



REPUBLIC OF KENYA

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

Civil Case 453 of 2004

WAINAINA KAHWAI..... APPLICANT

VERSUS

THE LAND REGISTRAR..... RESPONDENT

AND

GLADYS WAMBUI MBOCHA..... INTERESTED PARTY

RULING

By chamber summons dated 16.05.08 stated to be brought under sections 3A and 63 (e) of the Civil Procedure Act, Cap.21 as well as Order VI rule 13 (1) (b), (c) & (d) and Order XXIII rule 3 the Civil Procedure Rules, the applicant applied for the following orders:-

1. That the interested party's chamber summons dated 17.03.05 be struck out or otherwise dismissed.
2. That costs of this application be and the application dated 17.03.05 be met by the interested party's estate.

The grounds upon which the application is based are:-

- a) That the interested party's suit abated as the applicant received information that the interested party died in the year 2006.
- b) That the interested party's estate has not taken any steps to substitute her with the personal representative despite several requests to their advocate hence the application has abated.
- c) That the interested party or her estate has not taken any steps to prosecute the pending application since 05.04.05 aforesaid.
- d) That prayer 4 of the application does not lie.
- e) That the application is scandalous, frivolous and vexatious.
- f) That the application is prejudicing and delaying the fair conclusion of this matter.
- g) That the application is an abuse of the court process.

The present application is supported by the applicant's affidavit sworn on 16.05.08.

At the hearing of the application, on 18.06.08 the applicant was represented by learned counsel, Mr S.K. Gichigi; the respondent was represented by learned counsel, Mr. V.M. Chahale; while Mr J.T. Nzioki held brief for Mr N. Njenga for the interested party. Mr. Nzioki informed this court that Mr. Njenga for the interested party was not ready to proceed because his client had gone to his office the previous day concerning this matter but could not find Mr. Njenga who was before the High Court and that Mr. Njenga had not been able to get the interested party to file a replying affidavit to the present application. Mr. Nzioki told this court that Mr Njenga was seeking adjournment and leave to file a replying affidavit. Mr. Nzioki did not say why Mr. Njenga was not in court at the hearing of the present application on 18.06.08.

Mr. Gichigi for the applicant opposed both the application for adjournment and the application for leave to file a replying affidavit. He said that the present application was served on counsel for the interested party on 23.05.08 which gave enough time for the interested party to file reply but this had not been done. Mr. Gichigi added that in any case, counsel for the interested party had informed him (Mr. Gichigi) in May, 2006 that the interested party had died and that arrangements were being made for the interested party's substitution under Order XXIII rule 3 and that applicant's counsel had written to counsel for the interested party to expedite the matter but no action had been taken. Applicant's counsel submitted that the proceedings by the interested party had abated and that even if time was given for the interested party to file a replying affidavit, there would be no competent person to file such affidavit.

Mr. Chahale for the respondent also opposed the adjournment, for the same reasons as those advanced by applicant's counsel.

As no explanation had been offered for the absence of Mr. Njenga for the interested party at the hearing of the present application on 18.06.08 and also because there appeared to be no competent person in existence to file the replying affidavit alluded to by Mr. Nzioki, I declined to grant the adjournment sought and directed the hearing to proceed. Hearing proceeded and applicant's counsel essentially repeated the message that because the interested party was reported in May, 2006 to have died and that todate there was no evidence

of her substitution, the said interested party's chamber summons application dated 17.03.05 seeking to be made a party to the suit herein had abated and that it should be struck out or otherwise dismissed. Respondent's counsel associated himself with applicant's counsel's sentiments. Mr. Nzioki holding brief for Mr. Njenga said he left the matter to court since no reply had been filed by the interested party.

I have given due consideration to the applicant's chamber summons application dated 16.05.08, the grounds upon which it is based and the affidavit evidence in support thereof.

The applicant's affidavit sworn on 16.05.08 in support of the present application discloses that he learnt in the year 2006 that the interested party had died and he (applicant) informed his advocate who in turn raised the issue with the interested party's advocate. The applicant added that his advocate wrote to the interested party's advocate on the matter but got no response. The applicant's depositions have not been controverted since no affidavit has been filed in reply to the application now before court. I accept the applicant's affidavit evidence that by 2006 the interested party had died. No evidence has been tendered before this court that there has been any substitution of the interested party. Order XXIII rule 3(2) is to the effect that since no substitution of the interested party took place within one year of her death, her chamber summons application dated 17.03.05 seeking to be joined as a party to the suit herein has abated. In the premises, I allow the applicant's chamber summons application dated 16.05.08, grant prayer 1 thereof and dismiss the abated application.

Ordinarily, costs follow the event. In the present case, the interested party's chamber summons application dated 17.03.05 abated by operation of law because nobody was substituted for the deceased interested party within a year of her death. It would appear to be a double tragedy for the deceased interested party's application to fail and also for her estate to be condemned to costs of the present

applicant's application through no fault of the deceased interested party. I direct that the parties shall bear their own respective costs of the chamber summons application dated 16.05.08 and the chamber summons application dated 17.03.05.

Orders accordingly.

Delivered at Nairobi this 8th day of July, 2008.

B.P. KUBO

J U D G E