

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
HIGH COURT CIVIL CASE NO. 131 OF 1995

KIBARIA NGURE DEFENDANT/APPLICANT

VERSUS

NGIGI GAKUYA PLAINTIFF/RESPONDENT
ESTHER WANJIRU NGIGE CO-PLAINTIFF/RESPONDENT

R U L I N G

By a chamber Summons dated 7th January 2003, Kibaria Ngure (hereinafter referred to as the Defendant/Applicant) has come to this court under order XXIII rules 3(1) & 2, Order VI rule 13(1) (b) (c) & (d) of the Civil Procedure Rules seeking orders:

- (a) That the suit by the original Plaintiff Ngigi Gakuya against the Defendant herein has abated.*
- (b) That the suit by the alleged Co-Plaintiff Esther Wanjiru Ngige be dismissed.*

In order to put this application in its right perspective, it is necessary to recapitulate its background. The suit which is the subject of the application was filed on 20th June 1995 by Ngigi Gakuya (hereinafter referred to as the Plaintiff) against the Defendant/Applicant. The prayers in the plaint included:

- (a) A declaration that the Defendant is registered in land parcel No. Mwerua/Gitaku/352 in trust for the Plaintiff to the extent of 1.45 acres.*
- (b) alternatively a declaration that the Plaintiff has acquired the title to the said portion by way of adverse possession under sections 37 and 38 of Limitation of Actions Act Cap 22 Laws of Kenya having been in occupation of the said land for more than 12 years.*

The Defendant/Applicant filed a defence on 6th August 1996 in which he denied the Plaintiff's claim maintaining that he was the absolute owner of parcel number Mwerua/Gitaku/352 (hereinafter referred to as "suit land"). He claimed that the Plaintiff was in occupation of part of the suit land by permission from the Defendant/ Applicant which permission was terminated on 9th May 1995. The Defendant/Applicant therefore counter-claimed against the Plaintiff for an order for Plaintiff's eviction from the suit land.

On 14th November 1997, Esther Wanjiru Ngigi describing herself as 3rd party/applicant brought a notice of Motion against the Defendant seeking orders:

- That the honourable court be pleased to join the applicant to the suit and*

thereafter refer the same to the Land disputes Tribunal Kirinyaga to determine ownership and whether the deceased Plaintiff should be buried thereat.

According to the supporting affidavit sworn by Esther Wanjiru Ngigi, she claimed she was the widow of the Plaintiff who had died on 6th November 1997 during the subsistence of the suit and that she was in occupation of the land which was held in trust by the Defendant for her family hence her application. On 28th November 1997, the application having been served, the parties appeared through their advocates before court which made the following orders:

- *The matter in this case involves a dispute in land and burial of the late Ngigi Gakuya. The panel of elders to decide if the deceased has a right to be buried on land parcel No. Mwerua/ Gitaku/352. Wife of the deceased claiming 1.45 acres (half share).*
- *The applicant is joined as a Co-Plaintiff.*
- *Parties to appear before the tribunal on 4th December 1997 at 9.00 a.m.*

On 23rd January 1998, Esther Wanjiru Ngigi moved the court for orders to transfer Kerugoya SPMCC No. 218 of 1997 to the High Court for disposal. Apparently the High Court order referring the matter to the tribunal could not be effected in view of Kerugoya SPMCC No. 218 of 1997 wherein an order had been issued restraining the burial of the Plaintiff on the suit land.

The matter came up before the court on 23rd January 1998 when the parties entered into a consent order that the matter should proceed before the Kirinyaga Land Disputes Tribunal as ordered by the court on 28th November 1997.

By another notice of motion dated 22nd July 2002 Esther Wanjiru Ngige came back to this court and moved the court under section 3A of the Civil Procedure Act and section 8 of the Land Disputes Tribunal Act for orders inter alia:

- *Judgment be entered as per the award of Baricho Land disputes Tribunal dated and delivered on 24th July 1998.*

The application was listed for hearing on 2nd August 2002 but was stood over generally and remains pending to date. In the meantime the Defendant/applicant changed advocates and his new advocates filed the chamber Summons dated 7th January 2003 which is the subject of this ruling.

For the Defendant/Applicant it is submitted that the Plaintiff having died on 6th November 1997 and no substitution having been made the suit abated after one year. It is further submitted that the application made by Esther Wanjiru Ngige to be joined as a Co-Plaintiff was irregular as it was made when there was no Plaintiff in existence, and that in any case no pleadings have been filed by Esther Wanjiru Ngige, who had averred in her affidavit that the suit land was held by the Defendant in trust for her family. It was further maintained that the Co-Plaintiff had no locus as she was claiming on behalf of the estate of the Plaintiff, but had not taken out letters of administration. In this regard reliance was placed on the case of **Truistik Union International v/s Jane Mbeyu CA 45 of 1990** and the court was urged to dismiss the Co-Plaintiff's suit on that basis.

Finally it was submitted that the order made on 28th November 1997 for Esther Wanjiru Ngige to be joined as a Co-Plaintiff was against the law as the court could not vest locus where none existed. The case of **Omega Enterprises (K) Ltd. v/s Kenya Tourist Development & two others CA 59 of 1993** was cited for this proposition.

The application was opposed by Esther Wanjiru Ngige, on behalf of whom it was submitted that this suit was effectively discontinued on 28th November 1997 when a consent order was recorded essentially placing the dispute under the land Disputes Tribunal Act, and that the consent order having been acted upon this court is functus officio. The case of **Omega Enterprises (K) Ltd. v/s Kenya Tourist Development Corporation & 2 others** was distinguished on the basis that in that case, unlike this case the orders set aside were issued in breach of the rules of natural justice. The **Truistik Union International & Another v/s Jane Mbeyu** and another was also distinguished on the basis that Esther Wanjiru Ngige did not go to the tribunal in her representative capacity but was claiming directly from the Defendant/Applicant and therefore did not require letters of administration.

It was submitted that there was no suit pending before this court which could abate. It was submitted that the application before the court was simply seeking appellate orders against the orders of the tribunal without following the proper procedure.

From the above, issues have arisen as to what is the basis of the claim of Esther Wanjiru Ngige against the Defendant/Applicant. Was she claiming in her own right or in a representative capacity? Was she properly joined as a co-plaintiff or is the order joining her a nullity? Has the Plaintiff's suit abated? Or has it been completely transferred to the Kirinyaga Land Disputes Tribunal such that this court can be said to be functus officio? Finally is the applicant/ Defendant entitled to the orders sought or is he estopped by the consent order and his participation in the tribunal?

The fact that the Plaintiff who initiated this suit died on 6th November 1997 is not in dispute. It is also evident that as at the time the order joining Esther Wanjiru Ngige as a Co-Plaintiff was made the original Plaintiff was already dead. The Co-Plaintiff maintains that she was claiming directly from the Defendant/Applicant in her own personal capacity and did not therefore require Letters of administration for the estate of her late husband as she was not claiming on behalf of his estate. Nevertheless despite having been joined as a Co-Plaintiff she has not filed any pleadings to show what her claim against the Defendant/Applicant is. The only documents the court has which it can use to discern the Co-Plaintiff's claim is her affidavit sworn on 14th November 1997 in support of her application to be joined as a Co-Plaintiff, which affidavit read in conjunction with the original plaint shows that the Co-Plaintiff claims that the Defendant/Applicant holds half the suit land in trust for her family based on the fact that the suit land was purchased jointly by her deceased husband and the Defendant/ Applicant. That being the position, it is apparent that the Co-Plaintiff

was pursuing the suit in a representative capacity for and on behalf of her deceased husband's estate. I concur with the submission that on the authority of the case of **Truistik Union International & Another v/s Jane Mbeyu and Another**, the Co-Plaintiff had no capacity to pursue the suit on behalf of her husband's estate without first being appointed the representative of his estate through letters of administration.

A question was posed as to whether in granting the application to join Esther Wanjiru Ngige as a Co-Plaintiff the court improperly vested the Co-Plaintiff with locus standi where none was provided by law. I would answer this question in the affirmative given that the provisions of Order XXIII rule 3(1) of the Civil Procedures Rules relating to the procedure for substitution in the case of death of a sole Plaintiff was not followed, and the fact that the Co-Plaintiff did not seek to be joined before the death of the sole Plaintiff nor has she shown that she has any independent claim against the Defendant/Applicant. The order issued by this court on 28th November 1997 joining the Respondent as a Co-Plaintiff was therefore a nullity.

Secondly it was suggested to this court that the orders made by the court on 28th November 1997 and the consent order recorded by the court on 23rd January 1998 effectively transferred the Plaintiff's suit to the Kirinyaga Land Dispute Tribunal and therefore this court is functus officio as there is no suit pending before it.

The order made on 28th November 1997 was however very clear that although the case involved dispute in land and burial of the late

Ngigi Gakuya, the panel of elders was "to decide if the deceased has a right to be buried

on land parcel No Mwerua/Gitaku/352.” This is a clear indication that the reference to the panel of elders was not a reference of the whole suit but was only limited to the issue of whether the deceased Plaintiff could be buried on the suit land.

That is to say that the court still retained the jurisdiction to determine the ownership dispute and the suit remained pending before this court for this purpose. Moreover, although the order of 28th November 1997 was not clear as to the law, under which the case was being referred to the panel of elders i.e. whether as an arbitration under order 45 of the Civil Procedure Rules or as a land dispute under the Land Dispute Tribunal Act No.18 of 1990, it became evident from the consent recorded on 23rd January 1998 that the reference was to the Kirinyaga Land Dispute Tribunal which is a tribunal established under Section 4 of the Land Dispute Tribunal Act No.18 of 1990 and whose jurisdiction under Section 3(1) of that Act is limited to:

“Cases of a civil nature involving a dispute as to:

(a) the division of or the determination of boundaries to land including land held in common.

(b) a claim to occupy or work land or,

(c) trespass to land.”

The orders referring the issue of burial of the deceased on the suit land to the Kirinyaga land Dispute Tribunal was a nullity as the issue was tied to the dispute relating to ownership of the suit land and was a matter not within the jurisdiction of the tribunal.

I adopt the holding in the case of **Macfoy v/s United Africa Co. Ltd. [1961] 3 All ER 1169** which was followed by the Court of appeal in **Omega Enterprises (Kenya) Ltd. v/s Kenya Tourist Development Corporation & 2 others** where it was stated:

“If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

It follows that neither the court order of 28th November 1997, nor the consent order of 23rd January 1998 could confer jurisdiction where none existed in law. The order referring the dispute to the Kirinyaga Land Dispute Tribunal was a nullity and the Plaintiff’s suit therefore remains pending before this court and this court is therefore not functus officio.

Since no action has been taken in accordance with order XXIII rule 3 (1) of the Civil Procedure Rules and more than 7 years have gone by since the death of the Plaintiff Order XXIII rule 3(2) has taken effect and the suit has abated.

I do therefore grant prayer (1) of the chamber Summons dated 7th January 2003 and declare that the Plaintiff’s suit has abated. I further order that the costs of the suit shall be paid to the Defendant/ Applicant from the estate of the deceased Plaintiff.

There being no suit in existence by the alleged Co-Plaintiff I make no orders in regard to prayer (2).

These shall be the orders of this court.

Dated signed and delivered this 18th day of March 2005.

**H. M. OKWENGU
JUDGE**