



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 938 OF 2005**

**WALTER NJENGA.....APPELLANT**

**VERSUS**

**STEPHEN NG'ANG'A.....RESPONDENT**

**AND**

**ESTHER NJERI NJENGA & ROSEMARY WANJIKU NJENGA**

**(Suing as the legal representatives of the estate of WALTER NJENGA - Deceased).....APPLICANTS**

**RULING**

1. The applicants have taken out the Notice of Motion dated 16<sup>th</sup> July, 2019. The Motion is premised by the grounds laid out on its face and the facts averred in the affidavit sworn by the 1<sup>st</sup> applicant, *Esther Njeri Njenga*. The applicants are seeking the orders hereunder:

***i. THAT this Honourable Court be pleased to vary or set aside the orders issued on 16<sup>th</sup> June, 2015 dismissing the appeal and have the appeal reinstated for hearing.***

***ii. THAT Walter Njenga (“the deceased”) be substituted with the applicants herein as the appellants.***

***iii. THAT the costs of the application be in the cause.***

2. The respondent filed Grounds of Objection and a replying affidavit he swore to oppose the motion. The respondent also filed supplementary affidavit to further resist the motion.

3. The 1<sup>st</sup> applicant rejoined with the further affidavit sworn on 28<sup>th</sup> August, 2019.

4. When the matter came up for hearing before this court on 3<sup>rd</sup> October, 2019 the parties' respective counsels opted to rely on the facts deponed in the affidavits filed in support of and in opposition to the application.

5. It is noted that the applicants also filed written submissions; however, no directions were given to that effect. Consequently and in balancing the interest of the parties, I will restrict myself to the grounds laid out on the face of the Motion and the facts deponed in the aforementioned affidavit, which I have carefully considered.

6. The brief background of the matter is that a dispute arose between the appellant and respondent, being father and son respectively, over ownership of entitlement to the properties known as Plot No. 200 Chura Scheme (Kabete/L. Kabete/200) and Naivasha/Maraigushu Block 11/134 Karai. The appellant instituted Civil Suit No. 812 of 1998 (originally High Court No. 2291 of 1996) before the Principal Magistrate's Court at Kiambu seeking for inter alia injunctive orders against the respondent.

7. Upon consent of the parties, the matter was then referred to the elders for arbitration and upon hearing the parties, the elders made an award which was later filed in the subordinate court on 29<sup>th</sup> November, 1999 and a consent was subsequently entered into between the parties and filed on 14<sup>th</sup> February, 2000 regarding the adoption of the award as a judgment of the court.

8. Thereafter, the respondent through his advocate filed the application dated 12<sup>th</sup> November, 2004 seeking for the adoption of the arbitral

award made by the elders on the basis that the same was never truly adopted as a judgment of the court, and which application, though opposed by the appellant, was allowed by the subordinate court vide its ruling of 17<sup>th</sup> May, 2005.

9. Thereafter, the respondent through his advocate lodged another application dated 21<sup>st</sup> September, 2005 seeking for an order to the effect that the Executive Officer of the court do execute the relevant transfer documents. The respondent opposed the application.

10. The subordinate court in the end granted the order sought through its ruling delivered on 17<sup>th</sup> November, 2005 which ruling is now being challenged vide this appeal which was eventually dismissed for want of prosecution.

11. Before addressing the merits of the Motion, it is important to determine a preliminary issue touching on the competency of the appeal, raised by the respondent. The respondent is of the submission that the appeal was filed out of time and without leave of court. The 1<sup>st</sup> applicant's opposed the argument stating that the appeal was regularly admitted to hearing.

12. I have perused the memorandum of appeal and note that the same is indicated as having been filed on 28<sup>th</sup> November, 2005 pursuant to leave granted on 17<sup>th</sup> November, 2005. The record also shows that the appeal was admitted for hearing pursuant to the court order made on 12<sup>th</sup> October, 2012.

13. It is therefore apparent that the respondent's objection has no merit.

14. The main order sought is the reinstatement of the appeal. As concerns whether the application has been timeously filed, it is not disputed that there has been a prolonged delay in filing the application. The issue which has to be answered is whether the delay in both bringing the application and prosecuting the appeal has sufficiently been explained.

15. On her part, the 1<sup>st</sup> applicant has stated that at the time of dismissal of the appeal, the appellant had already passed on and that the applicants only came to learn of the existence of the appeal after obtaining the grant of probate in relation to the estate of the appellant on 15<sup>th</sup> July, 2016.

16. On his part, the respondent pointed out that prior to his death, the appellant's conduct could be depicted as that a party who is disinterested in prosecuting his appeal. It is also pointed out that after the applicants became aware of the existence of the appeal sometime in 2017, they took no steps bring the present application soon thereafter.

17. It is clear that the record of appeal was filed way back in 2007 but was not prosecuted by the appellant for reasons best known to him. The record reveals that the appellant later died on 28<sup>th</sup> March, 2014 preceding the dismissal of the appeal as averred hereinabove.

18. The record also shows that a grant of probate was issued to the applicants on 15<sup>th</sup> July 2016.

19. On the one part, the applicants' arguments are that the subject matter in dispute encompasses family land and or property belonging to the appellant and as such, they are apprehensive that unless they are permitted to prosecute the appeal, the beneficiaries of the estate of the appellant will be gravely prejudiced.

20. On the other part, the respondent maintains that he is already the registered owner of the property in question, hence should the orders being sought be granted, he stands to suffer great loss.

21. I have looked at the memorandum of appeal and noted that the grounds of appeal put forward are arguable.

22. It is apparent that notwithstanding the respondent's position that he is currently the registered owner of the registered owner of the property known as Naivasha/Maraigushu Block 11/134 Karai, the truth is that the aforesaid title deed was issued on 30<sup>th</sup> May, 2007 which was close to two (2) years after the memorandum of appeal was filed.

23. The dispute as a whole touches on family/succession matters therefore in the premises, the beneficiaries to the appellant's estate stand to suffer a greater degree of prejudice if the order for reinstatement is rejected.

24. In the end, given the special circumstances of the matter, I am persuaded that it would only be in the interest of substantive justice to reinstate the appeal for prosecution so that the pending issues can be determined.

25. As regards the prayer for substitution, it is clear that a grant of probate was issued in favour of the applicants on 15<sup>th</sup> July, 2016 vide High Court Succession Cause No. 2939 of 2014. There is no evidence that the grant has been revoked.

26. I am satisfied that the nature of the matter is such that the same would survive the appellant. On that basis, I am convinced that there is no reason for this court to decline to substitute the name of the appellant with that of the applicants.

27. The upshot is that the Motion is allowed giving rise to the grant of following orders:

**a) The dismissal order issued on 16<sup>th</sup> June, 2015 is hereby set aside and the appeal is reinstated.**

b) The name of Walter Njenga (“the deceased”) shall be substituted with the names of Esther Njeri Njenga & Rosemary Wanjiku Njenga (Suing as the legal representatives of the estate of WALTER NJENGA-Deceased) as the appellants.

c) The applicants shall thereafter ensure to prosecute the appeal within 120 days from today, failing which the appeal shall stand dismissed.

d) Costs of the application to abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 13<sup>th</sup> day of November, 2019.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

..... for the Applicants