



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 371 OF 2009

ELIZABETH WANJIKU KARIUKI.....1ST PLAINTIFF

PAULINE NJOKI KANGI.....2ND PLAINTIFF

ANNE JULIA WAMBERE KANGI.....3RD PLAINTIFF

- VERSUS -

K-REP BANK LIMITED.....1ST DEFENDANT

PETER KINYANJUI MUKOMA.....2ND DEFENDANT

NANCY WAMBUI NJUGUNA.....3RD DEFENDANT

JOSEPH MURIITHI MIANO.....4TH DEFENDANT

REGENT AUCTIONEERS (N) LIMITED.....5TH DEFENDANT

CHIEF LAND REGISTRAR.....6TH DEFENDANT

RULING

1. This suit was filed by three plaintiffs against six defendants. It is pleaded, in this case, by the plaintiffs that the 1st plaintiff is registered as trustee, of **Paul Warui** and **Jocelene Muthoni Kariuki**, over the properties:

NAIROBI/BLOCK/69/117/26 comprising of units 26 and 149; NAIROBI/BLOCK/69/117/48 comprising of units 48 and 149; and NAIROBI/BLOCK/69/117/9 comprising of units 9 and 148.

These properties were charged to the 1st defendant as security for financial accommodation. It is pleaded that on 26th May 2009 the 5th defendant (an auctioneer) auctioned the said properties to the 2nd to the 4th defendants. The plaintiffs' case is that the said sale was wrongful, invalid, null and void. The plaintiffs seek a declaration that the said sale was unlawful and therefore prays that the court do order the transfer of the said properties to the 1st plaintiff.

2. The plaintiffs have presented an application dated 14th January 2020 seeking the substitution of Peter Kinyanjui Mukoma, the deceased 2nd defendant, with his personal; representatives, namely Miriam Muthoni Kinyanjui, Kenneth Karimi Kinyanjui and Stephen Kamau Kinyanjui.

3. The 2nd defendant passed away on 17 June 2013.

4. Substitution of the deceased 2nd defendant is sought under the provisions of Order 24 of the Civil Procedure Rules (the Rules). In this case the appropriate Rule of that Order 24 is Rule 4. That Rule provides:

“4. (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a

party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.”

5. As it will be noted from the provision in Sub-Rule 3, above, where there is no application for substitution within one year of the defendant passing away the suit abates. This suit indeed abated by operation of the law in the year 2014. That however is not the end of the matter. The suit can be revived on sufficient cause being shown. This is provided under Order 24 Rule 7 (2) of the Rule, which provide:

“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.”

6. Curiously the 2nd defendant was represented by an advocate, in all attendances before court up and until 3rd December 2019.

7. On 27th November 2019 the advocate for the deceased 2nd defendant argued an application, a chamber summon, dated 20th August 2010 (hereinafter referred to as **the previous application**). That previous application was argued nine years after it was filed. It is to be noted that an interlocutors judgment was entered against the deceased 2nd defendant on 25th March 2010. The prayer sought by the previous application was:

“That this Honourable court do set aside the ex-parte interlocutors judgment entered herein on 25th March 2010 against the 2nd defendant.”

8. It is not clear why that application was not argued before and why the learned advocate for the deceased 2nd defendant continued to attend court, on this matter, as though the 2nd defendant was still alive or as though his substitution had been permitted by the court.

9. On 27th November a consent was recorded between the plaintiffs’ learned advocate and the advocate of the deceased 2nd defendant. That consent was in the following terms:

“The 2nd defendant shall file and serve its defence by close of business today.

The plaintiffs shall file and serve its (sic) reply to that defence by close of business 29th November 2019”

10. Following that consent the court ordered the judgment entered against the deceased 2nd defendant be set aside.

11. On 3rd December 2019 the learned advocated for the deceased 2nd defendant withdrew an application, dated 10th July 2017 which application was filed on behalf of deceased 2nd defendant’s personal representative. That application sought the substitution of the deceased 2nd defendant. The withdrawal of that application left all the other advocates, and more particularly the plaintiffs’ learned advocate aghast. The plaintiffs’ advocate opposed the withdrawal of the application on the basis that if it was withdrawn the plaintiffs would be prejudiced because the plaintiffs had withheld filing their application, to substitute the deceased 2nd defendant, because such application had been made by the personal representatives of the deceased 2nd defendant. That if the plaintiffs had filed their application to substitute the deceased 2nd defendant such an application would have been a duplication of the plaintiffs’ application.

12. The plaintiffs in the light of what is stated above have shown sufficient basis for this court to allow the application for substitution of the deceased 2nd defendant. In other words the plaintiffs could not themselves have sought to substitute the deceased 2nd defendant because the application for substitution of the personal representatives of the deceased 2nd defendant was subsisting and on court record. It was subsisting until it was withdrawn on 3rd December 2019.

13. Although the plaintiffs did not specifically seek for the suit, which abated a year after the 2nd defendant died, to be revived I am of the view that the interest of justice require this suit, which is substantially heard, to be revived. It will be revived on the basis that the plaintiffs have shown they were prevented by sufficient cause from seeking substitution of the deceased 2nd defendant, as discussed above.

14. The fair and just order in respect to the costs of the application is that the costs be in the cause.

CONCLUSION

15. In the end, in regard to the Notice of Motion dated 14th January 2020, the court grants the following orders:

a. The case against the deceased 2nd defendant is hereby revived.

b. Peter Kinyanjui Mukoma, the deceased 2nd defendant, is hereby substituted in this case by Miriam Muthoni Kinyanjui, Kenneth Karimi Kinyanjui and Stephen Kamau Kinyanjui.

c. The said Miriam Muthoni Kinyanjui, Kenneth Karimi Kinyanjui and Stephen Kamau Kinyanjui shall file and serve their defence within 15 days from today 4th May, 2020.

d. The costs of the application dated 14th January 2020 shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of MAY, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **4th** day of **May, 2020**.

MARY KASANGO

JUDGE