



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 116 OF 2007 (O.S)

KIARIE WAINAINA.....PLAINTIFF

VERSUS

NJERI NJOROGE (Sued as the Administrator of the estate of

NAOMI WANJIRU NJOROGE.....DEFENDANT

RULING

Damaris Mwihaki Mwaura filed the application dated 15/1/2020 seeking to be made a party to these proceedings and to have the suit struck out on the grounds that the matters pleaded were *res judicata* or in the alternative that the suit against the Defendant had abated. The grounds upon which she made the application were that the subject matter of the suit had been heard and finally decided by the court and that this suit was filed to mislead the court and defeat the course of justice. She contended that the Defendant died over a year ago and had not been substituted by the Plaintiff.

She deposed in the supporting affidavit that she was the personal representative of Naomi Wanjiru Njoroge and wished to be made a party so that she could prosecute this suit. She averred that the land known as Ngenda/Karuri/53 (“the Suit Property”) was registered in the name of Wanjiru Njoroge. Kiarie Wainaina filed **HCCC No. 1847 of 1976** against Wanjiru Njoroge claiming that she held the land in trust for him together with the families of Wainaina Kiarie and Njoroge Kiarie. She annexed a copy of the decree vide which Khamoni J dismissed that suit on 16/6/1997 and added that no appeal was preferred against that judgement. Wanjiru Njoroge died on 15/12/1999. She contended that Njeri Njoroge was wrongly sued as the administrator of the estate of Naomi Wanjiru Njoroge when in fact she had never been appointed as such. Njeri Njoroge died in 2009 and was not substituted. She urged the court to dismiss the suit.

Dominic Njuguna Kiarie, swore the replying affidavit opposing the application. He relied on this court’s ruling of 1/4/2019 in respect of his application dated 29/4/2018 in which he sought to have the Defendant substituted. He contended that the instant application was brought in bad faith and was an attempt to defeat the course of justice and prevent the court from adjudicating the real issues in controversy.

On the issue of the suit being *res judicata* he contended that the claim in **HCCC No. 1487 of 1976** related to a declaration of trust while the present suit was premised on adverse possession. He alluded to the different procedures for bringing the two causes of action. He added that he together with his other relatives including his late father had lived on the Suit Property all their lives, built permanent developments and even buried some relatives on the suit land. He contended that his late father filed **Civil Appeal No. 149 of 1999** but that appeal was not heard because Wanjiru Njoroge died a few months later and her daughter Njeri Njoroge refused to take out letters of administration to facilitate the continuation of the appeal. He contended that the Applicant was not the administrator of the estate of the late Wanjiru Njoroge while urging the court to dismiss her application.

The Applicant filed submissions and urged that the suit over this same property was heard and dismissed by Khamoni J on 16/6/1997. She relied on Section 7 of the Civil Procedure Act and contended that Dominic Njuguna Kiarie wishes to proceed with this suit which is *res judicata* yet his late father was the Plaintiff in the suit that was dismissed in 1997. She relied on Order 24 Rule 4 of the Civil Procedure Act on the abatement of a suit within a year where a dead defendant was not substituted. The Applicant pointed out that this court made an order on 1/4/2019 reinstating a suit which was *res judicata* following an *ex parte* application and with no disclosure that the suit was *res judicata*. She contended that the court was misled to reinstate a suit that had been dismissed which was *res judicata*. The Applicant averred that Dominic Kiarie had admitted in his affidavit that Njeri Njoroge never took out letters of administration yet he joined her as the personal representative of the late Naomi Wanjiru Njoroge.

The issue for determination is whether the court should grant the orders sought by Damaris Mwihaki Mwaura in the application dated 15/1/2020. This court delivered a ruling on 1/4/2019 and reinstated the suit following an application by Dominic Njuguna Kiarie. The court also substituted Damaris Mwihaki Mwaura as the Defendant. The suit had been dismissed on 26/1/2012. It is clear that Damaris Mwihaki Mwaura did not participate in the hearing of the application for reinstatement of the suit.

The court notes that the late Kiarie Wainaina sued Njeri Njoroge as the administrator of the estate of the late Naomi Wanjiru Njoroge. The Applicant contended that Njeri Njoroge was never appointed administrator of the estate of Naomi Njoroge. The late Kiarie Wainaina did not attach letters of administration to the Originating Summons to confirm that indeed Njeri Njoroge had been appointed administrator of the estate of the late Naomi Wanjiru Njoroge. The court notes from the exhibits attached to the instant application that the Damaris Mwaura was granted limited letters of administration *ad litem* on 17/7/2017 in respect of the estate of Damaris Mwhaki Mwaura who died on 15/12/1999. In essence, the suit that the late Kiarie Wainaina filed against Njeri Njoroge was defective for the reason that she was not the administrator of the estate of Naomi Wanjiru Njoroge. Njeri Njoroge never took up this issue when she was sued. Had this fact been brought to the attention of the court when the application dated 29/3/2018 was urged, the court would not have reinstated the suit. The court allowed the application to have Damaris Mwhaki Mwaura substituted as the Defendant. Strictly speaking the person that ought to have been substituted as the Defendant was the administrator of the estate of Njeri Njoroge who had been sued as the Defendant.

The Plaintiff contended that this suit was not *res judicata* for it was premised on adverse possession unlike **HCCC No. 1847 of 1976** which sought a declaration of trust over the suit land. The court has looked at the judgement of Khamoni J. delivered on 16/6/1997 in **HCCC No. 1847 of 1976** in which Kiarie Wainaina sought to be registered as the proprietor of part of Ngenda/Karuri/ 53 which he claimed Wanjiku Njoroge held in trust. Judge Khamoni analysed the evidence which dated back to 1957 when the suit land was first registered in the name of Njoroge Kiarie, who was the husband of Wanjiku Njoroge, sued as a defendant. Khamoni J. dismissed the suit and observed that Kiarie Wainaina should have claimed his father's share in the suit land at the time the succession cause over the estate of Njoroge Kiarie was determined at the Gatundu Magistrates' Court. If indeed Kiarie Wainaina had resided on the suit land all that time as the Plaintiff claims, then he ought to have sought an alternative prayer in **HCCC No. 1847 of 1976** based on adverse possession.

The court agrees with the Applicant that this suit is *res judicata* and allows the application dated 15/1/2020. Since the Defendant did not promptly bring to the fore the issue of the suit being *res judicata*, each party will bear its own costs.

Dated and delivered virtually at Nairobi this 2nd day of July 2020

K.BOR

JUDGE

In the presence of:-

Mr. Maxwell Njehu for the Plaintiff

Mr. V. Owuor- Court Assistant

No appearance for the Defendant and the Applicant