



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC NO. 113 OF 2014

ANG.....PLAINTIFF

-VERSUS-

MGM.....1ST DEFENDANT

SH LIMITED.....2ND DEFENDANT

AND

PNG.....1ST APPLICANT

CWM.....2ND APPLICANT

RULING

A. INTRODUCTION

1. By a plaint dated 29th May, 2014 and amended on 19th September, 2014 the original Plaintiff, ANG, who claimed to have a beneficial interest in *LR No. Aguthi/Gatitu/[...]* (*the suit property*) sued the Defendants claiming the following reliefs:

(a) *A declaration that the purported sale and/or transfer of Land LR No. Aguthi/Gatitu/[...] is null and void ab initio.*

(b) *A permanent injunction restraining the 2nd Defendant, his servant and or agents from evicting the Plaintiff and her children siblings from the suit land conducting sale,*

subdivision, transferring, using, leasing, interfering or in any other matter dealing with the parcel LR No. Aguthi/Gatitu/[...].

(c) *An order that the Land Registrar Nyeri do cancel the subsequent title issued in the name of SH Limited and any other entry other and revert the same in the name of 1st Defendant.*

(d) *An order for reinstatement of the Plaintiff in the suit land.*

(e) *Special damages of Kshs.23,500 per month from the date of demolition of the rental premises erected in the suit land.*

(f) *General damages.*

(g) *Cost of this suit and interest.*

2. The original Plaintiff who was the wife of the 1st Defendant pleaded that she contributed both directly and indirectly towards the acquisition and development of the suit property during the subsistence of their marriage hence she had acquired a beneficial interest therein even though it was registered solely in the name of the 1st Defendant. The amended plaint reveals that she was aggrieved because the 1st Defendant had sold the suit property without her knowledge or consent. However, it would appear from the material on record that the original Plaintiff (*the deceased*) died in 2017 before the hearing and determination of the suit.

B. THE APPLICANTS' APPLICATION

3. By a notice of motion dated 15th September, 2017 brought under **Order 24 Rule 3(1), Order 51 Rule 1 of the Civil Procedure Rules, 2010** and **Sections 1A and 1B of the Civil Procedure Act (Cap. 21)** the Applicants, who are children of the deceased, sought an order for their substitution as Plaintiffs in the suit in place of the deceased. They also prayed that costs of the application should be in the cause.

4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn jointly by the Applicants on 15th September, 2017. The Applicants stated that they were the personal representatives of the deceased having been issued with a limited grant *ad litem* by the Chief Magistrates' Court at Nyeri on 18th August, 2017 for the purpose of prosecuting the instant suit for the benefit of the estate of the deceased. They contended that the deceased's cause of action survived her death.

C. THE DEFENDANTS' RESPONSE

5. The 1st Defendant filed a replying affidavit sworn on 11th October, 2017 in opposition to the said application. He contended that the application was misconceived and an abuse of the court process. It was contended that the claim by the deceased was personal to her and did not survive her death. It was further contended that the deceased's claim was under the **Matrimonial Property Act, 2013** and that such claims do not survive for the benefit of a deceased's estate.

6. The 2nd Defendant filed grounds of opposition dated 29th September, 2017 in response to the said application. It was contended that the application was misconceived, incompetent, bad in law, defective and without merit. It was further contended that the application was frivolous, vexatious and otherwise an abuse of the court process. The court was consequently urged to dismiss it with costs.

D. DIRECTIONS ON SUBMISSIONS

7. When the matter was listed for directions on 10th February, 2021 it was directed that the said application shall be canvassed through written submissions. The Applicants were granted 14 days within which to file their submissions whereas the Defendants were granted 14 days upon the lapse of the Applicants' period to file theirs. The record shows that the Applicants filed their submissions on 5th March, 2021 whereas the Defendants filed theirs on 12th April, 2021.

E. THE ISSUES FOR DETERMINATION

8. The court has considered the Applicants' notice of motion dated 15th September, 2017 together with the supporting affidavit and annexures thereto, the 1st Defendant's replying affidavit in opposition thereto, as well as the 2nd Defendant's grounds of opposition dated 29th September, 2017. The court is of the opinion that the following issues arise for determination herein:

(a) *Whether the application dated 15th September, 2017 is bad in law, frivolous, vexatious and otherwise an abuse of the court process.*

(b) *Whether the Applicants have made out a case for their substitution as Plaintiffs in place of the deceased Plaintiff.*

(c) *Who shall bear costs of the application.*

F. ANALYSIS AND DETERMINATION

(a) ***Whether the application is bad in law, frivolous, vexatious and otherwise an abuse of the court process***

9. Although the Defendants contended that the application was bad in law, frivolous, vexatious and otherwise an abuse of the court process, there was no demonstration of those allegations in the replying affidavit which was filed by the 1st Defendant. There was also no demonstration of the allegations in the Defendants' written submissions. The common thread running through the Defendants' submissions, was that the cause of action of the deceased abated upon her death hence the application for substitution was without merit.

10. In the case of **Trust Bank Limited v H. S. Amin & Company Ltd & Another [2000] eKLR** the High Court considered the meaning of some of those phrases as follows:

“In **Bullen & Leake and Jacobs Precedents of Pleadings (12th Edition)** on chapter dealing with striking out pleadings at page 145 it is stated:

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense.

... and lastly a pleading which is an abuse of the process of court really means in brief a pleading which is a misuse of the court machinery or process”

11. There is no material on record from which it may be concluded that the application for substitution is fanciful, groundless, offensive or totally hopeless. There is no material on record to demonstrate that the application is a misuse of the court machinery. The mere fact that the Defendants hold the opinion that the application is weak or has no prospects of success does not necessarily make it frivolous, vexatious or an abuse of the court process. The court shall therefore proceed to consider the merits of the application for substitution.

(b) Whether the Applicants have made out a case for substitution in place of the deceased Plaintiff

12. The court has considered the submissions and material on record on this issue. The Applicants contended that having been issued with a limited grant *ad litem* they had the capacity as personal representatives of the deceased Plaintiff to seek an order for substitution. They contended that the cause of action survived the deceased and that they were desirous of prosecuting the suit for the benefit of the estate of the deceased.

13. The Applicants relied upon the cases of **Elizabeth Kwini & Another v Managing Director of & Another [2014] eKLR**; **Karl Wehner Claasen v Commissioner of Lands & 4 Others [2019] eKLR**; and **Catherine Nyambura Karunditu v Stephen Reuben Karunditu [2010] eKLR** among others in support of their application. It was submitted that the cause of action in the suit did not abate with the death of the deceased and that it survived for the benefit of her estate under **Section 2 of the Law Reform Act (Cap. 26)**.

14. The Respondents, on the other hand, submitted that the cause of action was of such a personal nature that of necessity it abated upon the death of the deceased. In particular, it was submitted that claims under the **Matrimonial Property Act, 2013** do not survive the death of a claimant unlike claims instituted under the English **Married Women Property Act, 1882**, which applied to Kenya prior to 2013. The Respondents cited the cases of **Elizabeth Kwini & Another v Managing Director of & Another [2014] eKLR**; and **Karl Wehner v Commissioner of Land and 4 Others (supra)** in support of their submissions.

15. It would appear that courts in Kenya are not in agreement on the issue of whether or not a claim of the instant nature survives or abates upon the death of the claimant spouse. For instance, in **Esta Kuto & 2 Others v M. Oriental Bank & 2 Others [2018] eKLR** Ombwayo J was of the opinion that the cause of action does not survive and that upon the death of the claimant the property in issue devolves upon the surviving spouse. Similarly, in **L. N. v A.N. [2018] eKLR**, Onyiego J. held that such a cause of action cannot survive upon the death of the claimant.

16. However, in **Catherine Nyambura Karunditu v Stephen Reuben Karunditu (supra)** R. Nambuye J (as she then was) held that married women had a recognized distinct and separate estate capable of being protected by a personal representative upon her death. The court further held that there was no distinction as to the authorized class of personal representatives who could pursue the claim of the deceased spouse. The court was of the opinion that even close relatives and children of the deceased could be proper personal representatives to pursue the claim.

17. The court has carefully considered the authority of **Karl Wehner v Commissioner of Lands and 5 Others (supra)** which was relied upon by the Applicants as well as the Defendants. It was a decision rendered from an appeal against the decision of the Environment and Land Court (*Obaga J*) on the issue of whether the cause of action of the original petitioner had survived his death.

18. The original Petitioner had filed a Constitutional petition alleging violation of his constitutional rights on account of alleged wrongful appropriation of his two farms in Kitale comprising 4,638 acres. The Petitioner therefore sought the usual declarations and compensation for wrongful deprivation of his property. Before the petition could be heard and determined, however, the Petitioner died in consequence whereof his son (*the Appellant*) obtained a limited grant *ad litem* for the purpose of prosecuting the pending petition.

19. When the Appellant applied for substitution in his capacity as the personal representative of the deceased Petitioner, the Environment and Land Court dismissed the application on the basis that a constitutional petition alleging violation of the fundamental rights of the deceased was an action of a personal nature which abated upon his death. The court was also of the opinion that alleged violation of the deceased Petitioner's rights had not been ascertained hence there was really nothing to be taken over by the personal representative.

20. The Court of Appeal was, however, of a different opinion and upon consideration of the appeal it set aside the order of the Environment and Land Court dismissing the Appellant's application for substitution. The Court of Appeal was of the opinion that Section 2 of the **Law Reform Act (Cap. 26)** was clear on what causes of action survived or abated upon the death of a litigant.

21. **Section 2 (1) of the Law Report Act** stipulates as follows:

(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

22. In allowing the appeal the Court of Appeal held that:

“...The learned judge erroneously relied on the Ugandan statutory provisions in arriving at a decision that the petition had abated. The finding that the proceedings (petition) had abated is contrary to the express provisions of Section 2(1) of the Law Reform Act and Section 82(a) of the Law of Succession Act and the purpose of Article 22 (2). We are in agreement with the decision of the High Court in Elizabeth Kwini Case (supra), that, whether or not a right to action in a constitutional petition survives the death of the Petitioner depends on the nature of the petition and the relief sought and find that in the circumstances of this case the constitutional petition seeking compensation for deprivation of property survived for the benefit of the estate upon the death of the petitioner and may be continued by the appellant as a legal representative of the deceased petitioner...”

23. The court is of the opinion that on the basis of **Section 2 of the Law Reform Act (Cap. 26)** and the Court of Appeal decision in the **Karl Wehner** case the Applicants' application is merited. There is no demonstration that the deceased's cause of action abated upon her death. The court is of the opinion that both the **Constitution of Kenya, 2010** and the **Matrimonial Property Act, 2013** support the existence of

separate and distinct property rights for spouses before, during and after dissolution of marriage. The Defendants' suggestion that such property rights would just disappear into thin air upon the death of a spouse is not supported by the law.

(c) Who shall bear costs of the application

24. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. However, since most of the parties herein are related the court is of the opinion that costs should be in the cause.

G. CONCLUSION AND DISPOSAL

25. The upshot of the foregoing is that the court finds merit in the instant application. Accordingly, the Applicants' notice of motion dated 15th September, 2017 is hereby allowed as prayed.

It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 19TH DAY OF MAY 2021.

In the presence of:

Ms. Ann Thungu for the Applicants

Ms. Machira holding brief for Ms. Lucy Mwai for the 1st and 3rd Defendants

Mr. Wahome Gikonyo for the 2nd Defendant

Court assistant - Wario

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Y. M. ANGIMA

ELC JUDGE

19.05.2021