



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC APPLICATION NO. 114 OF 1986

STEPHEN MUTISYA TITI & ANOTHER.....PLAINTIFF

VERSUS

THE MINISTER FOR LANDS AND SETTLEMENT

THRO' DC MACHAKOS.....DEFENDANT

RULING

By an application dated 13.08.2004 but filed nearly (5) months later on 11.01.2005 the Plaintiff herein seeks, one principal order, namely, that the name of the first Respondent, **ITUMO TITI** (hereinafter referred to as the deceased) be substituted with that of **ELIZABETH NDULU ITUMO** his wife and **KIVAVI ITUMO** (son) the joint legal representatives to the deceased's estate. The subsidiary prayer was that costs be in the cause.

The application was supported by the Affidavit of Stephen Titi sworn on 13.08.2004 and the grounds set out on the face of the application. The principal ground for the delay in bringing the application was that the court file herein was in the custody of either the retired Justice Sheikh Amin (of this court), or with retired Judge of Appeal, Lady Justice Effie Owuor, and in either case pending a Ruling – which was in the event never delivered up to now.

In a supplementary affidavit sworn and filed on 15.03.2005, the defendant Stephen Titi depones that the court file became available only about 23.02.2004, and that by that time the First Defendant was already dead, and that the only way to move the case forward was to substitute the name of the deceased with that of the applicant, **Elizabeth Nduku Itumo** and **Kivai Itumo** his wife and son respectively.

The Respondents opposed the application, and 1st Respondent filed grounds of opposition dated 18.01.2005, and the 2nd Respondent through the Hon. The Attorney General filed a Notice of Preliminary objection.

The 1st Respondent's grounds of opposition were that application has no merit and is an abuse of the process of the court; the applicant was guilty of inordinate delay since the suit against the deceased, the Respondent, has abated. The third ground that the persons sought to be substituted for the deceased are neither the Administrators of his estate nor the legal representatives is answered by Exhibit ST1 to the Supplementary Affidavit of Stephen Titi. It is a certified copy of the certificate of confirmation of a Grant dated 4.05.1999.

The 2nd Respondents preliminary objection was in two parts, firstly, that the Notice of Motion dated

6.03.1987, is incompetent, incurably defective and misconceived and does not lie because the same offends the mandatory provisions of Order LIII of the Civil Procedure Rules and secondly that the Chamber Summons application dated 13.08.2004 is misconceived and the orders sought therein cannot lie; and prayed that both applications be dismissed with costs.

I wish to state on the outset that the Applicant did not urge the Notice of Motion dated 6.03.1987, although he had notice of it under the Defendant's Notice of Preliminary Objection. I shall revert to this issue in the latter part of this Ruling.

Adverting therefore to the Chamber Summons dated 13.08.2004, the grounds therefore provide inter alia that the 1st Respondent Titi died on 7.05.1989. Under the provisions of Order XXIII Rule 4(3) of the Civil Procedure Rules, where within one year no application is made under Sub rule (1) the suit shall abate as against the deceased defendant.

The application herein was made eight (8) years after the death of the 1st Defendant/Respondent the reason advanced by the Plaintiff's Counsel Mr. Ndolo for the inordinate delay in bringing the application is blamed upon the non-delivery of the judgment, and this is one case of delayed justice being justice denied. It is however quite clear to me that if the deceased 1st Respondent died on 7.05.1989, the application herein ought to have been brought by 6.05.1990, that is some seven years before the adjudication by the court in 1997. In my view this blame must lie with the Plaintiff's legal advisers.

There is another reason why the Plaintiff's legal advisers must carry blame for this state of affairs. In the supplementary affidavit of Stephen Titi sworn on 15.03.2005, is attached a letter dated 23.02.2004 written by C.K. Njai, then Chief Court Administrator, and now, Registrar of this Court, written in reply to the Plaintiffs' Advocate's letter of 14.01.2003 the Hon. The Chief Justice directed the case proceeds under the provisions of Order XVII Rule 10 of the Civil Procedure Rules. The Plaintiff's Counsel was advised to mention the case before the judge on a date convenient to all the Advocates, so that directions may be given concerning the future conduct of the matter, in terms of the directions by the Hon. the Chief Justice.

It is quite shocking that learned Counsel for the Plaintiff ignored this free legal advice, and opted to pursue the application for substitution of the 1st Defendant. It was a bad gamble. Counsel knew the requirement that such an application must be brought within one year of the death of the 1st Defendant.

The provisions of Order XXIII, Rule 3 are mandatory. The suit abates after one year if no application is made for an order to make the legal representative a party to the suit. A delay of over 8 years is inexcusable, the attempt to lay the blame on two retired Judges does not hold water. The blame must clearly lie at the feet of the Plaintiff's legal advisers. I wish I could come to a different conclusion for the sake of the Plaintiff. The rule in issue does not confer upon me any real discretion in the matter.

In the result therefore, the applicant's application by way of Chamber Summons dated 13.08.2004 is dismissed with costs.

There is however the other aspect of this matter, and concerns the power of this court to move under Order XVII Rule 10 of the Civil Procedure Rules. I accordingly direct that the parties counsel address the court on this aspect in line with their respective submissions filed in Miscellaneous Civil Case No. 114 of 1986, dated 3.03.1997 (on account of the Attorney General), 19.11.1996 (on behalf of the Respondents) and 7.11.1996 (on behalf of the Applicants). Parties shall take dates mutually convenient to them in the Registry.

Those are the Orders of this Court.

Dated and Delivered at Nairobi this *6th day of June* 2005,

ANYARA EMUKULE

JUDGE