



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 686 OF 1995

SERAH WACHUKA GITHONGO.....PLAINTIFF

VERSUS

MICHAEL GITHINJI1ST DEFENDANT

NGOTHO NGARUIYA.....2ND DEFENDANT

RULING

The applicant's application dated 12th March, 2004 seeks orders that:-

- (a) leave be granted to Samuel Ngigi Githongo to be substituted in place of the Plaintiff who is now deceased.
- (b) The order of 18/2/2004 declaring the suit as having abated be set aside.
- (c) The suit be revived.

The application was made on the ground that Samuel Ngigi Githongo was the Legal Representative of the estate of the deceased plaintiff and that if the orders sought were not granted the Plaintiff's estate and dependants stood to suffer irreparable loss as the subject matter of the suit was land.

The application was supported by an affidavit sworn by Samuel Ngigi Githongo, a son of the deceased Plaintiff on 12th March, 2004. He deposed that he was the eldest son of the Plaintiff who passed away on 13/5/2000 and one week after her demise, he informed his former advocates, Muthanwa & Company about the death and instructed them to apply to have him substituted in place of his deceased mother. He even paid to the said firm of advocates Kshs.19,500/- for filing of the application. Copies of receipts for payment of the said sum were annexed to the affidavit of the applicant. The applicant further deposed that his former advocates told him that they had filed the appropriate application only to be surprised by their letter dated 17th September, 2003 which was addressed to Sarah Wachuka Githongo (the deceased Plaintiff) and stated as follows:-

“Dear Madam

RE: NAKURU HCCC NO. 686 OF 1995

YOURSELF VS MICHAEL GITHINJI

I have looked at the file carefully and our view in the matter is that we would rather another firm of advocates deals with the case.

Kindly arrange to advise us of the advocate of your choice to enable us hand in the file urgently. Disbursements paid can be collected on 23/9/2003.

Yours faithfully Signed

MUTHANWA & COMPANY

ADVOCATES ”

Thereafter he visited the chambers of the said firm and was given the entire file without any explanation. He then consulted his present advocates who informed him that nothing had been done on the matter since his mother passed away and that he needed to apply for Letters of Administration urgently which he did sometimes thereafter.

He therefore blamed his former advocates for not having acted on the instructions that he had given them.

The respondent opposed the application saying that the suit abated long time ago and the applicant had taken a very long time to move the court and the respondent had already moved the court to declare that the suit had abated.

Order XXIII Rule 8(2) requires the Plaintiff or the person claiming to be the legal representative of a deceased Plaintiff who is applying for an order to revive a suit which has abated to show that he was prevented by sufficient cause from continuing with the suit. I have taken into consideration the reason that caused the suit to abate and it is clear that the fault lay squarely on the applicant's former advocates who failed to file the appropriate application despite the fact that they had been instructed and paid one week after the death of the Plaintiff.

I have also taken into consideration the fact that the claim herein relates to family land and the estate of the deceased Plaintiff should not be prevented from pursuing their claim because of their former advocate's mistake. In

ESSANJI AND ANOTHER VS SOLANKI [1968] E.A. 224 the Court of

Appeal stated that:-

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his rights.”

In HCCC No. 110 of 1983 at Nakuru, **MACHARIA GACHANGAGA VS PETER KAMAU MACHARIA** the court allowed a suit which had abated to be revived and ordered that the legal representatives of the deceased be joined as defendants in place of a deceased Defendant.

I am satisfied that the orders sought by the applicant are merited and I hereby set aside this court's order of 18th February, 2004 and order that this suit be revived and Samuel Ngigi Githongo be substituted as the Plaintiff in place of the deceased Plaintiff.

The costs of this application shall be in the cause.

DATED, SIGNED & DELIVERED at Nakuru this 30th day of September, 2004.

DANIEL MUSINGA

AG. JUDGE

30/9/2004