



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC CASE NO. E001 OF 2021**

**GERVASIO MWITHIMBU.....PLAINTIFF**

**VERSUS**

**PETER KIRIMI M'MUKIIRA.....1<sup>ST</sup> DEFENDANT**

**JULIUS MURITHI M'MUKIIRA .....2<sup>ND</sup> DEFENDANT**

**RULING**

**A. PLEADINGS**

1. The applicant's notice of motion dated 21.9.2021 seeks for orders of stay of proceedings in **Succession Cause No. E14 of 2021** until the determination of this suit and secondly the court to enjoin Cypriano Kongiru in this suit as a duly appointed administrator of the estate of Mr. Rimberia Muthumba aka Rimberia Muthima. The application is supported by an affidavit sworn by Gervasio Mwithimbu on the even date.

**B. GROUNDS OF OPPOSITION**

2. The grounds upon which the application is brought are THAT the succession cause was filed after this suit following a grant issued on 11.8.2021 in favour of the proposed interested party; that the succession cause is focusing on the distribution of **L.R. No. Ntima/Igoki/1578** which is the subject of this suit, and that if the property is not preserved by staying the succession cause the applicant shall be prejudiced.

3. The 2<sup>nd</sup> respondent opposes the application through a replying affidavit sworn on 7.10.2021 on the basis that the 1<sup>st</sup> defendant is now deceased; the applicant knew of the succession cause long before he filed his suit since he had informed him of the process, there is no cause of action against the defendants as well as the proposed party; the application is lacking merits, is an afterthought and an abuse of the court process.

4. The application is opposed by the proposed interested party through Cypriano Kongiru's affidavit sworn on 7.10.2021 as being an afterthought; filed in bad faith vexatious, scandalous and an abuse of the court process since the applicant has no cause of action against the defendants for lack of letters of administration.

5. Secondly, Cypriano Kongiru states the purported joinder would be in futility since the suit is incompetent and the court should not stay the succession cause based on a suit which is already dead.

**C. WRITTEN SUBMISSIONS**

6. By written submissions dated 26.10.2021, the applicant urges the court to exercise its discretion under **Article 42 Rule 6, Section 3A of the Civil procedure Act** and stay the succession cause for the end of justice to be met and for the right of fair trial to prevail.

7. Regarding the threshold of stay of proceedings, the applicant relies on ***Kenya Power & Lighting Co. Ltd -vs- Esther Wanjira Wokabi [2014] eKLR, Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR*** on the proposition that since he has raised an apparent right to ownership, by virtue of adverse possession, and has filed the application expeditiously, coupled with demonstrated sufficient cause, the court should allow the application.

8. Secondly, it is submitted the succession cause was filed soon after this suit was lodged with the intention of defeating his claim and hence it is in the interest of justice his case be heard first otherwise his rights as to fair hearing would be violated.

9. Concerning the prayer for joinder of Cypriano Kongiru, the court is urged to find **Order 1 Rule 10 (2)** grants it powers in deserving cases such as this application to bring on board any party whose presence is necessary so that all issues and questions involved in the suit can be determined wholesomely.

10. On this proposition, the applicant relies on *JMK –vs- MWM & Another [2015] eKLR, Central Bank of Kenya Ltd. –vs- Trust Bank & 4 Others [1996] eKLR, Tang Gas Distributors Ltd. –vs- Said & Others [2014] E.A 448.*

11. Further, the applicant submits he instituted the originating summons against the defendant under the honest believe they were the legal representatives since they were illegally selling the suit property and by joining Cypriano Kongiru, it would be the best option for the ends of justice to be met. He relies on *Marigat Group Ranch and 3 Others –vs- Wesley Chepkoimet & 19 Others [2014] eKLR.*

12. The respondents submit whereas a court has powers under **Order 1 rule 10 (2) Civil Procedure Rules**, to join a party, this can only be done if there exists a competent suit before the court.

13. In the instant suit, it is submitted it would cause unnecessary costs on the proposed party if the court were to order him to come on board yet the plaintiff/applicant has sued the wrong parties making the suit is incurably defective.

14. Further, the respondents submit the replying affidavit has addressed the court on the issues of the defects of the suit and urge to find the application lacking merits more so now that the 1<sup>st</sup> defendant is deceased.

#### **D. QUESTIONS BEFORE THE COURT**

15. The applicant approached this court by originating summons dated 11.12.2020 seeking adverse possession of 0.28 Ha. out of **L.R No. Ntima/Igoki/1578** registered in the name of Rimberia Muthumba (deceased).

16. He sought further for the excision of the portion and registration in his favour within or upon the administration of the estate of the deceased and that the administration therefore shall be subject to his claim.

17. The appellant claimed he was not aware of whether proceedings to administer the estate had been lodged but knew the respondents to be issues of and nephews of the deceased. He attached a sale agreement dated 9.1.2020.

#### **E. ISSUES FOR DETERMINATION**

18. Going through the application and the submissions by parties, this court has to determine:-

**a) If the suit is competent.**

**b) If the applicant deserves the orders sought.**

19. The law allows a party to bring a claim over adverse possession against a registered owner of a property in line with **Sections 7 and 38 of the Limitation of Action Act as read together with Order 37 rule 7 of the Civil Procedure Rules.**

20. The applicant described the defendants as the issues and or nephews of the deceased and not as administrators of the estate. The respondents in the replying affidavit sworn on 12.2.2021 did not deny that they had no capacity to be sued. Instead at paragraph 5 and 6 of the reply they admitted the facts on occupation but on consent of their late father though that they had accepted the request by the applicant.

21. The respondents extensively replied to the originating summons and put in written witnesses statements.

22. In rejoinder the applicant swore a further affidavit on 7.4.2021 on the issues raised by the respondents.

23. **Order 37 of the Civil Procedure Rules** provides an application under **Section 38 of the Limitation of Actions Act** shall be made through an originating summons supported by a certified extract of the title to the land in question. Upon filing, the court is mandated to direct on whom and in what manner the summons shall be served.

24. Whereas the extract to the land claim was not attached to the originating summons, there is no doubt it referred to the estate of Rimberia Muthumba. The power to direct on whom the summons to be served belongs to the court.

25. In this application the applicant has explained the circumstances under which he cited the defendants as respondents. The respondents did not decline service of the originating summons. The proposed respondent has admitted he has letters of grant and has submitted to this court even before the court formally joined him. He has extensively disclosed more information than was required under the application before the court.

26. The court has been told and shown a notification of death regarding the 1<sup>st</sup> defendant. Either way therefore, the originating summons had to be amended to reflect the demise of the 1<sup>st</sup> respondent.

27. This court thus finds the suit before it competent since the facts alleged are curable by way of amendments. After all, the grant was issued to the proposed respondent after the originating summons was filed and as at the time the defendants filed their replies and witnesses

statements, there was in existence no grant issued by the court.

28. My finding is that, it would be in the interest of justice under **Article 159 of the Constitution and Sections 1A, 3 and 3A of the Civil Procedure Act** to order the originating summons be amended to reflect the current realities.

29. Coming to the 2<sup>nd</sup> issue raised by the applicant on stay of proceedings, the applicant has a right to raise a claim over adverse possession after the 12 years are over against the registered owner of the land.

30. Similarly, it is a Constitutional right of the beneficiaries to an estate of the deceased person to lodge for letters of grant or probate whenever they feel like under the **Law of Succession Act Cap 160 Laws of Kenya**.

31. So therefore, the respondents herein cannot be faulted and all be called names and do not deserve expletives used by the applicant herein and which this court find inappropriate more or so when encouraged by officers of his court.

32. Times without number, courts have held that affidavits should be restricted to issues before court and which a party can substantiate. Unfortunately, both parties in this suit went out of their way to exchange unpalatable words which in my view were uncalled for and should not be used in a court of law.

33. That notwithstanding, the applicant waited too late to lodge his suit and should not use that as an excuse to urge this court to stop a process which has nothing to do with the claim at hand.

34. Further, once the suit was filed and pleadings closed on 7<sup>th</sup> April, 2021, there is no good reason given why the applicant did not prosecute his case. He cannot blame the respondents for that.

35. Stay of proceedings is serious, grave and has fundamental interruption of in the right of a party to conduct its litigation. Such power can only be exercised sparingly and in exceptional circumstances where there are valid grounds and sufficient cause.

36. The applicant has not told this court if he has filed a protest in the succession cause against the issue of distribution in line with **Rule 41 (3) and (4) of the Probate and Administration Rules** as a **Cestui quo** trust.

37. **Order 37 of the Civil Procedure Rules** as read together with **Section 82 of the Law of Succession Act Cap 160** allows a court handling a succession cause to set aside a particular share while awaiting the determination of proceedings pending or otherwise where an identity or share of a beneficiary in a deceased's estate arises.

38. In *Harman Singh & Others –vs- Mistry [1971] E.A* 122, the court held an order for stay of a suit for sufficient reason where the ends of justice so require is a discretionary power vested in a court.

39. In view of the circumstances of this matter, I find the applicant has shown no sufficient cause why this court should order for a stay of proceedings in a family court. I disallow the prayer.

40. Given the foregoing, the amended originating summons shall be filed and served **within 14 days**. Parties to comply with **Order 11 within 45 days** from the date hereof.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2022**

**IN PRESENCE OF:**

**NYAMU NYAGA FOR DEFENDANTS**

**KIBATHI FOR PLAINTIFF/APPLICANT**

**COURT ASSISTANT - KANANU**

**HON. C.K. NZILI**

**ELC JUDGE**