



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 149 OF 2017

MARK KITHINJI MBATIAH PLAINTIFF

VERSUS

WILBUR EARL HIGHTOWER JR..... DEFENDANT

RULING

1. Through an application dated 26.10.2021 the applicant seeks to substitute the defendant who is deceased; upon which the matter to be heard on priority basis in 30 days or in the alternative the applicant to be allowed to give her evidence **debene esse** and lastly the court to order for a site visit.
2. The application is supported by an affidavit sworn on undisclosed date by Najahait Faiza Hightower alias Hightower Faiza Wilbbur Earl.
3. The grounds upon which the application is made are that the applicant lives in the U.S.A, is a wife of the deceased defendant who passed on the 21.2.2021 before he could defend the suit.
4. The application is opposed through a replying affidavit sworn on 8.11.2021. The basis of the opposition is that the suit was finalized and a judgment entered against the defendant. Secondly it is averred a similar application for setting aside and stay was dismissed on 21.5.2020.
5. Further the respondent takes the view the applicant has misrepresented facts in the affidavit particularly paragraph 7, 9 and 10 and hence does not deserve the orders sought.
6. Lastly it is averred the applicant has not demonstrated her availability in Kenya throughout the trial if the application is allowed.
7. **Order 1 rule 10** provides for the substitution and addition of parties at any stage of a suit if the court is satisfied it is necessary for the determination of the dispute at hand. .
8. **Order 24 rule 4** is the most applicable law for a deceased defendant. It provides an application shall be made within a year upon death of a party where a suit survives the deceased.
9. The court record shows the matter was heard and determined on 17.10.2018 and the plaintiff was declared the owner of **Parcel No. Ntima/Igoki/1490** by virtue of adverse possession. A decree to that effect was issued on 3.12.2018 subsequent to another order was made dispensing with the production of the original title deed upon an application by the plaintiff dated 12.8.2019.
10. In an application dated 30.1.2020 the applicant sought for prayers that; M/s Charles Kimathi & Co. Advocates be allowed to represent him, stay of execution and inhibition orders to issue against the above decree. Another similar application was also filed dated 3.2.2020 leading to a ruling delivered on 21.5.2020 whereof the applicant filed a notice of appeal dated 20.5.2020 against the said ruling.
11. Further the applicant filed yet another notice of motion dated 22.5.2020 in which the court granted him orders of status quo with an interpartes on 22.6.2020.
12. As if that was not enough the applicant filed another application dated 20.6.2020 this time seeking for the setting aside of the exparte judgment, inhibition orders over the property, a rehearing of the suit through the taking of the current applicant's evidence through video link or any other electronic means, a site visit and or receipt of other expert evidence. The court gave an interpartes for 29.9.2020.
13. As concerns the ruling delivered on 21.5.2020 the court pronounced itself over the issues of inhibition orders, stay of execution, issuance of orders of status quo, the setting aside of the exparte judgment, the hearing afresh of the suit and or leave for the applicant to

file a defence.

14. The plaintiff by an application dated 30.8.2021 has sought for temporary orders of injunction against one Nathan Kinoti Itonga and Celina Kanini Kinoti and for the court to declare the power of attorney No. 535 of 2020 held by the said respondents as invalid. This is despite the fact that the two named persons are not parties to this case.

15. On 18.1.2021 the court gave directions that it shall deliver a final ruling on the pending two applications dated 22.5.2020 and 20.6.2020 as well as a preliminary objection dated 14.7.2020 simultaneously given that parties by consent had agreed to canvass the same through written submissions.

16. The two applications were mentioned in the open court on 22.3.2021 and status quo was ordered to be maintained.

17. On 9.4.2021 the court was informed of the demise of the defendant and hence gave directions that the defendant be substituted. A mention date was given for 20.7.2021 to confirm the progress on substitution. The pending applications including the one dated 20.6.2020 were put on hold until the issue of substitution was finalized. Similarly orders of status quo were extended.

18. No action was taken by any party until 28.7.2021 when the applicant took a date for 26.10.2021 for hearing of an unspecified application. While awaiting the scheduled date the instant application was filed under certificate of urgency on 10.9.2021.

19. Through oral submissions the applicant submits the matter was heard *ex parte*, the land is still in the name of the deceased defendant, that by the time of his death, the defendant had issued a power of attorney and that the law allows a party to come to court for the settling aside of any proceedings under **Order 10 Rule 11**.

20. Counsel further submitted the court has discretion to allow the defendant an opportunity to be heard on merits since there will be no prejudice to the respondent.

21. On the part of the respondent Miss Rimita Advocate submitted the application was an abuse of the court process since it was an appeal in disguise.

22. Secondly counsel submitted there was nothing left to defend since the suit was heard and determined and a judgment in 2018.

23. Further counsel submitted a similar application had been filed and determined on 21.5.2020 hence the applicant did not deserve the orders sought.

24. Whereas the notice of appeal touches on both the ruling delivered on 21.5.2020 and the judgment of 17.10.2018 the court is being asked to allow for the substitution of a deceased defendant who has filed an appeal to the Court of Appeal.

25. Having set the record, and looking at the applications herein, replying affidavits and having heard submissions from both sides, the issue for determination is whether the applicant deserves the orders sought and if the respondent is also entitled to the orders sought both in the application and the preliminary objection.

26. First the applicant cannot have it both ways, file an appeal and at the same time revert to this court. This court is therefore **functus officio** and cannot sit on appeal on its own judgment over similar prayers and or issues which it has already determined as alluded above. My findings are that the said applications offend **Section 7 of the Civil Procedure Act**.

27. The applicant has chosen to go to the Court of Appeal as a matter of right. He has not sought for the review of the ruling delivered on 21.5.2020. Therefore the only avenue is for the applicant to move to that court for the appropriate orders as regards the setting aside of the default judgement and for rehearing of the suit.

28. Turning to the prayer for substitution of the deceased defendant, the record shows that the applicant had asked for six months to do so.

29. **Order 24 rule 4** grants the court the power to cause a legal representative of a deceased defendant to be made a party. In line with ***Trouistik Trouistic Union International and Another –vs- Jane Mbeyu & Another [1993] KLR***, the proposed party obtained a limited grant of letters of administration ad litem on October 2021.

30. Though the grant ad litem indicates it is issued for the purpose of defending the suit, it is quite apparent the matter is only pending execution before this since the judgment was regularly entered against the defendant during his lifetime.

31. In ***Mary Wambui Njuguna –vs- William Ole Nabala & 9 Others [2018] eKLR*** the Court of Appeal held under **Order 24 rule 4** the application to substitute the legal representative in place of the deceased defendant may be made by any party to the proceedings including the deceased legal representative.

32. In the premises **prayer No. 2 of the application dated 10.9.2021** is allowed but the rest of the prayers are dismissed with costs.

33. Given the foregoing, the applications dated 22.5.2020 and 20.6.2020 by the applicant are also dismissed.

34. Coming to respondent's application dated 30.8.2021, the orders sought are against persons who are not parties to the suit and without a prayer to enjoin them.

35. There is a no evidence of service of the application upon the intended parties. Further as pointed out in the foregoing there is no defendant until the intended party is formally enjoined to the suit I find no merits on the same. The same is dismissed with costs.

36. File closed.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 15TH DAY OF DECEMBER, 2021

In presence of:

Miss Otieno for plaintiff/respondent

Kimathi for defendant/applicant

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE