedings particularly after the dismissal of suit. The cases of ***Zeddy Syongo*** Vs ***Vitaform Products Ltd*** [2008] e KLR and ***Stephen Ndungu Njuguna*** Vs ***Safaricom Ltd*** [2008] e KLR were cited to support the position. Mr. Wandugi, advocate, was thus still validly on record for the applicant. He should take the course under Order 9B rule 8 Civil Procedure Rules to apply to set aside the judgemet that followed Mugo J's

dismissal order or have the same varied - not Mr. Mwathi Njue, Advocate.

Further on points of law, the court was told that the 2nd plaintiff had filed the present application, wherein he had deponed that his co-plaintiffs (1st, 3rd) died. The claim concerned them all yet there was no compliance with Order 24 rule 3 Civil Procedure Rules to bring in the legal representatives of the deceased plaintiffs in order to properly continue with the action. And in any case it is over 12 months since the deaths occurred and no substitution had taken place. The suit had thus abated as regards those 2 plaintiffs. So all herein was deemed an abuse of the court process.

On the merits of the application the defendant who did not file papers to oppose, asserted that Mugo J was satisfied that the plaintiffs had failed to prosecute their claim and she dismissed it, when they failed to attend court for the hearing they had fixed on 16.11.05. Accordingly, and there being no appeal, the defendant moved the County Council of Mbeere to remove the names of the plaintiffs from the register of the suit plot no. 28 Ishiara Market. There were no triable issues to convince this court to use its discretion to set aside, Mugo J's orders as prayed. The plaintiffs were indolent in moving to set aside and the case of ***Peter Njogu Mbachu*** Vs ***Hannah Mukuha Murigu*** [2006] e KLR was cited regarding the 3 factors therein enunciated, when it comes to setting aside orders of dismissal of a suit for non-attendance: applying for such orders without delay; diligently, doing so and whether compensation with damages will do in the circumstances, with due regard to serving the ends of justice. In this context the court was referred to the period from 16.11.05 when the suit was dismissed and the filing of the application herein on 9.2.11. To the defendant all this constituted undue delay and moving the court in bad faith. The need to move diligently and without delay following a dismissal of suit order as is the case here, was supported by citing the case of ***Mary Game Vs Marsabit County Council & Ors*** [2007] e KLR. Accordingly this application should be dismissed.

To begin with, it appears pertinent to state at this point that the file herein was traced and with all the previous proceedings and pleadings, it is the very one on which all this is being transacted. And also it is noted that the defendant neither filed grounds/affidavit in opposition to this application.

To determine this application the court is obliged to refer to the provisions of law denoting the powers invoked by the 2nd plaintiff/applicant whose other co-plaintiffs (1st, 3rd) are deceased. Incidentally looking at the plaint filed here on 12.9.97 there was a 4th plaintiff – Nambiri Nguu. If he is not referred to any more, then the parities should know better what became of him. The applicant cited sections 80, 3A of the Civil Procedure Act. While section 80 provides for review as sought here, Section 3A gives this court residual and inherent power to exercise discretion in order to do justice or prevent the abuse of its process.

The now repealed Order IXB rule 8 Civil Procedure Rules read:

"8. Where under this order judgement has been entered or the suit has been dismissed, the court on application by summons, may set aside or vary the judgement or order upon such term as just (sic)". (current Order 9B rule 8).

And under Order XLIV rule 1, 2, 3 Civil Procedure Rules, focus goes to these pertinent parts of rule 1:

"1. (1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who 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, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.

(2) …….”

Rule 2 thereof speaks of what kind of review application should go to the judge who passed the judgement or made the order and rule 3 permits for dismissal, a review application that lacks merit and allowing that that warrants.

To paraphrase rule 1, an aggrieved party may seek review of a judgement or ruling which gave rise to a decree or order in the event of:

i) discovering new and important matter or evidence that was not known to him at the time the decree was passed or order made however hard he may have tried to come by it;

ii) some mistake or error apparent on the face of the record;

iii) any other sufficient reason; in doing so,

iv) making the review application following the decree or order without unreasonable delay.

Any of the above will be looked at singly or in combination in the determination herein. The old Order L (now Order 51) stated in rule 16 (now rule 14) that any person who wished to oppose any application was obliged to file and serve a replying affidavit or grounds of opposition, not less than 3 clear days before the date of hearing. The present rule 14 does not provide for this time condition. But because this application was brought under the old rules, the respondent/defendant here was obliged to file any opposing papers if he wished or rule 16 (3) applies:

“ (3) If a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application *may* be heard *ex parte*.” (underlining added)

The applicant urged this court to hear this application ***ex parte*** in that it was not opposed because the defendant did not file papers in opposition. A well founded proposition yes, but due to the nature of this application or indeed the case itself together with the circumstances obtaining, the court was minded to and it heard both sides by way of their written submissions as already outlined above.

Beginning with the basic one, that the applicant was not properly presented here by Mr. Mwathi Njue & Co. Advocates, the court gathered from the submission here that by dismissing the suit on 16.11.05, that order constituted judgement in the matter and so Mr. Mwathi Njue should not have filed a notice of change of advocate which was in any event not served as per Order III rule 9 B (old) by notifying/serving the application to replace Mr. Wandugi Advocate, on that advocate, demonstrating such service to the court, followed by obtaining leave to replace Mr. Wandugi.

Mr. Mwathi could only file the present application **after** the court gave him leave to replace Mr. Wandugi. Such leave was not obtained and so Mr. Mwathi could not bring the current proceedings on behalf of the applicant. Or he could possibly annex a consent from Mr. Wandugi to replace him, when applying to do so.

The court was inclined to uphold this point on the basis that the record does not reveal that after the suit herein was dismissed, in essence making a judgement on it, M/s Mwathi Njue came on record to replace Mr. Wandugi by virtue of Order III rule 9A Civil Procedure Rules (old). All the court saw annexed to the supporting affidavit of the applicant was a letter by Mr. Mwathi Njue to the Law Society of Kenya (LSK) dated 3.12.10 referring to this case and informing the LSK, ***inter alia*** that

"We have been appointed advocates for complainant and plaintiffs in the matter.

Enclosed find notice of appointment."

Mr. Mwathi Njue was asking Law Society of Kenya to urge Mr. Wandugi to release to him (Njue) the entire file relating to this case. And prior to that, on 22.10.10 Mr. Mwathi had filed the notice of change of advocate earlier referred to. Having all the foregoing in mind, the applicant is not validly and properly represented here by his present lawyers as was required by Order III rule 9A Civil Procedure Rules (old). That firm cannot therefore institute and maintain these proceedings. In the circumstances Mr. Wandugi the former advocate is still considered to be the lawyer of the applicant (Order III rule 6, present Order 9 rules 5, 6).

In this connection the court's attention went to some parts of the applicant's supporting affidavit in which he stated that he complained to the Complaints Commission about the manner Mr. wandugi had handled this case until it was dismissed and in a disciplinary cause that followed, Mr. Wandugi was found guilty and fined a total of sh. 20,000/= and ordered to reconstruct the file and pursue its reinstatement (para 8):

"9. THAT when the matter came up for mention on 15th June 2009, to confirm compliance, the advocate confirmed having paid the fines imposed and filling (sic) for reconstruction of the file and asked to forward the file to Complaints Commission or LSK, he also asked to file application to withdraw from the matter." (underlining supplied).

From the sequence of those events, it can be presumed that the mention of 15.6.09 was before the Complaints Commission or LSK, to confirm compliance with the orders following disciplinary action as forwarded to him by the LSK on 4.3.09 (N M 4). AND that that is the forum to which Mr. Wandugi intimated that he wished to withdraw from this case. Otherwise there is no material placed before this court that Mr. Wandugi formally applied to it to cease to act for the applicant and leave was granted. As observed above, procedurally he remains the applicant's lawyer for the purposes of this case, even as the circumstances disclose otherwise.The relations after the disciplinary action must have been soured as between Mr. Wandugi and his client, the applicant.

Then the status of the 2 deceased plaintiffs fell to be addressed. The 3 plaintiffs jointly sued the defendant claiming rights/interest in plot no. 28 Ishaira Market. The 2 of them (1st, 3rd) were said to be dead and due death certificates were exhibited. How does the 2nd plaintiff alone move the claim in the circumstances? The law states as follows, where a situation like this one presents itself. The old Order XXIII rule 3 (Order 24 rule 3, new) read:

"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.

And:

(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."

And for what may appear solely as of interest only, with no bearing on the present proceedings:

"8. (1) ……

(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 order upon such terms as to costs or otherwise as it thinks fit."

To start with rule 3 (1) above, it can be paraphrased that where a plaintiff or plaintiffs die, an application made to court and granted shall enable legal representative or representatives of the deceased party to join the cause and proceed with it. But where there is no such application and substitution is not made within one year of the death(s), the defendant shall apply to the court for an order that the deceased plaintiff's suit has abated as against the defendant (rule 3(2)).

This court's understanding of the 2 provisions is that where there is no substitution of the deceased plaintiff, so that a legal representative does not come to proceed with the suit, it does not mean that the still living plaintiff's cannot proceed with the suit as regards his own interest in it. Parliament could not have intended that where deceased plaintiffs' are not substituted with legal representatives, the whole suit is deemed to have gone under including the interest of the surviving plaintiff. If it goes down it can only be in respect of the deceased plaintiff for whom no legal representative moved to substitute him and so continue with the suit alongside the surviving plaintiff. Rule 3 (1) does not militate against the interest in the suit of the surviving plaintiff simply because the co-plaintiff has died and there is no legal representative to apply, and come into the proceedings by order of the court in order to continue with the suit. The view held by this court is that a surviving plaintiff's interest in a given claim, remains alive and can be continued with, whether the deceased plaintiff is substituted or not. This ought to be the position. If there was nobody existing or coming forward as a legal representative of the deceased plaintiff, could such a state of things dictate the death of the surviving plaintiff's case without a chance to litigate it? Not all. And in this case not even when the interests in the suit of the 1st and 3rd plaintiff's abate. However, the court takes it that it was the whole suit which was dismissed on 16.11.05 for non-attendance on the part of all the plaintiffs because they were all alive then. But even with that, this court is inclined to hold that the surviving 2nd plaintiff could still on his own give instructions in respect of this matter, and not otherwise as the defendant proposes. The claim was joint no doubt, but this court is unable to agree that in such circumstances if one or some plaintiffs die, then all the claim must 'die" leaving the surviving plaintiff without forum to litigate or seek relief/remedy. The same could be said of the defendant(s).

On the issue of the merits of the application, the defendant took the view that it had none, the suit having been properly dismissed for non-attendance by the plaintiffs on 15/11/05. And that the applicant could be compensated with damages and in any event it took unreasonable delay to bring this application. Granted, one can say from 16.11.05 when the suit was dismissed, it has taken all that time until 9/2/11 to apply to review that order. But this court accepted the explanation that the 2nd plaintiff, a rural folk living some 250 km from Nairobi only came to know of the dismissal in 2006. Then the file went missing and he made a tour via the Disciplinary Committee to get his lawyer to answer for what transpired. Mr. Wandugi was ordered by that Committee to have the "missing" file reconstructed and apply for the reinstatement of the suit. He did nothing. Accordingly, the delay has been sufficiently explained.

In conclusion were it not that the applicants' lawyer did not procedurally come on record to institute these proceedings, the court would have been minded to grant the orders sought in addition to the fact that the court only dismissed the suit, yet there was a counter-claim which the defendant did not on 16/1/05 or later seek to prosecute. Dismissal of suit did not mean that he automatically got the prayers he sought in the counter-claim. On having the suit dismissed the defendant was obliged to set down his counter-claim for trial. That did not take place. It is still pending. The defendant could not therefore move to kick the plaintiffs out of plot no. 28 and have their names removed from the register of that plot by virtue of the dismissal of the suit herein.

In sum the application is dismissed with costs on account of Mr. Mwathi Njue, Advocate, purporting to present it before he procedurally came on record to replace Mr. Wandugi Advocate **after** an order that gave judgement to the defendant, when the suit was dismissed. He ought to have done so via Order III rule 9A of Civil Procedure Rules (old).

In its inherent power to see that justice that is apparently sought in the whole of this matter is done, it is ordered that the state of this suit, revert to the position it was in as at 16.11.05 when dismissal orders were given. The applicant to have counsel regularly and procedurally come on record to file and argue any applications desired. And the defendant still has a chance to prove his counter-claim. That should be done with due expedition, possibly informing the relatives of the deceased plaintiffs as well.

Orders accordingly. Costs to the respondent.

Delivered on 6.6.11.

J. W. MWERA
JUDGE