



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 590 OF 2012

ESTHER NYAGUTHII NJURU.....PLAINTIFF

=VERSUS=

GEOFFREY GITAU NJURU ALIAS GEOFFREY G. NJURU WAWERU ALIAS

GEOFFREY NJURU WAWERU.....DEFENDANT

RULING

The plaintiff brought this suit on 10th September, 2012 seeking; a declaration that she was the lawful owner of all that parcel of land known as Muguga/Gitaru/1394 (hereinafter referred to as “the suit property”), an order directing the Registrar of Titles Kiambu to rectify the register to reflect the plaintiff as the owner of the suit property and a permanent injunction restraining the defendant from charging, leasing, selling or taking possession of the suit property and/or interfering with the same in any other manner. The plaintiff averred that the defendant was her brother and that the suit property was allocated to her by their deceased father. The plaintiff averred that she had occupied the suit property for over 38 years. The plaintiff averred that the defendant had fraudulently and without any right to the suit property caused the same to be subdivided and had sold portions thereof to third parties and had continued to sell other portions to the great prejudice to the plaintiff. The plaintiff averred that the defendant held the suit property in trust for her.

The defendant filed a statement of defence and a counter-claim against the plaintiff on 19th November, 2013. The defendant denied the plaintiff’s claim in its entirety. The defendant denied that he was holding the suit property in trust for the plaintiff. The defendant admitted that the plaintiff was his sister. The defendant averred that the distribution of the estate of their father, Njuru Ndegwa Magithia was the subject of Nairobi High Court Succession Cause No. 2573 of 1999 in which a grant had been issued and confirmed. The defendant averred that according to the said confirmed grant, he was the lawful owner of the suit property. In his counter-claim, the defendant sought a declaration that he was the legal owner of the suit property.

The plaintiff died on 12th May, 2015. On 18th January, 2017, one, Charles Mungai Nyaguthii and Joseph Gachanga Nyaguthii (the applicants) applied through a Notice of Motion dated 13th January, 2017 to be substituted as plaintiffs in place of the deceased plaintiff and for the suit to be revived and the time for making the application for substitution extended. The applicants brought the application on the basis of a petition for grant of letters of administration ad litem in respect of the estate of the deceased plaintiff that they had made and were awaiting the issuance of a grant. The application was not prosecuted. On 11th October, 2017, the court made an order that the plaintiff’s suit had abated on 12th May, 2016 since no substitution had been done following the death of the plaintiff on 12th May, 2015.

On 19th January, 2018, Charles Mungai Nyaguthii and Joseph Gachanga Nyaguthii (the applicants) brought another application by way of Notice of Motion dated 18th January, 2018 seeking the reinstatement of their earlier application dated 13th January, 2017 and the revival of the suit. By the time this application was made, the applicants had not obtained a limited grant of letters of administration in respect of the estate of the deceased plaintiff and if they had obtained the same, a copy thereof was not attached to the affidavit in support of the application. The applicants’ second application was dismissed on 22nd June, 2018 for non-attendance.

What is before me is another application that was brought by Mercy Njeri Kiuna and Charles Mungai Nyaguthii (the applicants) by way of Notice of Motion dated 7th December, 2020. In the application, the applicants sought; leave for the firm of Wamaita Nderitu & Associates Advocates to come on record for the plaintiff in place of Wachakana & Co. Advocates, the setting aside of the orders made on 11th October, 2017, enlargement of time within which the applicants were to apply for substitution of the deceased plaintiff, leave for the applicants to be substituted as plaintiffs in place of the deceased plaintiff and an injunction restraining the defendant from having any dealing with the suit property pending the hearing and determination of the suit. The application was brought on the grounds set out on the face thereof and on the affidavit of the applicants sworn on 7th December, 2020.

The applicants averred that they were the administrators of the estate of the deceased plaintiff (hereinafter referred to only as “the deceased”)

having been issued with a grant of letters of administration *ad litem* on 19th February, 2018. The applicants averred that following the death of the deceased, they instructed Wachakana & Co. Advocates to apply for a limited grant of letters of administration on their behalf to enable them apply for substitution of the deceased in this suit. The applicants averred that the said firm failed to undertake their instructions. The applicants averred that they were all along not aware that the said advocates had not taken any action on their instruction until when they visited their offices on noticing some movements on the suit property and discovered that the deceased had not been substituted. The applicants averred that upon perusing the court file, they found out that the matter had been marked as having abated on 11th October, 2017. The applicants averred that they instructed another firm of advocates to take over the conduct of the matter and that instead of the said firm of advocates applying for substitution of the deceased, it proceeded to file a fresh suit namely, ELC No. 199 of 2018 that was struck out on 23rd April, 2018 for having been filed contrary to Order 24 Rules 7(1) of the Civil Procedure Rules.

The applicants averred that the defendant had continued to subdivide the suit property and to apportion the same to his children. The applicants averred that as the children of the deceased plaintiff, the suit property was their inheritance. The applicants averred that they were in occupation of the suit property. The applicants averred that if the defendant was allowed to continue with the activities complained of, they would be rendered destitute. The applicants averred that they were victims of bad legal representation for which they should not be made to suffer. The applicants urged the court to give them an opportunity to have the suit heard on merit.

The application was opposed by the defendant through grounds of opposition dated 11th February, 2021 and a replying affidavit of the defendant sworn on the same date. In his grounds of opposition, the defendant contended that the application was *res judicata* as two similar applications had been filed and dismissed by the court. The defendants contended further that the application was an abuse of the court process as the applicants had filed previous applications before this court which were dismissed and another application before the Succession Court in Kiambu that was similarly dismissed. The defendant contended further that the limb of the application seeking injunction had been overtaken by events since the suit property had already been transferred to third parties who were not before the court a fact that the applicants had admitted in Nairobi ELC No. 199 of 2018 between the same parties. The defendant also took issue with the name of the person whom the applicants' wished to substitute that was given as Esther Njeri Njuru instead of Esther Nyaguthii Njuru.

In his replying affidavit, the defendant reiterated the contents of his grounds of opposition. The defendant averred that no case had been made out for the orders sought. The defendant averred that he would be highly prejudiced if the application was allowed as he would be subjected to additional legal costs. The defendant averred that the applicants were guilty of undue delay and urged the court to dismiss the application with costs.

The application was heard on 22nd March, 2021 when the advocates for the parties to a large extent reiterated the contents of the affidavit in support of the application and grounds of opposition and replying affidavit filed in opposition to the application that I have highlighted above at length. The advocate for the applicants submitted that the defendant would not suffer any prejudice if the application was allowed. On his part, the advocate for the defendant submitted that the applicants had opportunity to substitute the deceased which they did not utilise. He reiterated that the limb of the application seeking injunction had been overtaken by events. The defendant's advocate submitted that litigation must come to an end.

I have also considered the application, the affidavit and grounds of opposition filed in opposition thereto and the submissions of counsels. The following is my view on the matter. The application has two limbs. The first limb seeks the revival of the suit and substitution of the applicants as plaintiffs in place of the deceased plaintiff. The second limb seeks a temporary injunction pending the hearing and determination of the suit. I will consider each limb separately starting with the one seeking revival of the suit and substitution of the deceased plaintiff. Under Order 24 Rule 3 of the Civil Procedure Rules, where a sole plaintiff dies and the cause of action survives him, the suit abates within 1 year if no application is made by the legal representative of the plaintiff to be made a party to the suit in place of the deceased plaintiff. The proviso to Order 24 Rule 3 (2) allows the court for good reason on application to extend the time within which an application for substitution of a deceased plaintiff can be made by his legal representative.

The plaintiff, Esther Nyaguthii Njuru (deceased) died on 12th May, 2015. It is not in dispute that the cause of action in this suit survived her. No application was made to substitute her with her legal representative within 1 year with the result that the suit abated. Two gentlemen, Charles Mungai Nyaguthii and Joseph Gachanga Nyaguthii in their capacities as the sons of the deceased made two applications for the revival of the suit and for them to be substituted as plaintiffs in place of the deceased. The applications which in any event were incompetent in that Charles Mungai Nyaguthii and Joseph Gachanga Nyaguthii had not been appointed as legal representatives of the deceased plaintiff did not see the light of the day. The first application as I have stated earlier was never prosecuted while the second application was dismissed for non-attendance.

The present applicants who have been appointed as the deceased's legal representatives have now sought extension of time to apply to be substituted in place of the deceased and for their substitution as the plaintiffs in place of the deceased. The power to extend time within which an application for substitution of a deceased plaintiff is to be made is discretionary. I have considered the grounds put forward by the applicants for the orders sought. I am in agreement with the defendant that the application has been made after a long delay. The delay in my view has however been reasonably explained. I am not in agreement with the defendant that the application is *res judicata* or that it is an abuse of the process of the court. I am in agreement with the applicants that they have been victims of their previous advocates indiscretion. What has played out from the material before the court is a desperate attempt by the applicants to have the dispute that they have with the defendant over the suit property determined on merit. The previous incompetent applications that were filed herein for substitution are a clear demonstration that the applicants were all along keen on substituting the deceased so that they could proceed with the suit. Although the defendant has contended that it will suffer prejudice, loss and damage if the suit is revived, the only possible prejudice mentioned by the defendant is that of legal costs that he will have to incur. I am of the view in the circumstances that the defendant will not suffer loss that cannot be compensated in costs if the application before the court is allowed. I will therefore allow the first limb of the application.

On the limb of the application seeking injunction, I have noted that together with the plaint, the deceased brought an application for a temporary injunction pending the hearing of the suit and on 22nd January, 2013, the court granted an order of *status quo* in lieu of injunction. The defendant has contended that the suit property has since been transferred to third parties and as such the injunction sought cannot issue. No evidence was however placed before the court in support of that contention. In any event, if the property is in the name of third parties the

defendant will not be affected by any injunctive order that may be given by the court. In the circumstances, I will restore the order of status quo.

In conclusion, I am satisfied that the application before me has merit. The same is allowed on the following terms;

1. The time within which the applicants were to make an application for substitution of the deceased, Esther Nyaguthii Njuru is extended up to and including 7th December, 2020 with the consequence that the suit herein which had abated stands revived.
2. The order made on 11th October, 2017 marking the case as having abated is set aside.
3. The applicants, Mercy Njeri Kiuna and Charles Mungai Nyaguthii as Legal Representatives of the estate of Esther Nyaguthii Njuru, deceased are substituted as plaintiffs herein in place of the deceased.
4. The applicants shall amend the plaint within 14 days from date hereof to effect the substitution.
5. The defendant shall be at liberty to amend his defence if necessary within 14 days from the date of service of the amended plaint.
6. The status quo prevailing as of the date hereof relating to title, use and occupation of all that parcel of land known as Muguga/Gitaru/1394 shall be maintained.
7. The applicants shall pay to the defendant Kshs. 20,000/= as thrown away costs, such payment to be made forthwith.

DELIVERED AND DATED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mwangi for the Applicants

Mr. Mirie for the Defendant

Ms. C. Nyokabi - Court Assistant