



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ENVIRONMENT & LAND CASE NO. 328 OF 2014

JOSHUA INJALI AMATSIMBI PLAINTIFF

VERSUS

VERONICA D. J. MUSIEGA1ST DEFENDANT/RESPONDENT

FESTUS AMUHANDA LUGOHE..... 2ND DEFENDANT/RESPONDENT

A N D

FLORENCE MMBOGA INJAGA.....APPLICANT

RULING

1. By a Notice of Motion dated 10/12/2014 premised to be brought under **Article 159 (2)** of the Constitution, **Section 1A, 1B and 3A** of the Civil Procedure Act, **Orders 40 rule 1 (b), 24 rule 3 (1) and 24 rule 7 (2)** of the Civil Procedure Rules, FLORENCE MABOGA INJAGA, (the Applicant), has moved this court seeking the following main prayers;
 3. THAT the Defendants by themselves, their servants, agents, employees or any other person acting under their instructions be restrained from selling, transferring, alienating and or disposing of LR No. South Maragoli/Buyonga/1352 pending the hearing and determination of this suit.
 4. THAT the Honourable court be pleased to revive Kakamega High Court Land and Environment Case No. 328 of 2014 (formerly Kakamega HCCC. No. 46 of 2011).
 5. THAT the applicant who is the legal representative of the deceased be made a party to this suit in place of the plaintiff.
 6. THAT the applicant be granted leave to amend the Plaintiff in consonance with the aforesaid substitution.
2. The application is supported by the grounds on the face of the motion and the affidavit of the Applicant sworn on 10/12/2014.
3. The Applicant's case is that she is the widow and legal representative of the Estate of Joshua Injali Amasimbi, the deceased plaintiff, who passed away on 23/6/2012. The Applicant applied for and obtained Limited grant of letters of Administration on 18/2/2014. The Applicant further states that she knew her late husband had a case relating to their parcel of land but did not know the number or the Advocate involved but after some effort, she found the details of the case and the Advocate. The Advocate filed the present application after obtaining Limited grant of letters of Administration.

4. The Applicant also deposed that although her late husband was the registered owner of Parcel No. South Maragoli/Biyonga/1352, the Respondent had the land transferred to himself in a fraudulent manner in 2010. Her husband had therefore sued the Respondent for cancellation of the title before he passed on. The Applicant prays that she be made a party in the suit in place of her deceased husband, and that the suit be revived. She also prays for an interlocutory injunction pending the hearing and determination of the suit

5. The 1st Defendant/Respondent filed a replying affidavit opposing the application. The Respondent deposed that she purchased the land from one Festus Amuhanda Lugohe in 2010, who transferred both the title and possession to her. In essence, the 1st Respondent was of the view that the deceased was laying a false claim over the land, and that he was not serious with litigation since he had abandoned the application he had earlier filed in court.

6. Regarding this application, the 1st Respondent asserts that after withdrawing the earlier application, it took the applicant a month to file the present one. The general view held by the 1st Respondent is that the applicant was indolent in filing her application and sought its dismissal.

7. The 2nd Respondent, Festus Amuhanda Lugohe, filed his own affidavit opposing the application and deposed that he was the owner of the suit before selling it to the 1st Respondent. He stated that he obtained ownership to the suit land pursuant to a Court Order issued by Chief Magistrate's court, Kakamega in Civil Case No. 544 of 1989.

8. The 2nd Respondent states that the Applicant is misleading the court yet she used to attend court with her late husband before he passed away. His position is that the Applicant does not deserve the orders she seeks.

9. Parties agreed to dispose of the application by way of written submissions which are on record. The Applicant's counsel has reiterated their position that they are entitled to the orders sought. Counsel has maintained that the Applicant was prevented by sufficient cause from proceeding with the suit. He relied on the decision in *Essanji & Another -vs- Solanki [1968] EA 224* and *Trust Bank Ltd. -vs- Amolo Company Ltd. Civil Appeal No. 215 of 2000* – Kisumu (unreported) – which emphasise the importance of determining disputes on merit.

10. It has been submitted on behalf of the Respondents that the applicant is not clear what she wants since she has come under both **Order 24 rule 3 (1)** and **24 rule 7 (2)** which are distinct rules and thus her application is incompetent for vagueness. Counsel further argued that the Applicant has not shown that she was prevented by sufficient reason and that the application for the revival of the suit was made late 10 months after grant of letters of Administration.

11. Counsel further submitted that what is sought is exercise Judicial discretion and the Applicant must show that she is **“an innocent searcher of justice and not a tainted joy rider interested only in abusing the court's process”** Counsel relied on a number of authorities to reinforce his arguments.

12. I have considered the application, Affidavits in support, those in opposition, submissions by counsel and authorities cited. This being an application under Order 24 rules 3 and 7, I am required to consider whether the Applicant has shown sufficient reason why the suit should be revived. The Applicant also seeks to have her enjoined in these proceedings in place of her deceased plaintiff husband.

13. The Applicant has asserted that her late husband who was the plaintiff herein, passed away on 23/6/202. She applied for and was granted, a Limited grant of Administration on 18/2/2014. She said that she knew her late husband had a case pending in court but did not know the particulars which delayed her effort to find out the position. When she eventually did find the file, her late husband's Advocate informed her that she could not do anything without obtaining a grant of

Administration, a process she embarked on immediately. She had filed an earlier application to be enjoined into the suit but before she obtained a grant which would have been unprocedural. This application was withdrawn culminating into the filing of the application that was eventually heard leading to the issuance of the Limited grant on 18/2/2014.

14. The Respondents have opposed this application saying that the Applicant was indolent, and that the reasons given are not merited hence the applicant has not satisfied the requirement of Order 24 rule 7 (2) of the Civil Procedure Rules, in that she has not shown sufficient reason why the suit could not be continued.

15. The plaintiff in this suit was the Applicant's husband. The Applicant is now the legal representative of the deceased plaintiff's estate. The suit relates to land and the Applicant has come before this court under Order 24 rule 3 (1) seeking to be made a party in place of her deceased plaintiff husband. **Order 24 rule 3 (1)** provides as follows;

O.24 r. 3 (1) "Where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit."

16. It is clear from the above rule that if the cause of action survives the plaintiff's death, like in this case, and the legal representative makes an application he/she shall be made a party to the suit. There is no other consideration in this regard except to show that the applicant is a legal representative of the deceased's estate and that the cause of action survives the death of the plaintiff which is the position herein.

17. The applicant has also applied to have the suit revived under **Order 24 rule 7 (2)** which the Respondents have also opposed. Order 24 rule 7 (2) provides as follows;

O.24 r.7 (2) "The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall revive the suit or set aside such dismissal upon terms as t costs or otherwise as it thinks fit."

18. The Applicant has explained that she was prevented from pursuing this suit by various factors including lack of finances, inability to get the details fo the case on time and the requirement that she first obtains a grant of letters of administration. Although the Respondents are not convinced that these are good reasons, on my part, I think they are. The Applicant having just lost her husband would naturally not turn to the case immediately. There are usually immediate concerns to deal with before one turns attention on such issues like a case in court. This is a fact that cannot be ignore.

19. As held in the case of *Essaji –vs- Solanki [1968] EA 218* at page 224;

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from pursuing his rights."

20. This position was again emphasised in the case of *Trust Bank Ltd. –vs- Amolo Company Ltd [2002] eKLR* where the Court of Appeal stated as follows;

"The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own

merit.”

In determining this application, I will be guided by the principles of law enunciated in the above decisions.

21. The dispute before court involves land and there are allegations and counter allegations which the court is enjoined to investigate and made a decision on. This involves hearing the dispute between the parties and decide the case on merit. Moreover, the overriding objective as envisaged under Section 1A of the Civil Procedure Act is to ensure that substantive justice is done to the parties. This can only be achieved if cases are heard on merit.

22. I am satisfied that the applicant was prevented by sufficient cause from continuing with this case leading to its abatement.

23. Consequently, the application dated 10/12/2014 is allowed and I make the following orders.

1. The applicant FLORENCE MMBOGA INJAGA the legal representative of JOSHUA INJALI AMATSIMBI, the deceased plaintiff, is made a party to this suit in place of the plaintiff JOSHUA INJALI AMATSIMBI, now deceased.
2. The suit is hereby revived and will be heard and determined in the usual manner.
3. Leave is hereby granted to the applicant FLORENCE MMBOGA INJAGA to amend her Plaint within 15 days from the date hereof. The Defendants have corresponding leave to amend their defence if need be within Fifteen (15) days from the date of service of the amended Plaint.
4. As there is already a inhibition order issued inhibiting registration of any transactions in relation to the suit land herein, the prayer for an injunction is declined.
5. Costs of the application shall be in the cause.

Dated and delivered at Kakamega this 5th day of May, 2015

E. C. MWITA

J U D G E