



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 212 OF 2007

ALPHONS KAMAU KIMANI.....PLAINTIFF

VERSUS

OL'KALOU FARMERS SACCO BANK LTD.....1ST DEFENDANT/RESPONDENT

CO-OPERATIVE BANK OF KENYA LTD.....2ND DEFENDANT/RESPONDENT

AND

JAMES KIMANI KAMAU.....1ST APPLICANT

BEATRICE GATHONI KAMAU.....2ND APPLICANT

AND

MARY WAITHERA KAMAU (being the legal representative of the estate of

John Ndirangu Kamau)..... PROPOSED INTERESTED PARTY/RESPONDENT

RULING

1. The applicants **Notice of Motion** dated 23rd July 2021 prays for the following reliefs;

- a) That this Honourable court be pleased to revive this suit against the Plaintiff herein, ALPHONS KAMAU KIMANI, now Deceased.*
- b) That this Honourable court be pleased to grant leave to the Applicants herein to substitute the Plaintiff herein ALPHONS KAMAU KIMANI (Deceased) with the legal administrators of the estate being JAMES KIMANI KAMAU and BEATRICE GATHONI KAMAU.*
- c) That MARY WAITHIRA KAMAU be enjoined into these proceedings as an Interested Party in her capacity as the legal representative of the Estate of John Ndirangu Kamau.*
- d) That pending the hearing and determination of this suit, there be a stay of sale of L.R. No. Nyandarua/ Gilgil West /388 and L.R. No. Nyandarua/Gilgil West /389 whether by way of public auction, private treaty, or any other manner whatsoever and more particularly, there be a stay of the sale scheduled for the 30th day of July, 2021 as advertised in the Daily Nation.*
- e) That, in the alternative to prayer (e) and (f) above, this Honourable Court be pleased to issue an order that a fresh valuation of the suit property be conducted by an independent valuer or by a valuer appointed by both parties to ascertain the market and forced sale value of the suit property prior to any auction.*
- f) That the costs of this application be borne by the Respondents.*

2. The application is supported by the grounds on the face thereof and the sworn affidavit by the 1st applicant dated 23rd July 2021. He deposed that he was one of the duly appointed legal representatives of the estate of the late **Alphons Kamau Kimani** (Deceased) the Plaintiff herein, having been issued with a Limited Grant Ad Litem in Nakuru High Court P&A Cause No. E076 of 2021. That the plaintiff herein is the registered and absolute proprietor of all that parcel of land known as L.R. No. Nyandarua/ Gilgil West /348 and L.R. No.

Nyandarua/ Gilgil West /389 (the suit property herein) and had instituted this suit against the defendants herein seeking that the illegal charges and encumbrances registered and maintained over the suit properties by the defendants be declared null and void and the same be removed to allow him deal with his properties as he wished.

3. He deposed further that unfortunately, the plaintiff passed away on or about the 10th October, 2013 before the suit could be concluded, hence the said encumbrances are still subsisting and the estate was therefore unable to deal with the said properties up to date. That it came to their attention that a judgement and a decree of Kshs 1,026,961/= had been entered in favour of the proposed interested party herein as against the deceased way back in 2010 in Nairobi ELC No. 1068 of 2007. That further, the said interested party had obtained an order for execution of the said decree and she intended to auction both suit parcels herein to recover the decretal sums aforesaid and has placed an advertisement for a sale scheduled to take place on the 30th July, 2021. He deposed that the said intended auction was unconscionable, immoral and unwarranted as its only aim is to sell two parcels of land measuring over 20 acres' worth over Kshs. 30,000,000/to recover a mere Kshs 1,000,000/-.

4. The 1st applicant deposed that they were willing to repay the whole decretal sum aforesaid and intend to sell at most two acres from the suit parcels to obtain the necessary monies to settle the decretal amount plus interest and auctioneer charges but are prevented from doing so by virtue of the said illegal encumbrances. It is in the interest of justice that this suit be determined first and the legal charges removed from the suit properties to enable the estate liquidate part of its assets to repay all its debts as there was no urgency in recovering the said decretal amount as the judgement in question was delivered way back in 2010 and has never been acted upon by the proposed interested party. He deposed that the reason for delay in bringing the application for revival of the suit and substitution of the Deceased was because they were not aware of these proceedings as they were only the children of the deceased who never involved them in any of his court matters.

5. He went on to state that at the time of filing this suit, the plaintiff also filed an application dated 24th September, 2007 seeking for injunction orders against the defendants herein and on the 24th October, 2007 the court issued orders. That although the said orders were set aside to afford the defendants an opportunity to be heard, the court finally re-confirmed the same on 20th July 2012 and have not been set aside to date. He added that allowing the said sale to take place on 30th July 2021 would mean that the suit properties would be disposed of and thus render these proceedings a nugatory and that they will also suffer irreparable loss and damage. He deposed further that the auctioneers had undervalued the suit properties at Kshs. 8,000,000/= which was below the market value of over Kshs. 30,000,000/= for the approximately 20 acres.

6. The applicant went on to depose that they were not served with the relevant statutory notices under the **Land Act, No. 6 of 2012** and the **Auctioneers Act Cap 526 Laws of Kenya** and hence the scheduled public auction is unlawful, improper and hence null and void for all purposes and intents. That it would be for the interests of justice that the proposed interested party be enjoined into these proceedings as this suit touches on her regarding any interests she may have over the suit property. That further, as the administrators of the estate, they were ready and willing to deposit any such sums as the court may determine as security thereof. He deposed that the respondents herein will suffer no prejudice that cannot be compensated by way of costs if the application herein is allowed.

7. The proposed interested party opposed the application through the grounds of opposition dated **28th July 2021** and a replying affidavit sworn on **11th August 2021** by **Mary Waithira Kamau**. She deposed that the bid to enjoin her in the present suit as an Interested party was misconceived as the suit had hopelessly abated and that there were no substantive pleadings or prayers sought against her in the plaint. She deposed further, that the instant application was without merit and an abuse of the court process as judgement was entered in Nairobi ELC 1068 of 2007 in its favour. That further, the applicants had already been substituted in the place of the deceased in the said suit as they had obtained a limited grant of letters of Administration Ad Litem on 5th March 2018. She went on to depose that she was advised by her advocate that this court cannot injunct itself or another court. That the only reasons for reviving the present suit was to scuttle the planned auction sale since the applicants had ran out of options in the primary suit giving rise to the auction.

8. When the matter came up for hearing the court directed that the same be determined by way of written submissions which the parties have complied.

APPLICANTS SUBMISSIONS.

9. The applicants identified five issues for determination and the first one is on whether the suit should be revived. They submitted that the law on revival of suit was well outlined under **Order 24 rule 7** of the **Civil Procedure Rules** and that the said provision does not limit the time within which a legal representatives of a deceased can approach the court to have an abated suit revived. They submitted further, that their lack of knowledge formed sufficient cause that prevented them from approaching the court sooner. They draw the court's attention to the case of **Kishor Kumar Dhanji Varsani Vs. Amolak & 4 others [2016] eKLR**.

10. On the second issue, whether an injunction order can be issued against the proposed interested party, they submitted that the circumstances of this case puts the suit properties in imminent danger of being disposed off by the proposed interested party. That this would defeat the purpose of this whole suit and application to allow the auction take place simply because pleadings have not been amended to include the proposed interested party. They refer the court to **Article 159 (2) (d)** which states that justice should be administered without undue regard to technicalities. They urged the court to stay the intended auction sale pending amendment to enjoin the proposed interested party.

11. On the third issue, whether this application is an abuse of the court process, they submitted that the proposed interested party's argument that their application was an abuse of the court process was centered around the fact that the judgment sought to be executed was entered in 2007 and thereafter the deceased plaintiff was issued with a Notice to Show Cause Why execution should issue and a prohibitory order issued in 2010. They submitted further that their application does not seek to set aside the judgment issued in Nairobi ELC Case No. 1068 of 2007, but instead to have this court preserve the subject matter of this suit so as to not render the whole proceedings a mere academic exercise.

12. On the fourth issue, whether this court issuing an order of stay would amount to it injunctioning itself or another, the applicant reiterated the contents of paragraph 11 above and submitted that the orders they sought do not in any manner injunct this court or any other court. The applicants submitted that the jurisdiction of this court was unlimited except where specifically limited by statute. That it was the duty of this court to administer justice to the parties and that therefore jurisdiction could not be said to be limited particularly where its decision would result to an injustice against one party. They draw the court's attention to the cases of **Mwenesi v Shirley Luchhurst & Another Civil Application No. Nairobi 170 of 2000, Republic v National Transport Services Authority Ex-Parte Extra Solutions Ltd [2017] eKLR** and **in the Matter of the Estate of George M'Mboroki Meru HC Succession Cause No. 357 of 2004**.

13. On the last issue, whether the applicants should be issued with injunction orders as sought, the applicants while placing reliance in the cases of **Robert Njeru Karega & 17 others v Mutokaa Nthautho [2017] eKLR** and **Ngungi Nthukire & 3 others v Joseph Mbugi Neari & 6b Others [2019] eKLR**, submitted that this being a court of justice it has a duty and an obligation to preserve what is before it so as to safeguard the integrity of its proceedings. They urged the court to consider their application and the orders sought.

PROPOSED INTERESTED PARTY'S/RESPONDENT SUBMISSIONS

14. On her part the proposed interested party raised four issues for determination by the court. The first issue is on reinstatement of this suit and substitution of the applicant for the deceased plaintiff. She submitted that she did not dispute that the plaintiff herein died on 10th October 2013. However, the provisions of **Order 24 (2) of the Civil Procedures Rules** came into operation which states that if within one year an application is not made under **sub rule (1)**, the suit shall abate. That the provisions of said Order were emphasized in the case of **Said Sweilem Gheithan Saanum v Commissioner of Lands (being through Attorney General) & 5 others Civil Appeal No. 16 of 2015[2015] eKLR**.

15. She submitted further that the suit herein abated on or about 10th October 2014 being a year after the plaintiff's demise. That on seeking substitution outside 1 year timeframe, the Court of Appeal in the case of **Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR**, emphasized that late application for substitution must be preceded by an application for extension of time. She submitted that the applicants had failed to provide sufficient cause for the inordinate delay to have the plaintiff substituted for 8 years. She added that the applicants had already been substituted in place of the deceased plaintiff in Nairobi ELC 1068 of 2007 on 5th March 2018 after being issued with the Limited Grant of Letters of Administration Ad Litem in Nakuru High Court P & A No. 10 of 2015. That the applicants had slept on their rights.

16. On the second issue of joinder of the proposed interested party, she wondered on what basis was she sought to be enjoined in the suit while it had abated. That the order of stay is untenable as an order was issued in Nairobi ELC 1068 of 2007 allowing the auction sale of properties. She submitted further that the applicants had sought stay thereon pending appeal before the Court of Appeal in Nairobi C.A Civil Application No. E264 OF 2020. That applicant ought to have sought stay of execution pending appeal under **Order 22 rule 55 of the Civil Procedure Rules** in this matter but had not done so. She draws the court's attention to the case of **Michael Bartenge vs Stephen Bartenge [2007] eKLR**.

17. On the last issue of independent valuation, she submitted that an order for valuation cannot be made in vain. She placed reliance on the case of **Nest Manor Residence & Suites Ltd & Another v African Banking Corporation Ltd & Another [2021] eKLR** where the court held that the onus of establishing a prime facie case, that the applicant's right was infringed by the respondent by failing to discharge the duty of care under **section 97(1) of the Land Act** lied on the applicants. That the applicants had failed to prove that the suit properties had been undervalued. She concluded by submitting that litigation must come to an end as was held in the case of **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2007] eKLR**. She further placed reliance on the case of **ANM v VN [2021] eKLR** and submitted that she should be allowed to enjoy the fruits of her judgment. She urged the court to dismiss the application with costs in her favour.

ANALYSIS AND DETERMINATION

18. I have considered the pleadings and submissions by parties and the issue for determination is **whether the plaintiff/applicant is entitled to the reliefs sought**.

19. One of the reliefs the applicant seeks in the instant application is that the suit against the plaintiff who is now deceased be revived. **Order 24, rule 3** provides as follows:

Procedure in case of death of one of several plaintiffs' or of sole plaintiff.

1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

2) Where within one year no application is made under sub rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

20. Similarly, **Order 24, rule 7 of the Civil Procedure Rules** provides:

1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

2) *The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.*

21. In **Rebecca Mijide Mungole & Another –V- Kenya Power & Lighting Company Ltd & 2 Others** [2017] eKLR where the Court of Appeal stated the following: -

“Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action.” (Emphasis mine)

22. Similarly, in **Said Sweilem Gheithan Saanum v Commissioner Of Lands & 5 Others** [2015] eKLR where the Court of Appeal in Malindi stated as follows:

“There are three stages according to these provisions. As a general rule, the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.”

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit.” (Emphasis mine)

23. In view of the above cited provisions the question that begs is, **has the applicants sought extension of time and if yes, have they proved that there is good reason to extend time or that he was prevented by “sufficient cause” from continuing the suit?** The applicable standard of proof in this case is on a balance of probabilities. The applicant obtained the limited grant on 21st July 2021 and thereafter filed this application on 23rd July 2021. The plaintiff herein as per the Limited Grant Ad Litem died on 10th October 2013 and it thus took them approximately 7 years 2 months before obtaining the said grant and filing of the instant application.

24. The applicant argues that the reason for the delay in bringing the application for revival of the suit and substitution of the deceased was because they were not aware of these proceedings as they were only children of the deceased who never involved them in any of his court matters. He argues further that he learnt of the advertisement for the sale of suit properties on the newspaper through a friend of his deceased father. In answering the question posed above, I note from facts stated above and the evidence on record that no application to extend the time was made by the applicant within a year. From the authorities cited it is trite law that without time being extended, no application for revival or joinder can be made. That further, without such extension a suit abates and no fresh suit can be brought on the same cause of action.

25. In the case of **Elizabeth Mutuku & Nzioka Mutuku & 6 others v Aimi Ma Kilungu Company Ltd** [2019] eKLR the court held as follows:

“That an order for abatement of suits is unnecessary was Dealing with the timelines prescribed under the above provision, Bosire, J (as he then was) in Rawal vs. Rawal [1990] KLR 275 reiterated that:

The object of any limitation enactment is to prevent a plaintiff from prosecuting “stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims.”

26. While I agree with the plaintiff that **Article 159 2 (d) of the Constitution** enjoins this court to be focused on substantive justice as opposed to concentrating on procedural technicalities that may vitiate the course of justice. Further, that where a mistake has been made a party should not be made to suffer the penalty of not having his case heard on merits. However, in the circumstance of this case I find that the applicants have not provided any sufficient cause that can be said to have prevented them from continuing the suit before it abated nor provided sufficient reasons for reviving the suit and moreover there was inordinate delay of more than 7 years on their part which is inexcusable in law.

27. In **Mwangi S. Kimenyi vs Attorney General & Another** [2014] eKLR it was held thus;

“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth” nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable....”

28. What I find dishonest on the part of the applicants is that they have two sets of limited grants namely, by Hon Justice Janet Mulwa dated 6th February 2015 and by this court dated 21st July 2021. Both relate to the estate of the deceased herein. One wonders why and how did they apply for the second grant with full knowledge of the earlier one. It smacks bad faith on the part of the applicant.

29. In the premises this court does not find the application meritorious at all for the reasons that this suit has abated and that there is sufficient affidavit evidence that this matter had been dealt with by the Environment and Land Court in Nairobi via case no. ELC 1068 OF 2007.

30. **The application is dismissed with costs to the respondents.**

DATED SIGNED AND DELIVERED VIA VIDEO CALL AT NAKURU THIS 10TH DAY OF FEBRUARY 2022.

H K CHEMITEL.

JUDGE