



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELCA NO. 17 OF 2018

OCTAVIO NDAMBIRI.....1ST APPLICANT

FREDRICK MAGOTO.....2ND APPLICANT

MBOGO NGARI.....3RD APPLICANT

JAELI WARIGIA MAGONDU.....4TH APPLICANT

VERSUS

SIMON GACHOKI MUGO.....RESPONDENT

AND

CYRUS KATHIRU MAGONDU.....APPLICANT

RULING

By a Notice of Motion dated 7th February 2020, the Applicant moved this Court for the following orders:-

(1) *Spent.*

(2) *That the Honourable Court be pleased to grant leave to the Applicant, CYRUS KATHIRU MAGONDU to substitute the deceased 4th Appellant, JAELI WARIGIA MAGONDU.*

(3) *That the Honourable Court does reinstate the orders issued on 15th February 2019 as the same have lapsed.*

(4) *That the Honourable Court be pleased to extend time within which the appeal should be heard beyond the 6 months granted by the Court on 15th February 2019.*

(5) *That the Honourable Court be pleased to allow the Appellants to include additional evidence in the Appeal and the supplementary record of Appeal dated 5th September 2019 be deemed as duly filed.*

(6) *That the costs of this application be in the cause.*

Ground in support of the Application

(a) That the 4th Appellant died on 30th May 2019.

(b) That the Applicant was granted limited grant in respect of the estate of the 4th Appellant vide KERUGOYA CMC SUCCESSION CAUSE NO. 318 OF 2019.

(c) That it is in the interest of justice that the 4th Appellant be substituted.

- (d) That the Respondent is attempting to interfere with the status quo by forcefully trying to get into the suit property.
- (e) That when considering the Appellant's application for stay of execution of the judgment of the lower Court, the Court gave a condition that the Appeal to be heard before six months lapsed.
- (f) That unfortunately, the 4th Appellant started ailing before the 6 months lapsed. However, the process of getting a Certificate of Death and applying for Limited Grant has delayed the hearing of the Appeal beyond the 6 months granted by the Court.
- (g) That it is in the interest of justice for the Court to extend the period within which the appeal is to be heard while still maintaining the orders of stay of execution of the judgment of the lower Court and of maintenance of status quo.
- (h) That the parties herein litigated in regard to the suit land as an unregistered parcel of land. That when the Appellants instructed the current advocates on record, for the purposes of the appeal, he advised that it would be in the interest of justice to investigate whether the land had been registered.
- (i) That the parties had produced documents issued by Kirinyaga County Council and the County Government of Kirinyaga in the lower Court.
- (j) That the current Advocate on record made investigation at the Lands office and discovered that the land had been registered as a leasehold L.R. BARAGWE/GUAMA/412 where the 1st Appellant herein, the husband of the 4th Appellant herein DAVID MAGONDU, the 2nd Appellant, the 3rd Appellant and the father of the Respondent, JOEL KARANGI were registered as tenants in common in equal shares.
- (k) That this information was not available to the 4th Appellant who was sued as a representative of her husband.
- (l) That the said information is very important in assisting the Court make a fair determination of the dispute between the parties herein.
- (m) That the said new evidence will not occasion prejudice to the Respondent who acknowledged that the suit plot was initially owned by the 5 individuals. It is only that the evidence presented to the trial magistrate was not very clear as to whether the tenants were tenants in common or joint tenants.
- (n) That it is mete and just to allow the application herein.

Applicants summary of Facts

The Applicant reiterated the grounds in support of the application and deposed as follows:-

- (1) That I am the administrator of the deceased defendant's Estate and therefore competent to swear this affidavit.
- (2) That the 4th Appellant died on 30th May 2019 (Annexed hereto and marked "EMN 1" is a copy of the Certificate of Death).
- (3) That I was granted Limited Grant in respect of the Estate of the 4th Appellant vide KERUGOYA CMC SUCCESSION CAUSE No. 318 of 2019 (Annexed hereto and marked "EMN 2" is a copy of the Limited Grant of Letters of Administration Ad Litem).
- (4) That it is in the interest of justice that the 4th Appellant be substituted.
- (5) That when considering the Appellant's application for stay of execution of the judgment of the lower Court, the Court gave a condition that the Appeal ought to be heard before 6 months lapsed.
- (6) That unfortunately, the 4th Appellant started ailing and died before the 6 months lapsed. However, the process of getting a Certificate of Death and applying for Limited Grant has delayed the hearing of the Appeal beyond the 6 months granted by the Court.
- (7) That it is in the interest of justice for the Court to extend the period within which the appeal is to be heard while still maintaining the orders of stay of execution of the judgment of the Lower Court and of maintenance of status quo. That the Respondent is attempting to interfere with the status quo by forcefully trying to get into the suit property.
- (8) That the parties herein litigated in regard to the suit land as an unregistered parcel of land. That when the Appellant instructed the current advocate on record for purposes of the appeal, he advised that it would be in the interest of justice to investigate whether the land had been registered.
- (9) That the parties had produced documents issued by Kirinyaga County Council and the County Government of Kirinyaga in the lower Court.
- (10) That the current advocates on record made investigation at the Lands office and discovered that the land had been registered as

a leasehold L.R. BARAGWE/GUAMA/410 where the 1st Appellant herein, the husband of the 4th Appellant herein, DAVID MAGONDU, the 2nd Appellant, the 3rd Appellant and the father of the Respondent, JOEL KARANGI were registered as tenants in common in equal shares. (Annexed hereto and marked "EMN 4" is a copy of the green card).

- (11) That this information was not available to the 4th Respondent who was sued as a representative of her husband.
- (12) That the said information is very important in assisting the Court make a fair determination of the dispute between the parties herein.
- (13) That the said new evidence will not occasion prejudice to the Respondent who acknowledged that the suit plot was initially owned by the 5 individuals. It is only that the evidence presented to the trial magistrate was not very clear as to whether the tenants were tenants in common or joint tenants.
- (14) That it is mete and just to allow the application herein.
- (15) That what is deponed to herein is true to the best of my knowledge, information and belief save where otherwise stated.

Respondent's summary of Facts

The Respondent filed a replying affidavit in opposition to the application and deposed as follows:-

- (1) That I am the Respondent herein and therefore competent to swear this affidavit.
- (2) That I have read the Applicants application dated 7th day of February 2020 and I have understood the contents therein.
- (3) That I do strongly oppose the Applicant's application herein and pray that the same be dismissed with costs since it lacks merit.
- (4) That as clearly stated by the applicant, they were indeed granted a stay of execution and on condition they prosecute the said appeal within six months from the said date of granting the said orders.
- (5) That it is now over 12 months and the appeal has never been fixed for hearing.
- (6) That the Appellants did not intend to comply with the Court orders and the said appeal was only intended to delay the Respondent from enjoying the fruits of his judgment.
- (7) That there is no good reason which has been offered by the Appellants why they have not prosecuted the appeal.
- (8) That there are four Appellants in this matter and therefore passing on of one Appellant does not bar the appeal proceeding to hearing.
- (9) That further more before the passing of the 4th Appellant, there had lapsed four months which has not been explained why the Appeal had not been set down for hearing.
- (10) That further there was a delay in filing this application as the Applicant obtained Limited Grant of letters on 29th day of October 2019 and this application was filed on 10th day of February 2020.
- (11) That the appeal herein should stand dismissed since the duration of six months which had been granted by the Court has already lapsed.
- (12) That the Appellants intend to keep on delaying this matter since they are utilizing the said premises.
- (13) That I make this affidavit praying that the applicants' application be dismissed with costs.
- (14) That what is deponed herein above is true to the best of my knowledge, information and belief.

Applicant/Appellants Submissions

The Appellants/Applicants through the firm of Magee Law LLP submitted on the following issues:-

- (a) Substitution of the 4th Appellant**
- (b) Reinstatement of stay orders and extension of time within which to hear appeal and**
- (c) Additional evidence.**

(a) Substitution of the 4th Appellant

On the first issue, the Appellants/Applicants submitted that this appeal relates to the judgment made in respect to ownership of a plot and that the said cause of action survived the 4th Appellant under the provisions of *Order 24 Rule 1 CPR*.

The Appellants/Applicants further submitted that the law requires a legal representative to substitute the party within 12 months of the death of the deceased and that the 4th Appellant died on 30th May 2019 and the application for substitution was filed on 7th February 2020 within the 12 months allowed by the law. The Applicants/Appellants also argued that the Applicant seeking to be substituted in place of the 4th Applicant is the legal representative of the deceased having been issued with limited grant on 29th October 2019 vide Kerugoya CMC Succession Cause No. 318 of 2019.

(b) Reinstatement of Stay orders and extension of time within which to hear appeal

On this ground, the Applicants submitted that on 15th February 2019, the Honourable Court granted the Appellants stay of execution on condition that the Appeal is heard and determined within 6 months. The Appellants filed their record of Appeal on 20th May 2019, a period of about 3 months after the conditional stay was granted. Unfortunately, the 4th Appellant died on 30th May 2019, a period of 10 days after the record of Appeal was filed. They contend that they did their bit within 3 months and that the 4th Appellant died before the lapse of the 6 months granted by the Court. The Applicants also submitted that the certificate of death was issued on 1st August 2019 and the Applicant filed Succession Cause No. 318 of 2019 and the Court issued Limited Grant on 29th October 2019. By the time the Applicant was issued with Limited Grant, 6 months had lapsed.

(c) Additional Evidence

The Applicants cited *Order 42 Rule 27 CPR and Article 159 (2) (d)* in support of the additional evidence. The Applicants also cited the case of *Attorney General Vs Torino Enterprises Limited (2019) e K.L.R.*

Respondent's Submissions

The Respondent through the firm of J. Ndana & Company Advocates submitted on the three issues. Regarding the issue of substitution of the 4th Appellant, the Respondent submitted that the order should be declined since the period granted to the Appellant to prosecute the said Appeal has since lapsed and it will serve no useful purpose to substitute. The Respondent further argued that more than 12 months have already lapsed since the demise of the 4th Appellant and that the appeal has abated. On the 2nd issue, the Respondent submitted that the Court granted the Appellant six months to prosecute the Appeal which lapsed in the month of August 2019.

It is further argued that if the 4th Appellant passed on, the other Appellants would have proceeded with the Appeal since they have a common claim in the Appeal. The Respondent further submitted that the Applicants have not been serious in prosecuting their Appeal and that the said Appeal was only intended to delay the Respondent from enjoying the fruits of his judgment. It is also submitted that the Applicants have not offered any good reasons why they have not prosecuted their Appeal. On the last issue, the Respondent argued that the document sought to be introduced as an additional evidence is a green card for land parcel Number BARAGWE/GUAMA/410 which was a lease granted by the Kirinyaga County Council for a period of 33 years commencing from 1973. He submitted that the entire proceedings in the lower Court together with the pleadings related to the plot No. 6 at Karumandi and that the Appellants in their pleadings or in the Appeal did not mention land parcel No. BARAGWE/GUAMA/410. He submitted that this must be a totally different parcel which does not relate to plot No. 6 at Karumandi. He argued that the green card sought to be introduced as an additional evidence can only be produced by the Land Registrar on oath and be subjected to the rigours of cross-examination as to its authenticity. The respondent further submitted that the purported lease shows that it expired in the year 2004 and it has not been shown that there was extension of lease by Kirinyaga County Council.

In conclusion, the Respondent submitted that the Appellants who were represented by an advocate in the lower Court never brought the document sought to be introduced now and no relationship or relevance has been shown with plot Number 6 at Karumandi which was the subject of dispute in the Magistrates Court and that the Appellants are bringing additional evidence to make a fresh case in appeal and fill up omissions or patch up the weak points in their case. He referred to the case of *Mohammed Abdi Mahamud Vs Ahmed Abdullahi Mohamed & 3 Others (2018) e K.L.R.* and submitted that the same does not apply in the instant case.

Legal Analysis and Decision

I have considered the affidavit evidence and the rival submissions by the parties. The guiding principles for substitution is founded in *Order 24 CPR and the Law Reform Act Cap. 26 Laws of Kenya. Section 2(1) of the Law Reform Act* states as follows:-

“2(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate;

Provided that this sub-section 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”.

The claim by the Appellants before the trial Court which is also the subject of this Appeal, is a parcel of land described as Plot Number 6 at Karumandi. The nature of the action in dispute is clearly a matter that shall survive for the benefit of his Estate.

The Applicant has annexed a copy of the death certificate indicating that the 4th Appellant died on 30/5/2019. The applicant also annexed a copy of a Limited Grant Ad Litem issued on 29th October 2019. I am satisfied that Applicant has filed the application for substitution within one year as required under **Order 24 Rule (3) CPR**. I find the prayer for substitution is merited.

On the order for Reinstatement of the stay orders and extension of time within which to hear this Appeal, the Applicant has explained that the reason for the delay was the demise of the 4th Appellant. The Applicant has also stated that he compiled the record of Appeal in time but before he could set down the matter for hearing, the 4th Appellant died. I also find the prayer for reinstatement of stay and extension of the same pending hearing of the Appeal merited.

The third prayer is for the production of additional evidence under **Order 42 Rule 27 CPR**. The provisions of the law states as follows:-

“27(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Court to which the appeal is preferred; but if:-

- (a) The Court from whose decree is preferred has refused to admit evidence which ought to have been admitted; or*
- (b) The Court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.*

The Court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the Court to which the appeal is preferred, the Court shall record the reason for its admission”.

Several decisions have been rendered by the Courts on the threshold for admission of additional evidence. In the case of **Dorothy Nelima Wafula Vs Hellen Nekesa Nielsen and Paul Fredrick Nelson (2017) e K.L.R.**, the Court held thus:-

“Though what constitutes “sufficient reason” is not explained in the rule, through judicial practice, the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a party seeking to present additional evidence on appeal. Before this Court can permit additional evidence under Rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing, two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not be incontrovertible”.

Again in the case of **Mzee Wanje & 93 Others Vs A.K. Saikwa (1983 – 88) 1 K.A.R 463**, the Court of Appeal held:-

“This Rule (Rule 29) is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal”.

The claim by the Respondent before the Magistrate’s Court (CMCC No. 296 of 2012) is described as plot No. 6 Karumandi. The Applicant in his affidavit in support of application herein stated that the parties herein litigated in the trial Court in regard to the suit land as an unregistered parcel of land but after conducting a search in the Lands office, they discovered that a lease has been issued. The discovery by the Applicant is a new evidence that was not available during the trial of the suit. It is a fresh evidence which the Applicant has discovered and which he intends to import it to patch up the weak points in his case which he lost in the trial Court. The application by the Applicant to have such evidence admitted in this Appeal is unacceptable. The same is hereby rejected.

The upshot of my finding is that the application dated 7th February 2020 is partially allowed in the following terms:-

- (1) The Applicant, CYRUS KATHIRU MAGONDU is allowed to substitute the 4th Appellant, JAELI WARIGIA MAGOND.**
- (2) The orders of stay issued on 15th February 2019 are hereby reinstated and extended until the hearing and determination of this Appeal.**
- (3) The application for additional evidence in this Appeal is declined.**
- (4) The supplementary record of Appeal dated 5th September 2019 is hereby struck out.**
- (5) The costs of this application shall abide the event.**

Ruling READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 23rd day of July, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Mr. Asimwe holding brief for Magee for Applicant*
2. *Mr. Ndana for Respondent*
3. *Kabuta – Court clerk.*