



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 669 OF 2008**

**JOHN ALEX NYARANGO ANUNDA.....PLAINTIFF/APPLICANT**

**VERSUS**

**BARCLAYS BANK OF KENYA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KENWIDE AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**HOMEPLUS DEVELOPERS.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

By a Certificate of Urgency Application dated 17<sup>th</sup> February 2020, filed together with Notice of Motion and Supporting Affidavit, the Counsel for Applicant Mr. Edward M. Oonge, on behalf of the Applicant urged the court to be heard on priority basis for reasons;

- a) That the suit herein was dismissed for want of prosecution on 13<sup>th</sup> March, 2017 at a time when the Plaintiff was seriously ill and in need of medical care and attention.
- b) That the Plaintiff passed on, on 17<sup>th</sup> May 2019 after a long illness.
- c) That the subject matter of the suit is a property known as **L.R. No. Nairobi/Block 76/86**, which was the deceased Plaintiff's matrimonial home and where his family is currently staying.
- d) That the family of the deceased have been threatened with eviction from the property by the 3<sup>rd</sup> Defendant and unless this court urgently intervenes they could be rendered homeless.
- e) That it is in the interest of justice and fairness that the Application is considered as a matter of urgency for the above reasons.

In the Notice of Motion brought under **Section 3 and 3A of the Civil procedure Act (Cap 21) Laws of Kenya, Order 24 Rule 3(1), Order 9 Rule 9 and Order 51 Rules 1, 3 & 4 of the Civil Procedure Rules, and all other enabling provisions of the law**. The applicant sought orders;

- a) That the firm of Were & Oonge Advocates be granted leave to come on record on behalf of the Plaintiff in place of Konosi & Company Advocates.
- b) That this Court sets aside the order made on 13<sup>th</sup> March 2017 dismissing the Plaintiff's suit herein for want of prosecution and reinstate the suit for hearing and determination on its merits.
- c) That upon reinstatement of the suit, this Court to substitute the name of the Plaintiff John Alex Nyarango Anunda, who is deceased, with that of Tabitha Nyomenda Manwa who is his appointed legal representative.

The Application is based on grounds that;

1. The Plaintiff filed this suit in the year 1996 under case number **HCCC No 638 of 1996**, which was later consolidated with **HCCC No. 3059 of 1997**, which had been filed by the 3<sup>rd</sup> Defendant. The consolidated suits were later allocated the current case number.

2. The subject matter of the suit is property L.R. No. Nairobi/Block 76/86, which was the deceased Plaintiff's matrimonial home and where his family is currently staying.
3. The Plaintiff passed on, on 17<sup>th</sup> May 2019 after a long illness.
4. On account of the Plaintiff's long and serious illness he was not able to follow up on this matter with his advocates as he was mostly admitted in hospital or recuperating at home.
5. The estate of the deceased only found out that the matter had been dismissed for want of prosecution late in 2019 after the Plaintiff had been laid to rest.
6. The Plaintiff's family found out the details of the case after the 3<sup>rd</sup> Defendant started making calls threatening to evict them from the subject property.
7. This prompted them to instruct the current advocates to peruse the court file and find out the status and it was after the perusal that they established that the matter had been dismissed on 13<sup>th</sup> March 2017, by Hon. L. J. Ngetich for want of prosecution after both parties failed to appear in court to show cause.
8. Unless this suit is reinstated and heard on its merits the Estate of the Plaintiff (deceased) stands to suffer irreparably as the subject property is where they currently live and where they have called home almost all their lives.
9. Tabitha Nyomenda Manwa, the widow of the deceased has successfully applied for and obtained a limited Grant Ad Litem for her to be made a party to this suit on behalf of the Estate and has also subsequently obtained a Grant of letters of Administration Intestate for the Estate of the deceased.

### **REPLYING AFFIDAVIT**

The application was opposed vide an Affidavit dated 4<sup>th</sup> March 2020, sworn by Wakano Katambo Director of the 3<sup>rd</sup> Defendant/Respondent herein. He averred that by a public auction conducted by the 2<sup>nd</sup> Defendant/Respondent on the instructions of the 1<sup>st</sup> Defendant/ Respondent, the 3<sup>rd</sup> Respondent purchased the suit premises being L.R. No. Nairobi/Block 76/86 and transfer to itself was effected on 2<sup>nd</sup> September 1997; marked "WK1" is a copy of the certificate of lease issued.

He stated that the Plaintiff who was the former owner and occupant of the suit premises declined to vacate the suit premises and filed **HCCC No. 638 of 1996 in the Civil Division** to challenge the 2<sup>nd</sup> Respondent auction sale whereas the **3<sup>rd</sup> Respondent filed HCCC 3059 of 1997** in the Civil Division to recover possession of the suit premises from the Plaintiff of the suit premises.

He asserted that on 2<sup>nd</sup> January 2002, the court ordered that both suit be consolidated with the suit **No. HCCC 3059 of 1997** being the lead suit.

That what followed was a series of efforts to frustrate the hearing of the suit by the Plaintiff since he was in occupation of the 3<sup>rd</sup> Defendant's premises for which he was not paying any rent.

He further stated that on 2<sup>nd</sup> October 2002 and on various other dates the court ordered this suit to be fixed for hearing on priority basis.

That the Plaintiff filed various applications in the matter which were dismissed that contributed to delayed hearing of the matter as intended by the Plaintiff.

That the said consolidated suits were then transferred to this Division and granted the current suit number in the year 2008 hence this suit was in court unprosecuted for 20 years before its dismissal.

He deposed that after their various discussions on 11<sup>th</sup> December 2017, they had a meeting between himself as the director of the 3<sup>rd</sup> Defendant, the Plaintiff and the 3<sup>rd</sup> Respondents Advocates at the advocates premises where an offer was given to the Applicant in writing to purchase the suit premises and which the Applicant readily accepted; marked "WK 2" is the letter of the offer dated 13<sup>th</sup> December 2017.

On 17<sup>th</sup> January 2018 the 3<sup>rd</sup> Respondent's advocates then did a letter that was picked in their office by the Plaintiff on 29<sup>th</sup> January 2018 about the pending sale transaction; marked "WK 3" is the letter.

That on 25<sup>th</sup> July 2019 the 3<sup>rd</sup> Respondent advocates wrote to the Applicant and delivered the letter on 26<sup>th</sup> July 2019 requiring her to vacate the suit premises as her deceased husband, the Plaintiff, did not consummate the purchase deal; the letter is marked "WK 4".

The Plaintiff's advocates wrote to the 3<sup>rd</sup> Respondent's advocates about the notice given to the Applicant to vacate the premises to which the 3<sup>rd</sup> Respondent's advocates responded to vide their letter dated 14<sup>th</sup> August 2019 indicating that the transaction to sell the premises to the Plaintiff had fallen through the Plaintiff having failed to pay agreed deposit and made a fresh sale offer at Ksh 9,000,000/-. Marked "WK 5" is letter dated 14<sup>th</sup> August 2019.

On 3<sup>rd</sup> October 2019, the 3<sup>rd</sup> Respondent's advocates wrote to the Plaintiff's advocates and informed him that the 3<sup>rd</sup> Respondent would proceed to evict the Applicant as the negotiations had not materialized; marked "WK6" is letter dated 3<sup>rd</sup> October 2019.

He stated that the foregoing establishes that the Plaintiff was aware of the dismissal of the suit immediately after its dismissal and that is why he commenced negotiations to purchase the suit premises from the 3<sup>rd</sup> Respondent but took no action to reinstate the same.

The action now being taken by the Applicant to reinstate this suit is informed by the reasons that they were unable to purchase this house from the 3<sup>rd</sup> Respondent; and as such as an afterthought and an abuse of the process of the court.

He affirmed that having been involved in negotiations to purchase the suit premises from the 3<sup>rd</sup> Respondent it is clear that the Plaintiff's suit was frivolous, he had no rights to the suit premises and any reinstatement of the suit in the foregoing circumstances will lead to no good but futile litigation.

## **DETERMINATION**

From the pleadings and submissions by Counsel for both parties, the issues for determination are;

- a) **Whether the suit dismissed vide order of 13<sup>th</sup> March 2017 ought to be reinstated.**
- b) **Whether Counsel for the Plaintiff should be allowed to come on record.**
- c) **Whether the Plaintiff who died on 17<sup>th</sup> May 2019 ought to be replaced by the widow?**

The suit was dismissed after Notice to show Cause was issued after the Court noted that no action had taken place over a long time. Since there was no appearance the Court rightfully dismissed the suit for want of prosecution.

The Applicant, widow of the deceased, Tabitha Nyomenda Manwa, sought reinstatement of the suit and substitution of the Plaintiff John Alex Nyarango Anunda now deceased to her name as she obtained grant ad litem and letters of administration intestate.

The Applicant deponed that the Plaintiff suffered long illness and failed to keep track of the proceedings or meet his obligations in negotiations he made. He went through terminal illness and focused on treatment and wellbeing until his demise.

The Respondent 3<sup>rd</sup> Defendant Purchaser and Owner of the suit premises

LR No Nairobi/Block/76/86 upon transfer on 2<sup>nd</sup> Sept 1997 vide Certificate of Lease. The Plaintiff failed to pay rent to the Respondent owner. In 2017, negotiations were held with the Plaintiff to repurchase the premises but failed to honor the Agreement. For this reason, the Respondent opposed the reinstatement of the suit as a means of the Plaintiff to delay vacating the premises.

This Court relies on **Order 12, rule 7 CPR 2010** that provides;

***"Setting aside judgment or dismissal where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as maybe just."***

**Order 17, Rule 2 CPR 2010** provides;

**"2. Notice to show cause why suit should not be dismissed**

***(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.***

***(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.***

In reliance of the above provisions there is legal ground to reinstate suit where the Court is satisfied there is sufficient cause to reinstate the suit and grant such orders that will enable expeditious disposal of the matter.

This Court considers that the Plaintiff was indebted to the 1<sup>st</sup> Defendant who caused sale of the suit property to 3<sup>rd</sup> Defendant. The Plaintiff negotiated to repurchase the suit property and agreed on the conditions with the 3<sup>rd</sup> Defendant in 2017. The Plaintiff thereafter suffered ill health arising from terminal illness and succumbed to his death in 2019. These reasons are not controverted and the Court is satisfied that the Plaintiff's illness and eventually his death caused his absence in Court or to contact and instruct his lawyers then or take any action with regard to the matter. The suit was dismissed as these reasons were not relayed to the Court.

The Applicant taking over the matter is the widow of the Plaintiff now deceased. The Applicant was not privy to the circumstances of the case until the Applicant was served with Notice to vacate the premises of 26<sup>th</sup> July 2019, 2 months after her late husband's death. Although

the matter abated for 4 years, it would prejudice the Plaintiff/Deceased's family if they are not granted an opportunity to familiarize with the circumstances of sale of their home, an opportunity to salvage it as they were not aware of the sale or the indebtedness regarding the suit property or party to the Plaintiff's actions. More importantly, they ought to be granted their Constitutional rights to a fair hearing under **Article 50** and access to justice under **Article 48 of COK 2010**. See *John Nahashon Mwangi vs Kenya Finance Bank Ltd ( In Liquidation) [2015] eKLR*

The Respondent will be prejudiced by delay of resolution of the dispute but they dealt with the Plaintiff who is deceased and it is only fair and just to give opportunity to the Plaintiff's representative and administration incharge of his estate to take over the matter and pursue their rights. The suit did not abate under **Order 24 (1) (b) CPR 2010**. The order of dismissal was in absence of relevant and crucial information as to the Plaintiff's health and death thereafter.

For those reasons, this Court reinstates the Suit forthwith but on condition

- a) The Plaintiff shall prosecute the matter within 1 year in default it shall stand dismissed forthwith.
- b) With regard to the new advocates on record, Messrs Were & Oonge Advocates, the Respondents did not object to their coming on record, **Order 9 Rule 9 CPR 2010** no judgment had been passed.
- c) With regard to substitution of the Plaintiff with his widow who obtained a grant of letters of administration, The Applicant relied on **Order 24 Rule 3 (1) CPR 2010**. The Respondent objected to substitution as there was no suit that survived the Plaintiff to justify substitution. The said provision provides;

***"3. 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."***

I have outlined the provision to illustrate that the substitution may be made to allow legal representative of the Plaintiff to proceed with the suit. Therefore, it is allowed to have the Applicant upon proof of the Limited grant ad litem /letters of administration intestate from Family Division/Court, the Applicant shall thereupon be deemed the Legal Representative of the Plaintiff now deceased.

The Court has relied on **Article 159 (a) & (d) COK 2010** and the Overriding Objective under **Section 1A 1B & 3A of CPA** to have the substantive dispute heard and determined instead of dismissal of the same on technical reasons, due to the reasons indicated above.

**DISPOSITION**

- 1. The Applicant's application certificate of urgency filed on 18<sup>th</sup> February 2020 is granted.**
- 2. The Plaintiff's suit is reinstated on condition that the Plaintiff initiates prosecution of the matter within 1 year. In default of prosecution the suit shall automatically stand dismissed.**
- 3. The advocates Messrs Were & Oonge Advocates shall come on record as Applicants advocates on record.**
- 4. The Plaintiff, the Late John Alex Nyarango Anunda shall be substituted by the Applicant, Ms Tabitha Nyomenda Manwa as Legal Representative of the Plaintiff's estate subject to filing with the DR Commercial & Tax Division and serving the Respondents with the Grant ad litem letters of administration intestate of the Plaintiff's estate within 14 days.**
- 5. The 1 year prosecution period shall begin to run after 14 days elapse from delivery of this Ruling.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 5<sup>TH</sup> OCTOBER 2020. (VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**MR. MWANGI FOR THE PLAINTIFF/APPLICANT WACHIRA NDUNG'U & CO.  
ADVOCATES FOR DEFENDANT- N/A**

**COURT ASSISTANT: TUPET**