



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 223 OF 2011

(CONSOLIDATED WITH ELC NO. 1679 OF 2005, ELC NO. 256 OF 2010,

ELC NO. 618 OF 2010, ELC NO. 636 OF 2010 AND ELC NO. 347 OF 2013)

HAROLD GERALD RURIGI.....PLAINTIFF

- VERSUS -

GETHSEMANE MINISTRY.....1ST DEFENDANT

PHILIMA LIMITED.....2ND DEFENDANT

CITY COUNCIL OF NAIROBI.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

AND

KAREN NYAMBURA RURIGI

DEREK NELSON MWAI RURIGI (Legal Representatives of the Estate of

HAROLD GERALD RURIGI, Deceased).....APPLICANTS

RULING

Harold Gerald Rurigi, deceased (hereinafter referred to only as “the deceased”) brought this suit against the defendants on 18th March, 2011. In his plaint, the deceased averred that a parcel of land known as L.R No. Nairobi/Block107/1128 purportedly owned by the 1st and 2nd defendants was fraudulently created and as such the same was non-existent. The deceased averred that the said parcel of land was created over the deceased’s parcel of land known as L.R No. Nairobi/Block107/1/1128. The deceased sought among others; a declaration that L.R No. Nairobi/Block107/1128 was non-existent and a permanent injunction restraining the 1st and 2nd defendants from undertaking any construction activities on his parcel of land, L.R No. Nairobi/Block107/1/1128 (hereinafter referred to as “the suit property”). The 1st and 2nd defendants filed a joint statement of defence on 31st May, 2011 while the 3rd defendant filed a statement of defence on 11th March, 2013. The plaint was amended on 9th October, 2012 to add the Attorney General as a party to the suit.

From the record, the plaintiff and the 1st and 2nd defendants had complied with Order 11 of the Civil Procedure Rules as at 3rd May, 2013. On 30th October, 2013, the court ordered that this suit be consolidated with ELC No. 1679 of 2005, ELC No. 256 of 2010, ELC No. 618 of 2010, ELC No. 663 of 2010 and ELC No. 347 of 2013 with ELC No. 347 of 2013 as the lead file. After consolidation, the parties to the consolidated suits were directed to comply fully with the requirements of Order 11 of the Civil Procedure Rules. The matter was thereafter mentioned on several occasions to confirm compliance with Order 11 of the Civil Procedure Rules and further directions that were given by the court. On 11th February, 2015, the consolidated suits were fixed for hearing on 13th, 14th, 15th and 16th July, 2015. On 13th July, 2015, the court on its own motion removed the matter from the hearing list.

The parties subsequently listed the matter for hearing on 26th and 27th July, 2016. When the matter came up for hearing on 26th July, 2016, the same was adjourned and stood over generally on the ground that the deceased herein had died and his then advocates wanted time to

apply for his substitution with his legal representatives. On 27th January, 2017, the advocates for the 1st and 2nd defendants herein filed an application seeking an order that the orders that had been issued by the court barring the 1st and 2nd defendants from continuing with construction on L.R No. Nairobi/Block107/1128 be discharged and this suit be declared to have abated. The application was brought on the grounds that the deceased herein had passed away and that he had not been substituted with his legal representatives and that the 1st and 2nd defendants wished to continue with the construction of a church building on L.R No. Nairobi/Block107/1128.

When the 1st and 2nd defendant's said application came up for hearing on 13th February, 2018, the court made an order that this suit had abated. What is now before the court is the application brought by Karen Nyambura Rurigi and Derek Nelson Mwai Rurigi, the joint personal representatives of the estate of the deceased seeking; the revival of the suit, extension of time within which to apply for substitution of the deceased with the applicants and the substitution of the deceased with the applicants. The application was brought on the grounds that the applicants were the personal representatives of the deceased who died on 7th December, 2015 and that the deceased owned the suit property in respect of which he had filed this suit. The applicants averred that they were not aware of the existence of this suit as at the time of the death of the deceased. The applicants averred that they were issued with a grant of letters of administration in respect of the estate of the deceased on 10th July, 2017 and that it was after that that they learnt of the existence of this suit. The applicants averred that they instructed their advocates on record to peruse the court file and take necessary action to safeguard the interest of the estate of the deceased in the matter. The applicants averred that their advocates were unable to trace the court file and that it took long for the said advocates to discover that this suit had been consolidated with other suits including ELC No. 347 of 2013 and that ELC No. 347 of 2013 was the lead file. The applicants averred that it was upon perusing ELC No. 347 of 2013 that their advocates on record learnt that the court had made an order that this suit had abated following the death of the deceased and his non- substitution with his legal representatives.

The applicants averred that the consolidated suits are yet to be heard and that the applicants are desirous of prosecuting this suit. The applicants averred that their failure to take action in the matter was not intentional and that it was caused by the fact that they were not aware of the existence of this suit and that it was consolidated with others. The applicants averred that the outcome of the consolidated suits will affect the interest of the estate of the deceased in the suit property and as such the estate will be prejudiced if the said cases are determined without hearing the estate of the deceased.

The application was opposed by the 1st and 2nd defendants through grounds of opposition dated 5th December, 2019 and a replying affidavit sworn by Nephace Chiluka Muriango on 10th December, 2019. The 1st and 2nd defendants contended that since this suit had abated, the court was *functus officio*. The 1st and 2nd defendants averred further that the applicants' previous advocates were negligent in their failure to substitute the deceased with the applicants. The 1st and 2nd defendants averred further that the applicants were all along aware of the existence of this suit and that they had concealed material facts to the court. The 1st and 2nd defendants averred that the applicants had come to court with unclean hands and that the 1st and 2nd defendants would suffer substantial prejudice if the orders sought were granted.

The applicants' application was heard on 19th December, 2019 when Mr. Kamau Muturi appeared for the applicants while Mr. Makori appeared for the 1st and 2nd defendants. The advocates acting for the parties in the suits consolidated with this suit who appeared at the hearing of the application did not oppose the application. In his submission in support of the application, Mr. Muturi reiterated the grounds set out on the face of the application and the supporting affidavit and urged the court to allow the application. Mr. Muturi cited Elizabeth Mutuku & others v Aimi Kilungu Company Limited [2019] eKLR and submitted that the court has jurisdiction to revive a suit that has abated and that what is required of the applicant is to give good reasons why the deceased was not substituted within the prescribed time. Mr. Muturi submitted that most of the allegations contained in the replying affidavit by the 1st and 2nd defendants were unsubstantiated and were unknown to the applicants.

In his submissions in reply, Mr. Makori submitted that the applicants' application was incompetent the same having been brought in an omnibus manner. Mr. Makori submitted that the orders sought by the applicants could not be sought in a single application. He submitted further that no sufficient reason had been given why substitution of the deceased was not done within the prescribed time. Mr. Makori reiterated that the widow of the deceased was well aware of the existence of this suit and that the applicants had approached the court with dirty hands. Finally, Mr. Makori submitted that the 1st and 2nd defendants were enjoying the benefit of the abatement of the suit and as such they would be prejudiced if the suit was reinstated.

I have considered the application together with the affidavit filed in support thereof. I have also considered the grounds of opposition and replying affidavit filed by the 1st and 2nd defendants in opposition to the application. It was not disputed that this court has power under Order 24 of the Civil Procedure Rules to grant the orders sought by the applicants. The power granted to the court is discretionary. In Patriotic Guards Ltd. v James Kipchirchir Sambu [2018] eKLR the court stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

I am satisfied from the explanation given by the applicants that they were prevented by sufficient cause from substituting the deceased within the period prescribed by the Civil Procedure Rules for that purpose. The deceased's wife may have been aware of the dispute between the deceased and the defendants. There is however no evidence that she was aware of the details of the case that was pending in court and its status. There is also no evidence that the applicants' advocates on record were aware of the fact that this suit had been consolidated with four others and that the proceedings were being conducted in ELC No. 347 of 2013. I am satisfied that the cause of action in this suit survived the deceased and that the estate of the deceased would suffer prejudice if the orders sought are not granted. I am of the view that any prejudice to be suffered by the 1st and 2nd defendants can be remedied in costs. In Nchapi Leiyagu v I.E.B.C & 2 others. [2013] eKLR, the court stated that:

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality.”

In Philip Chemwolo & another v Augustine Kubede [1982-88] KAR 1033 at 1040, Apaloo J.A. stated as follows:

“Blunder will always be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is as often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

The 1st and 2nd defendants had also taken issue with the form in which the application was brought. I did not appreciate their argument on the issue. In my view, the applicants saved the court’s time by seeking all the prayers in a single application. The 1st and 2nd defendants did not convince me that they suffered any prejudice on account of the form in which the application was brought. For the foregoing reasons, I hereby make the following orders;

1. The Notice of Motion application filed herein on 15th November, 2019 by the applicants is allowed.
2. This suit, namely, ELC No. 223 of 2011 is revived.
3. The time within which the applicants were to file an application for substitution of the deceased, Harold Gerald Rurigi is extended to and including 15th November, 2019.
4. The applicants, Karen Nyambura Rurigi and Derek Nelson Mwai Rurigi, the joint personal representatives of the estate of the deceased, Harold Gerald Rurigi are substituted as plaintiffs in this suit.
5. The applicants shall further amend the amended plaint within 30 days to effect the substitution of the deceased plaintiff with the applicants.
6. The applicants shall pay to the 1st and 2nd defendants thrown away costs assessed at Kshs. 20,000/= forthwith.

Delivered and Dated at Nairobi this 9th day of July 2020

S. OKONG’O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Kamau Muturi for the Applicants

Mr. Makori for the 1st and 2nd Defendants

N/A for the 3rd Defendant

N/A for the 4th Defendant

Ms. Ogutu h/b for Ms. Kivindu for the 2nd and 16th defendants

in ELC No. 347/2013

Ms. C. Nyokabi-Court Assistant