

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

Civil Case 924 of 2004

HARRISON MUSAU PLAINTIFF

VERSUS

SIMON SABONYO 1ST DEFENDANT/RESPONDENT

TAMOS OLEWALLAH 2ND DEFENDANT/RESPONDENT

DAUDI TEKAA 3RD DEFENDANT/RESPONDENT

RULING

The Plaintiff filed this suit on 31st August, 2004 claiming that he was Jointly with his wife the registered proprietors of **L.R. No.13869** situated in Nairobi and which he pleaded that the Defendants had by themselves and through their servants and/or agents in April 2004 trespassed thereon and erected structures thereon when they had no proprietary or other interest in the land. The suit was for permanent injunction, mandatory injunction and general damages for the trespass.

In **High Court Civil Case No.201 of 2005** the Plaintiff was jointly sued with his wife by the Plaintiffs therein in an originating summons seeking to be declared the owners of the land which they claimed to have been in adverse possession for more than 12 years since 1991. They asked for orders that the land be transferred to them.

On 16th September, 2009 the parties recorded a consent to consolidate the two cases.

On 5th October, 2009 FLORAH WAKESHO MUSAU (the 2nd Defendant in **201 of 2005** and the joint registered owner in the land in dispute) filed this application seeking to revive the suit and be substituted as the legal representative of her husband HARRISON MUSAU (1st Defendant in **201 of 2005** and the Plaintiff in the instant case). The application was made under **Orders 23 rule 2** and **19 rule 5** of the **Civil Procedure Rules** and **Sections 3A and 95** of the **Civil Procedure Act** and was on basis that the Plaintiff had died on 22nd August 2005 and because the interest in the property had passed over to her vide the rights of survivorship. She acknowledged that she ought to have made the application within one year of the death and blames the default on inadvertence and oversight.

What happened here is quite unfortunate because at the time of consolidating the case, the court was not informed the Plaintiff had passed on. The 1st Plaintiff in **201 of 2005** swore a replying affidavit opposing the application. He gave a narration of events to show that the applicant has been delaying the disposal of the application.

The court received written submissions from counsel of either side which I have considered.

Under **Order 23 rule 3(2)** of the **Civil Procedure Rules** an application to substitute a party must be made within one year in

default of which the suit shall abate. It follows that the Plaintiff's suit abated one year after his death on 22nd August, 2005. The Applicant has brought this application to revive the suit under **Order 23 rule 8(2)** of the **Civil Procedure Rules**. The **rule** provides the court with a discretion. Such a discretion has to be exercised with a view to having the real issues in the suit to be decided on merits, as long as the delay in bringing the application would not be prejudicial to the Respondent or to the fair determination of the case. The court has to consider the overriding objective specified in **section 1A** of the **Civil Procedure Act**.

I consider that the suit herein and in **201 of 2005** can only be determined if the Applicant is a party as she is the joint registered owner of the land in dispute. It is only by coming into the cases that life will be breathed into them. It is noted that her explanation was that the delay was due to inadvertence and oversight. She was represented and this ought not to have happened. One would, however, excuse such conduct, given the circumstances of the case.

I allow the application but ask that the Applicant pays costs of the Respondents. In the wider interests of justice, I order that the consolidation order be deemed to have been regularized by the revival of the suit and appointment of the Applicant as a party.

DATED, SIGNED AND DELIVERED AT NAIROBI

THIS 26TH DAY OF APRIL 2010.

A. O. MUCHELULE

J U D G E