



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. 25 OF 2014

IN THE MATTER OF SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT CAP 1 AND IN THE MATTER OF
PARCEL OF LAND GATURI/NEMBURE/6856

EMILY GICIKU NJERU.....1ST APPLICANT

DOMENIC NYAGA NJERU.....2ND APPLICANT

ROBERT KITHINJI NJERU.....3RD APPLICANT

MORRIS NJAGI NJERU.....4TH APPLICANT

DENIS GITONGA NJIRU.....5TH APPLICANT

VERSUS

JOHN NJERU MURUGU.....RESPONDENT

(AS A LEGAL REPRESENTATIVE OF PETER NYAGA MUCHUNGURI)

RULING

1. This ruling is on a notice of motion dated 15TH April, 2021 filed by the Applicants on 28th April, 2021. The notice of motion is expressed to be brought under Order 1 rule 7 of the Civil Procedure Rules. It is essentially an application for joinder

APPLICATION

2. The Applicants are EMILY GICIKU NJERU, DOMENIC NYAGA NJERU, ROBERT KITHINJI NJERU, MORRIS NJAGI NJERU AND DENIS GITONGA NJIRU while the Respondent is JOHN NJERU MURUGU who is sued in his capacity as legal representative of estate of Peter Nyaga Muchunguri.

The motion came with two (2) prayers, which are as follows:

i. THAT this honorable court be pleased to allow the applicants to join the respondent as a defendant to this suit.

ii. THAT costs of this application be in the cause.

3. The application was anchored on grounds inter alia, that at the time of filing the suit, the suit parcel of land was registered in the name of Peter Nyaga Muchunguri (deceased). It is pleaded that the legal representatives of the deceased at the time, were not known. It is further pleaded that there is a court order made on 6th October 2014 directing service to be effected by substituted service in the leading local newspapers and that personal service be effected on the public trustee to make enquiries in respect of the estate of the deceased.

4. The applicants further allege that their advocate stumbled on the court's cause list and came across HC SUCC NO. 80 of 2001 Consolidated with Succ No. 223 of 2011 which was in the matter of the deceased. In the confirmed grant of the estate, the respondent was the administrator and beneficiary of the suit parcel of land. According to the applicant, the issue of adverse ownership can now be properly canvassed between the applicants and the respondent and they therefore sought to have the respondent enjoined in the suit.

5. With the application is filed a supporting dated 1.4.2021, sworn by Caroline Wawira Beatrice, Court assistant for the applicant's advocate, which reiterates the grounds in the application.

RESPONSE

6. The application has been responded to by way of replying affidavit filed on 29.6.2021 and dated 22.6.2021. The replying affidavit is sworn by the respondent who strongly opposed the application to be enjoined in the suit for reason that he was not the administrator at the time of filing of the suit. Instead, his mother was the administrator.

7. According to him the present suit is a non-starter for having been instituted against a deceased person. The suit is said to be incompetent and incurably defective. The suit is further said to be res judicata Embu High Court Succession Cause No. 80 of 2001, Nairobi HCC No. 1082 of 1978, Meru HCC No. 99 of 1993 and Meru HCC No. 382 of 1990.

SUBMISSIONS

8. The application was canvassed by way of written submissions. The applicants relied on the grounds in the application and further averred that the respondent was the right and proper person to defend the suit by virtue of being a legal representative to the estate and by virtue of having being bequeathed the suit parcel of land. It is their case that the suit was not filed against a deceased person as the originating summons are against the legal representative of Peter Nyaga Muchunguri.

9. According to them, the suit was focussed on the legal representative and the respondent has a duty as a legal representative to defend it against the estate. Ultimately they argued that the respondent qualifies as a defendant in the suit.

10. The respondent's submissions were filed on 3.11.2021. The respondent too relied on his replying affidavit. He further submitted that the applicants had made an admission of having filed a suit against a deceased person and the suit was therefore defective for being against an entity incapable of being sued.

11. The suit was said to be time barred as the cause of action arose more than 30 years ago and no indication was made as to when time for adverse possession started running. Ultimately the suit was said to be res judicata to the suits referred to in the replying affidavit.

ANALYSIS AND DETERMINATION

12. I have considered the application, the response made, and the rival submissions. I have also looked at the court record. The applicants filed a suit seeking to be recognized as adverse possessors to land registered in the name of Peter Nyaga Muchunguri, who is deceased. In the application subject of this ruling the applicants seek to have the respondent joined in the suit as a defendant by virtue of being the legal representative to the estate of Peter Nyaga Muchunguri. The respondent has strongly opposed the application on grounds that the suit was filed against a deceased person and is defective and incurable.

13. Before I delve into whether the respondent ought to be joined in the suit, I find it necessary to first determine whether the suit was filed against a deceased person or the legal representatives to the estate.

14. It is not in dispute that at the time of filing the suit, the registered owner of the suit parcel of land was deceased, having died in the year 2000. The applicants had alleged not to have known the legal representative to the estate and there was no named legal representative at the time of filing the suit. However, they sought for the legal representative to the deceased estate to enter appearance and defend the suit.

15. The suit was filed together with an application that sought for orders for service to be effected by way of substituted service on the legal representative of the estate, which orders were granted and the parties subsequently ordered to effect service through the local dailies and to effect personal service on the public trustee to make further inquiries in respect of the estate.

16. The applicants later claimed to have found the legal representative of the estate, who is the respondent, and they wish to have him enjoined in the suit to enable them pursue their claim against the estate. I wish to point out that the grant to the estate of the deceased was confirmed on 8th July 2020 and the property subject of the suit was bequeathed to the respondent as well.

17. It is trite law that a suit cannot be brought against a dead person. Suits can only be brought against living persons who can defend such suits and whenever a suit is filed when someone is deceased, it can only be against the estate of the deceased through the legal representative.

18. In filing a suit involving the property of a deceased person the court in the case of **Melickzedeck Shem Kamau v Beatrice Waithera Maina & 2 others [2020] eKLR** stated that

“The law of Succession protects property that is registered in the name of a deceased person. Section 45 of the said Act states that except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. In my view for any purpose includes in defence of a suit against the property of the deceased.

Suits against the estate of a deceased person is brought by or against the legal representative of the estate. Section 2 of the Civil Procedure Act defines a legal representative as a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

19. As stated above the law of succession act mandates that a suit against a deceased person ought to be brought against a legal representative of the estate and where the beneficiaries to an estate have not taken out a grant, then the person intending to bring a suit against the estate ought to cite the legal representative to take out the letters of administration.

20. The applicant however has averred that they were not aware as to who the legal representative to the estate was. Probably this might be the reason they failed to file for citation proceedings against the legal representative. However, Section 66 of the Law of Succession Act lays down a ranking of persons who can be issued with letter of administration to the estate. The said section 66 of the Law of Succession Act provides that:--

“When a deceased has died intestate, the court shall save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice, to that discretion accept as a general guide the following order of preference, (my emphasis):

- a. Surviving spouse or spouses, with or without association of other beneficiaries,
- b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by part V:
 - i. the public trustee; and
 - ii. Creditors.

21. In my view, in the absence of the beneficiaries to an estate or if the beneficiaries are unknown as claimed by the applicants herein, then the applicants ought to have proceeded to cite the public trustee to take out letters of administration to defend the suit as against the estate of the deceased. This clearly was not done.

22. In an application made by the applicants seeking for orders for service to be effected by way of substituted service on the legal representative of the estate, the court granted the orders and mandated the applicants to effect service through the local dailies and to effect personal service on the public trustee to make further inquiries in respect of the estate. From the court record, I have not seen any evidence of such service having been effected on the public trustee. No affidavit of service has been filed as proof of service having been effected as directed by the court.

23. In the case of ***Kamlesh Mansukhlal Pattni & another v Central Bank of Kenya [2016] eKLR*** regarding the parties to a suit the court stated as follows

“It is trite law that for a court to have jurisdiction over a matter, and for a suit to be competently before a court, proper parties must be identified before the action can succeed. That is, the parties to the suit must be shown to be proper parties to whom rights and obligations arising from the cause of action attach.

“The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court, the court lacks jurisdiction to hear the suit and, where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned”

24. To me the approach used by applicant is an abuse of the court process as there are no proper parties before the court. If anything, this suit has no respondent or defendant to defend it. The suit herein was filed without proper parties before it. The applicants can possibly be said to have filed this suit against a deceased person as there is no specific person to defend the suit. The suit is defective and a non-starter. To me, the suit as filed is a legal aberration; for how do you file a suit naming only one side in an adversarial system?

25. I note that the respondent herein is a legal representative to the estate of the deceased and there is an application before the court to have him enjoined. As mentioned above this suit cannot be said to have been filed against the legal representative to an estate and is therefore a nullity in the first place.

26. In the case of ***Viktar Maina Ngunjiri & 4 Others vs Attorney General & 6 Others (2018) eKLR***. *Mbogholi Msagha J, cited with approval various Indian cases. He stated as follows :-*

“The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to court. In the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity”.

The entire suit is a nullity and the respondent cannot be joined in a suit that is void. The applicants are acting in utter disregard and/or ignorance of the law. This court is not with them.

27. The respondent has further averred that the suit herein is res judicata to Embu High Court Succession Case No. 80 of 2021, Nairobi HCC No. 1082 of 1978, Meru HCC No. 99 of 1993 and Meru HCC No. 382 of 1990. Res judicata is provided under section 7 of the Civil Procedure Act which provides that

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

On this issue of res judicata the respondent has not attached the proceedings of the other suits before the court and the court cannot therefore make a determination on whether the suits mentioned therein were similar to the one filed by the applicant.

28. The upshot of the foregoing is that the application herein lacks merit and is therefore dismissed. I make no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 16TH DAY OF DECEMBER, 2021

In the presence of Njagi for applicants and M/s Mutegi for Mugambi Njeru for respondent.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

16.12.2021