



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 183 OF 2002

JULIUS KOGO (Suing as the personal representative

of the estate of ANTHONY K. LELEI.....DEFENDANT/APPLICANT

VERSUS

FUNDI K. BIWOTT.....1ST PLAINTIFF/RESPONDENT

ESTHER J. NGETICH.....2ND PLAINTIFF/RESPONDENT

RULING

1. **JULIUS KOGO** (the applicant) filed this notice of motion dated 11th July, 2019 seeking for orders:-

i. That Julius Kogo be substituted as a legal representative of the late Anthony K. Lelei who died on the 14th day of September, 2018.

ii. That upon the said substitution of the deceased defendant by the legal representative, the said legal representative be granted leave to apply for orders of stay of execution of the decree passed against the deceased for its been sought and executed against a deceased party without the disclosure of the fact of death.

iii. That the judgment delivered on 31/10/2012 and/or decree/order or determination of the honorable court be set aside and/or reviewed for being illegal on the face of the record as it was obtained in error and is being executed in error.

iv. That this cause be remitted for trial before another court of competent jurisdiction to be heard and determined on merit.

2. The application is premised on grounds that the judgment herein was made in the absence of the defendant who had no notice of the said delivery date.

3. An application to discharge a charge in favor of the **Agricultural Finance Corporation (AFC)** was made on 30/3/2017 without service upon the deceased defendant or the next of kin of the defendant.

4. The **Land Registrar Nandi** has issued notice to the applicant of his intention to implement the decree herein despite the irregularities.

5. The application is opposed through a replying affidavit sworn by **Fundi K. Biwott** on grounds that all along during the proceedings in this case the deceased has been served with relevant hearing notices but chose not to attend court.

6. That this application has been brought after undue delay and no explanation has been given by the applicant.

7. Further, that the judgment and decree have already been implemented by the **Land Registrar** so there is nothing to be stayed, the same having been overtaken by events and should be dismissed with costs.

8. The application was canvassed by written submissions. The applicant submitted that the judgment affected interests in a registered title to land which made it necessary to certain applications to be made upon its delivery in compliance with Order 21 of the Civil Procedure Rules.

9. The applicant obtained an order for stay of execution and an order was served on 26/7/2019. The respondent then went ahead and obtained title to the disputed parcel on 27/8/2019.

By the time the title was procured, the judgment debtor had died and there were in existence court orders restraining the very acts that were

done.

10. The respondents submitted that the burden rests on the applicant to prove that he was never served with hearing notices for hearing of the case in question and/or give sufficient cause as to why he did not attend court for hearing despite service thereof.

11. It is argued that the deceased and the applicant were aware of this matter all along because during proceedings in this matter, the plaintiff's/respondent's advocates used to serve the deceased's former advocates with hearing notices, but the deceased and his advocates chose not to attend court and ventilate their issues despite the said hearing notices having been served upon them.

12. That applicant herein has admitted that indeed the plaintiffs did serve hearing notices in this suit to the deceased's former advocates. Further, the deceased's former advocates were duly served with a notice of the judgment delivered on 31/10/2012 but still neither they nor the deceased attended court on the said date.

13. It is also contended that the applicant has not demonstrated that the deceased, during his lifetime, took any steps to follow up on the progress of his case. That if the deceased been diligent enough in pursuing this case, he would have established the progress of the same and would have been able to defend his case before judgment was entered.

14. The deceased is accused of being indolent, and having slept on his right to be heard and cannot now blame the said failure on his advocates. In support of this argument the respondent relied in the case of **OMWOYO -VS- AFRICAN HIGHLANDS & PRODUCE CO. LTD [200211 KLR]**, where Ringera (J) stated that:

"Time has come for legal Practitioners to shoulder the consequences of their negligent act or omissions like other Professionals do in their fields of endeavor. The Plaintiff should not be made to shoulder the consequences of the negligence of the Defendant's advocates. This is a proper case where the Defendants remedy is against its erstwhile advocates for Professional negligence and not setting aside the judgment".

15. This application seeks to set aside judgment which was delivered on 31/10/2012. This application was filed on 12th July, 2019, six years and nine months later. The deceased died on 14th September, 2018, that is 5 years and 11 months after the delivery of the said judgment.

16. It is not disputed that the applicant's former advocates were duly served with hearing dates of this case but allegedly they never notified the deceased of the said dates. In the same way, the deceased's former advocates must have failed to notify the deceased of the judgment date duly served upon them by the respondents' advocates.

17. The judgment and decree herein which the defendant/ applicant seeks to set aside have already been implemented by the **Lands Registrar** and therefore there is nothing to stay as sought by the applicant in this application.

18. Since the judgment and decree herein were regularly obtained on 31/10/2012 during the lifetime of the deceased, the implementation of the same could not have been affected on his demise on 14th September, 2018.

19. Since this suit was filed in 2002, prior to the establishment of the **Land and Environment court** and the directive by the then **Chief Justice** that **Chief Magistrates Courts** start hearing land and environment matters which they have pecuniary jurisdiction on, it is the plaintiffs'/respondents' submissions that this Honorable court had and still has jurisdiction to hear this case.

Issues for determination

i. Whether the deceased defendant can be substituted after judgment.

ii. Whether the orders issued on can be set aside/reviewed.

ii. Whether the suit can be tried by a different court.

20. **Order 24 Rule 4 of the Civil Procedure Rules** provides for the substitution of the Legal Representatives of a deceased defendant as follows:

Procedure in case of death of one of several defendants or of sole defendant.

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 sub rule (1), the suit shall abate as against the deceased defendant.

21. The power of the Court **under Order 24 Rule 4** is to cause, on an application made in that behalf, *the Legal Representatives of the*

deceased defendant to be made a party.

22. The person to join as a party to the suit must be *the Legal Representatives of the deceased defendant*. The Court of Appeal decision in ***Trouistik Union International & Anor. v. Jane Mbeyu & Anor Civil Appeal No. 145 of 1990 [1993] KLR 230*** it was stated that the Legal Representative of the deceased is the person appointed as such by a Succession Court in accordance of the **Law of Succession Act**.

23. The power of the Court under **Order 24 Rule 5 of the Civil Procedure Rules** is to determine a question as to whether any person is or is not the Legal Representative of a deceased plaintiff or defendant must be exercised in accordance with the law and the Court cannot be at liberty to appoint a person who is not a Legal Representative in accordance of the Law of Succession Act.

24. **Order 45 of the Civil Procedure Rules** permit the court, on application to do so and to make **such order thereon as it thinks fit**.

25. **Order 45 further provides that** any person who is aggrieved by an order or a decree may ask the court that made the order or issued the decree to review it if he can demonstrate that he has discovered new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made.

26. The court will also review its decision if it finds some mistake or error apparent on the face of the record. Finally, it is open to the court to review its decision if it finds any other sufficient reason to do so.

27. An application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.

28. There is no sufficient reason provided which the court can conclude that there was discovery of new and important matter or evidence.

29. As regards to having the matter being tried by another court of competent jurisdiction, Section 7 of the Civil Procedure Act states:

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.

30. The purpose and only object of the **res judicata** rule is to bring litigation to finality so that nobody is vexed or just harassed with unwarranted litigation and attendant costs over same matter twice or more times over.

31. It is evident that the case was heard and determined by a court of competent jurisdiction and therefore, it will be unfair to the plaintiff/respondent who wants to enjoy the fruits of the judgment.

32. The suit has reached execution stage, in-fact the respondents have already acquired title to the suit land, there is nothing to stay and thus the prayers in the application are overtaken by events. Consequently, I hold and find that the application lacks merit and the same be and is hereby dismissed with costs to the respondent

Virtually Delivered and dated this 1st day of December 2020 at Eldoret

H. A. OMONDI

JUDGE

Mrs Mitei h/b Mr Ngigi for deft/applicant

N/A for respondent