



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**E.L.C. CASE NO 205 OF 2015**

**(FORMERLY KERUGOYA E.L.C. CASE NO. 37 OF 2014)**

**KIURA NDWIGA.....PLAINTIFF**

*VERSUS*

**ALBERT NJERU.....1<sup>ST</sup> DEFENDANT**

*AND*

**ALOICE NGARI DISHON.....PROPOSED INTENDED PLAINTIFF/APPLICANT**

**RULING**

1. By a notice of motion dated 26<sup>th</sup> July 2019 brought under **Order 24 Rules 3 and Rule 4 and Order 10 Rule 11 of the Civil Procedure Rules (hereafter the Rules), Sections 1A, 1B, 3A, 63(e), and 80 of the Civil Procedure Act (Cap. 21), Article 159 of the Constitution of Kenya, 2010, and all other enabling provisions of the law**, the Applicant sought the following orders:

- a. Spent
- b. Spent
- c. Spent
- d. The extension of time within which Aloise Ngari Dishon (the person proposed to be substituted with the Deceased Plaintiff) ought to have been substituted for and/or in the place of the Deceased Kiura Ndwiga.
- e. Aloise Ngari Dishon (the person proposed to be substituted with the Deceased Plaintiff) be substituted for and/or in the place of the Deceased Plaintiff, Kiura Ndwiga.
- f. The plaint be amended to enjoin the said Aloice Ngari Dishon as the Plaintiff and the Legal Representative of the Estate of Kiura Ndwiga.
- g. The suit be revived for hearing and determination.
- h. The orders issued by this honourable court on the 12<sup>th</sup> day of March, 2018 be set aside/reviewed.
- i. A temporary injunction do issue to preserve land parcels numbers Nthawa/Riandu/1875, Nthawa/Riandu/1877, Nthawa/Riandu/1880, Nthawa/Riandu/1868, Nthawa/Riandu/1864 and Nthawa/Riandu/1881 pending the hearing and determination of the main suit.
- j. The cost of this application be provided for.

2. The said application was based upon the grounds set out on the face of the motion and supported by the affidavit sworn by the Applicant on 26<sup>th</sup> July 2019 and the annexures thereto. It was contended that the deceased Plaintiff did not notify the Applicant and his family members of the existence of the suit prior to his death hence the Applicant was not aware of its existence. It was further contended that the

deceased was a polygamist and that there was disunity amongst his family members hence the difficulty and delay in obtaining letters of administration to facilitate the prosecution of the suit.

3. When the said application was listed for hearing on 8<sup>th</sup> October 2019 it was prosecuted by the Applicant's advocate in the absence of the Defendants. The Defendant's advocates did not file a response to the application and neither did they attend court for hearing on the said date. The court, therefore, heard the application *ex parte* and deferred its ruling to another date.

4. The court has considered the Applicant's said notice of motion, the supporting affidavit and annexures thereto as well as the material on record. The court has noted that the suit was filed on or about 17<sup>th</sup> December 2010, that is, more than 9 years ago. The Plaintiff is said to have died in 2013 and the application for revival of the suit and substitution was not filed until 26<sup>th</sup> July 2019. The material on record further indicates that the court declared the suit as having formally abated on 12<sup>th</sup> March, 2018 upon the Defendant's application.

5. **Order 24 Rule 3** of the **Rules** on abatement and revival of causes of action stipulates as follows:-

**“3 (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 subrule (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.”**

6. On the other hand **Order 24 Rule 7** of the **Rules** stipulates as follows:

**“(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.”** (emphasis added)

7. The court is therefore obliged to consider whether the Applicant has demonstrated **good reason** for extension of time and whether he was prevented by any **sufficient cause** from continuing the suit. The Applicant's explanation for the delay in filing the instant application was twofold. First, that he was completely unaware of the existence of the suit since he was never briefed of its existence by the deceased. Second, that the deceased had four (4) wives and that there was disunity amongst the family members who could not agree on who was to apply for letters of administration. The same reasons were also advanced to support the rest of the prayers in the application.

8. The court has given due consideration to the reasons advanced by the Applicant. Although the application was not opposed by the Defendant, the Applicant is still obliged to show good reason and sufficient cause within the meaning of **Order 24** of the **Rules**. The court is not satisfied that a good reason has been demonstrated by the Applicant within the meaning of **Order 24 Rule 3** of the **Rules**. The material on record demonstrates that the deceased had filed suit to challenge the purported sale agreement between him and the Defendant for the sale of the suit properties to the latter. The material on record further shows that it is one of the sons of the deceased one Anthony Ngari Kiura who lodged cautions against the suit properties thus preventing their transfer to the Defendant. The Applicant's said brother is the 2<sup>nd</sup> Defendant in the counterclaim. In those circumstances, it cannot possibly be true that the family members of the deceased were not aware of the suit and counterclaim for about 9 years.

9. The second explanation offered by the Applicant is equally lame. The mere fact that the deceased had four wives and that there was disunity and disharmony amongst his family members is not a good reason to sustain the instant application. The family of a deceased litigant is not at liberty to keep a suit pending for over 6 years after his death simply because of their internal disagreements. Whoever files a suit is obliged to prosecute it expeditiously and upon his death his personal representative is obliged to act with reasonable dispatch in seeking substitution and revival of the suit. The court is thus far from satisfied that the Applicant was prevented by sufficient reason from prosecuting the suit upon the death of the Plaintiff. A person who seeks the exercise of judicial discretion in his favour must act diligently. An indolent Applicant does not deserve the exercise of judicial discretion in his favour.

10. The upshot of the foregoing is that the court finds no merit in the Applicant's notice of motion dated 26<sup>th</sup> July 2019. Consequently, the same is hereby dismissed with no order as to costs.

11. It is so ordered.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **16<sup>TH</sup> DAY** of **JANUARY, 2020**.

In the presence of Ms. Mbwiria holding brief for Mr. Ndolo for the Applicant and in the absence of the rest of the parties.

Court Assistant: Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**16.01.2020**