



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

ELC CASE NO.251 OF 2017

Formerly Meru ELC 117 OF 2000

ARIEL NJERU NJAGI.....1ST PLAINTIFF

JOTHAM NJAGI M'ARUCHA.....2ND PLAINTIFF

VERSUS

M'MUGA THAMBURA MURUCHA.....1ST DEFENDANT

WILFRED NYAGA M'MUGA.....2ND DEFENDANT

RULING

1. This application states that it has been brought to court under section 1A, 1B, 3 and 3A of the Civil Procedure Act and under order 51 Rule 1 & 3, Order 12 Rule 7 of the Civil Procedure Rules and all other enabling legislations.
2. The application is dated **16th July, 2018** and seeks the following orders:
 1. That the application be heard on priority basis owing to its age.
 2. That the honourable court be pleased to set aside the order dismissing the suit issued by this honourable court on 13th December, 2017 and reinstate the same for hearing.
 3. That the costs of this application be in the cause.
3. The application is supported by the affidavit of Kaumbi Kioga on behalf of the applicant and has the following grounds:-
 1. That this suit was transferred from Meru High Court in May, 2017 and allocated the present number. The plaintiffs were informed of the transfer of the suit in August, 2017.
 2. That soon thereafter, a notice was issued to show cause why the suit should not be dismissed. The same was listed on 13th December, 2017, however on that day, Mr. Kioga who was in conduct of the suit was away in India for routine medical check-up.
 3. That unfortunately, the clerk who was sent to relay the instructions of the counsel's indisposition to the court was new and inexperienced. He had earlier met the second defendant in court who informed him that the 1st defendant had since passed and the case could not proceed.
 4. That the said clerk indicated on the counsel's file that the 1st defendant was deceased.
 5. That it was in early July, 2018 while the counsel was on a routine enquiry from the court's registry to find whether there was an application for substitution that he was shocked to realize that the suit was dismissed for failure to show cause.
 6. That the plaintiff/applicants have been very keen to ensure that this suit is heard and determined expeditiously since their witnesses are extremely elderly.
 7. That it is in the interest of justice that the plaintiffs' application be heard and allowed.

4. The application is supported by the affidavit of the applicants' advocate sworn on **16th July, 2018** which states:

I, **KAUMBI KIOGA of P. O. Box 899-60200** do hereby make oath and state as follows:

1. That I am an advocate and have handled this suit for the plaintiffs during my tenure as an associate at M. M. Kioga & Co. Advocates, well aware of the facts therein and therefore competent to make and swear this affidavit.
2. That this suit was transferred from Meru High Court to Chuka Environment and Land Court on May, 2017.
3. That a notice to show cause was issued for 13th December, 2017. The counsel who was in personal conduct of the suit was however indisposed as he was in India for a routine medical check-up.
4. That I am informed by the office administrator at the firm of M. M. Kioga & Co. advocates, that on 13th December, 2017 she had instructed a new clerk to convey the instructions to seek an adjournment on the grounds of counsel's indisposition.
5. That the clerk, who has since left the firm noted in the file that the 1st defendant was deceased. The presumption thereof was that the matter could not proceed without substitution of the party.
6. That in early July, 2018 while on a routine enquiry at the court's registry to check whether the 2nd defendant had taken any steps to substitute the 1st defendant, I was shell shocked to learn that the suit was dismissed on 13th December, 2017 for non-attendance.
7. That I urgently applied for a copy of the ruling which confirmed that indeed the suit was dismissed the counsel having failed to show cause as earlier required.
8. That the reason why there was no appearance in court was purely an excusable error.
9. That the plaintiffs are very eager to prosecute their claim as it involves ancestral land which has a lot of sentimental attachment.
10. That I therefore urge the court to reinstate the present suit and set it down for directions on priority basis.
11. That what is depend to hereinabove is true to the best of my knowledge.

5. The application was canvassed by way of written submission.

6. The applicants' submissions state as follows:

APPLICANT'S SUBMISSIONS

The applicant is the legal representative of the original plaintiff JOTHAM NJAGI who is now deceased. The case is partly heard before the Meru High Court.

The plaintiff's claim is ownership of L.R. No. **MUTHAMBI/IGAMURATHI/132** and **373** which are registered in the name of the 1st defendant (*also deceased*). The 2nd defendant was enjoined in this suit as a heir of the 1st defendant. His interests in the suit therefore derive from the 1st defendant. The 2nd defendant will subsequently be appointed to be legal representative of the 1st defendant now that he has died during the pendency of the suit.

Sometimes in the year 2017, the suit was transferred from Meru High Court to the present court after it was established. Notice was duly issued for the parties advocates to appear before the Hon. Judge for directions but the counsels did not appear. In particular, the plaintiff's counsel was indisposed as he had travelled out of the county. The clerk who was to convey this message was however late and the court dismissed the same for none attendance.

The applicant herein is anxious and ready to expeditiously see the suit is concluded and their respective rights determined. The respondent shall be availed an opportunity to canvass the suit bearing in mind that the plaintiff's case is almost being concluded. The respondent therefore shall not suffer any prejudice whatsoever, if the suit is reinstated for hearing.

It will be in the interests of justice that the suit be reinstated and the parties herein be granted limited time to conclude the hearing after which the court can proceed to give its judgment.

We submit that the reasons advanced in the face of the application and in the Affidavit in Support sufficiently convince the court to exercise its discretion and reinstate the suit for hearing.

We so pray,

DATED at MERU this 18th day of October, 2018

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For: KAUMBI & Co.

ADVOCATES FOR THE APPLICANT

7. The respondents' submissions state as follows:

SUBMISSIONS BY THE RESPONDENT

Your lordship, the respondent has filed a replying affidavit to the application dated 16th July, 2018. We entirely rely on that replying affidavit.

This suit was rightly dismissed for want of prosecution. No good reasons have been offered for the failure by the plaintiffs to prosecute their suit as required by the rules. Further, the 2nd plaintiff is deceased and his claim must be abated. The 1st defendant too is deceased and the claim against him has abated.

There is no pending application for revival of the suit by the 2nd plaintiff and against the 1st Defendant, reinstating the suit would be an exercise in futility.

Your lordship, this suit was dismissed on the Court's motion. There is no explanation why there was no response to the court's notice to show cause dated 30th November, 2017.

We urge you to find that the application is not merited and proceed to dismiss the same with costs.

We so humbly pray your lordship.

DATED AT MERU THIS29THDAY OFOCTOBER,.....2018.

GATARI RINGERA & COMPANY

ADVCOATES FOR THE 2ND DEFENDANT

8. I have carefully considered the pleadings and the submissions proffered by the parties' advocates in support of their veritably diametrical propositions. I do note that this suit has remained unheard and undetermined since the year 2000, 18 years ago.

9. The submissions proffered by the applicants do not persuade this court that this suit should be reinstated. I am in full agreement with the 2nd defendant's submissions that this suit should not be reinstated. It is noted that this application was filed many months after the suit was dismissed.

10. In the circumstances, this application is dismissed.

11. Costs for this application follow the event and are awarded to the 2nd defendant.

12. It is so ordered.

Delivered in open court at Chuka this 20th day of November, 2018 in the presence of:

CA: Ndegwa

Kirimi h/b Gatari Ringera for Defendant/Respondent

Ariel Njeru Njagi – 1st Applicant

P.M. NJOROGE

JUDGE