



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1554 OF 1981

PAUL HURI WAITHAKA..... PLAINTIFF

VERSUS

ROBERT IKIGU KAMAU & ANOTHER..... DEFENDANT

RULING

This is an application by Waithaka Hori the administrator of the estate of the deceased plaintiff for three main orders, namely,

1. ---

2. ---

3. That applicant as legal representative of the deceased plaintiff be made a party to the suit and proceed with the suit.

4. That the suit be revived and /or order of 13/6/2000 be set aside and status quo prior to the said order be reinstated and / or maintained.

5. That first defendant be restrained from trespassing , wasting, damaging, alienating, selling or disposing suit land Gatamaiyu/Kamuichege/74 until further orders of this court or determination of the suit.

The application is brought under order XXIII rule 3(1) 8(2) and 12 CP Rules and order XXXIX rule 1 (a) and 9 of C.P. Rules.

The application is also brought under S. 3A of the Civil Procedure court.

There is no dispute that plaintiff in this suit died on 25.9.92 By order XXIII rule 3(1) as read with order XXIII rule 3(2) CP Rules, a legal representative of the plaintiff could apply to be made a party within one year and in default the suit shall abate. By Order XXIII Rule 8(1) - where a suit abates or is dismissed, no fresh suit shall be brought on the same cause of action.

By orders XXIII Rules 8(2), a legal representative may apply for an order to revive a suit which has abated or to set aside an order of dismissal if it is proved that he was prevented by any sufficient cause from continuing the suit.

The previous limitation period of one year in order xxxiii Rule 8(3) CP Rules within which to make an application for revival of an abated suit was removed by deletion by L.N. 5/.96. The result is that the time for making an application for the revival of an abated suit is not limited. So the application is properly before the court.

First defendant made an application in person dated 28.4.2000 for an order that the suit has abated. That application was listed for hearing on 5.6.2000 It was to be served on deceased plaintiff's advocates. An affidavit of service showing that application was served on Mrs B.K. Nyabuto Advocate, an assistant of Mr. Orengo was filed. Plaintiffs advocates did not attend on 5.6.2000 and court declared the suit as having been abated.

The applicant has in para 3 of the supporting affidavit given reasons for the delay in applying for his appointment as a legal representative. He states that his elder brother Samuel Mburu Hori, was, by family consent, entitled to apply for letters of administration but he died on 13.8.94; that applicant was transferred to Garissa barely two weeks after he obtained the Grant of letters of administration; that in around January 1994 first defendant had deceived the family of possibility of settling the dispute and that his advocates on record had immense difficulties in training the file following their re-location from Agip House to Hazina Towers and then to Yaya centre.

Applicant disputes that the application dated 25.4.2000 was served on his advocates. Mr. Otieno Nyajow a processor server of JAB Orengo Advocates has filed an affidavit. He states that Mrs Nyabuto is not an Assistant of Mr. Orengo and that Mrs Nyabuto is an employee in the firm of M/S Murungi & Co., Advocates located at Hazina Towers.

The first respondent does not in his replying affidavit challenge the facts stated by applicant showing reasons for delay. He merely states in para 13 that there are no valid reasons for failure to take action. The first respondent did not reply to the averments in Mr Otieno's affidavit.

The applicant has annexed a certificate of death showing that his brother Samuel Mburu Huri died on 13.8.94 He has also annexed a letter dated September 1995 transferring him to Garissa. He has also annexed a copy of the Grant of letters of administration showing that Grant was given to him on 5.9.95.

The reasons applicant has given are in my view are justifiable. It was elder brother who was appointed by the family to apply for Grant but he died. Applicant without unreasonable delay obtained a Grant but he was immediately transferred to Garissa. His advocates kept on shifting offices.

In the circumstances, I am satisfied that the applicant has shown a sufficient cause for the delay.

The service of the application is disputed. The contents of Mr. Otieno's affidavit that Mrs Nyabuto who was allegedly served is not in the employment of JAB Orengo has not been refuted. In the circumstances there is no certainty that advocates on record for deceased plaintiff have been served.

In any case, it is my view that the application should have been served personally on the applicant and not on the advocates of a deceased's plaintiff because the advocates instructions to act for the deceased plaintiff ceased with the death of the plaintiff. The lawyer could not proceed in any manner with the suit until he received instructions from the deceased's legal representative.

Moreover the application dated 28.4.2000 appears incompetent because it was filed by first defendant in person when he had advocates on record and without having first filed and served a notice to act in person.

Lastly, the application is also brought under the inherent jurisdiction of the court. The court has inherent power to make any orders for the ends of justice.

Applicant refers to the merits of the abated suit. First respondent has also referred to the merits of the suit. The subject matter of the dispute is land - one acre. Land parcel no. Gatamaiyu/Kamuhege/74 comprising of 3 acres was solely registered in the name of the deceased plaintiff until 28.8.80 when both the deceased and first defendant were registered as tenants in common each owning 2/3 share and 1/3 share respectively. It is that registration which deceased was challenging in the originating summons as have been effected without a court order and without consent of the Land Control Board. I have read the affidavit of the deceased plaintiff shown on 6.5.81: the first defendants replying affidavit sworn on

23.9.82 and deceased plaintiff's further affidavit sworn on 1.12.82. First defendant does not say that there was any decree or order of the court giving him 1/3 share of the land. It is conceded by first defendant that the transfer of 1/3 share was executed by Kiambu court without the backing of a suit or decree. To that extent, the transfer is prima facie fraudulent.

Secondly, the deceased plaintiff denied that any consent of the Land Control Board was given. First defendant has annexed two consents - one for partition dated 12.11.80 and the second one for transfer dated 18.8.80. A serious issue arises from the affidavits as to whether or not the two consents were given.

More importantly, first defendant alleges that the deceased plaintiff agreed to sell one acre in 1968 and agreement was reached in 1968. He did not annex any memorandum in writing. The application for consent of the Land Control was not also annexed. The two consents were allegedly given in 1980. The agreement of sale becomes void for all purposes if no application for the consent of the Land Control Board is made within 6 months of the agreement. The alleged consent were being given 12 years after the date of the agreement. Prima facie, it appears that the consents were being given on a transaction which the Land Control Act had declared null and void and hence the consents are not, prima facie, valid in law.

I have referred to those aspects of the dispute to show that the abated suit is not frivolous. If the order or abatement is not, lifted the applicant will be left with no other remedy. It is in the interest of justice that suit should be revived and appropriate orders restoring status quo be made.

The suit abated by operation of the law. By order XXIII Rule 3(2) CP Rules, all that remained is for the first defendant to apply to court for an award of costs. But the order dated 5.6.2000 merely declaring the suit as having abated was used by first defendant to obtain a Title Deed. He has annexed a Title Deed given on 14.7.2000.

The circumstances under which the title Deed was obtained and of the registration of first defendant as proprietor have not been explained. According to the law, the surveyor must prepare mutation forms, assign a different number for each parcel. The owner of the land must agree to mutation and sign the mutation forms. There is no evidence that partition was legally done.

Lastly, and most importantly, the mutation of the land could not be legally done without involving the applicant as the administrator of the estate of the deceased plaintiff. In those circumstances part of prayer No. 4 that status quo prior to order of 5.6.3000 be re-instated is amply justified.

Prayer No. 5 for an order of injunction was not prosecuted. For all the above reasons, I allow the application dated 2.8.2000 and order that:

1. The applicant as legal representative of the deceased be made a party to the suit in place of the plaintiff.
2. The order of 5.6.2000 and issued on 13.6.2000 is set aside.
3. The abated suit be and is hereby revived
4. The partition/mutation of land parcel no. Gatamaiyi Kamucchege/74 is cancelled.
5. The registration of first defendant as proprietor of sub - division number Gatamayu/Kamucchege/698 is cancelled and the title Deed given on 14.7.200 is cancelled.
6. First defendant to return the original title deed to Land Registrar Kiambu within 7 days of this order for cancellation.
7. The entire Register in respect of Gatamaiyu/Kamucchege/74 to be restored and all entries including the entry of 28.8.80 registering the deceased plaintiff and first defendant as proprietors in common to be restored on the Register.

8. The above orders to be served on the Land Registrar Kiambu to take immediate action.

9. Costs of this application be costs in the cause in the suit.

E. M. Githinji

Judge

15.11.2000

Mr. Kairaria present

Waithaka Hori - applicant present

Mr. Kimuthi absent

1st Respondent present

Mr. Kairaria

I apply for certify copy of the Ruling. I also apply for leave to appeal,

Order: 1. Leave to appeal if necessary granted

2. Ruling to be typed and copy supplied as prayed.

E. M. Githinji

Judge

Order: File to be stored in the strongroom

E. M. Githinji

Judge