



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 384 OF 2013

EUNICE WANJA MURIITHI PLAINTIFF/DECEASED

VERSUS

WARUCHAGO KIRARA 1ST DEFENDANT/DECEASED

AND

ELIZABETH MUTHONI MURIITHIAPPLICANT

RULING

ELIZABETH MUTHONI MURIITHI (applicant herein) filed this application on 10th July 2014 seeking the following orders:-

1. *That this Honourable Court be pleased to enlarge time in which to bring this application.*
2. *That in such enlargement so being granted, the application to substitute the deceased plaintiff be deemed as filed within time.*
3. *That the applicant/proposed plaintiff ELIZABETH MUTHONI MURIITHI be substituted in place of her deceased mother the plaintiff EUNICE WANJA MURIITHI.*
4. *That the costs of this application be provided for.*

The application which was supported by the applicant's fourteen (14) paragraph affidavit is grounded on the following grounds:-

- a. *Time to file substitution application has lapsed.*
- b. *Letters of Administration Ad Colligenda Bone were granted to the applicant on 8th May 2014.*
- c. *That there is a consent order to be implemented herein.*
- d. *That the cause of action still survives.*

The applicant's advocate HARMESH KUMAR MAHAN also swore an affidavit in support of the application.

From the supporting affidavits herein, what comes out clearly is that the applicant is a daughter to the deceased plaintiff, who died on 7th April 2011. Before she died, the deceased plaintiff was engaged in a suit with the 1st defendant (now deceased) and the 2nd defendant (Respondent herein) over a property known as INOI/MBETI/280.

Before she died, the plaintiff and the two defendants had on 3rd March 2008 recorded a consent (applicant's annexure EMM 2) to the effect that the land would be wholly transferred to the plaintiff and

although the respondent has been willing to have the transfer effected, his sons have been misleading him and that much time has been spent in negotiations between the respective families and eventually, the respondent refused to attend the Land Board to finalize the transfer. The applicant therefore moved the Court and on 5th May 2014 was granted letters of Administration ad Litem in High Court Succession Cause No. 199 of 2014 and thereafter filed this application.

In his supporting affidavit, HARMESH KUMAR MAHAN has deponed, inter alia, that he had conduct of this suit on behalf of the deceased plaintiff and now the applicant since 1994 and that both the deceased plaintiff and the two defendants visited his chambers with a view to recording a consent which was signed in his presence but both defendants requested him not to file the consent until they cleared with the firm of Muchira and Company Advocates. That on 8th February 2008, the respondent instructed him to file both the consent and withdrawal of advocates which was done on 28th February 2008.

The respondent filed a replying affidavit in which he states that he never intended to transfer the parcel No. INOI/MBETI/280 to the 1st defendant (deceased) and in any case, no consent order could have been made in 2008 when the deceased plaintiff died in 2007. The respondent further states that he never signed any consent and further, this application should have been made within one year.

Submissions have been filed both by Mr. Mahan for the applicant and Mr. Chomba for the respondent.

I have considered those submissions and the rival affidavits and annexures thereto.

This application is founded under the provisions of **Order 24 Rule 1(2) 3(1) and 3(2) of the Civil Procedure Rules**. It seeks to revive the suit and substitute the applicant in place of her deceased mother.

It is not in dispute that the deceased plaintiff died on 7th August 2011 and the applicant ought to have applied to be substituted in her place latest by 7th August 2012 after which the suit abated. **Order 24 Rule 3(2) of the Civil Procedure Rules** provides as follows:-

“Where within one year no application is made under Sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned and, on application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit to be recovered from the Estate of the deceased plaintiff.

Provided the Court may, for good reason on application

extend the time” emphasis added.

The Court therefore has a discretion, ***“for good reason”*** to extend time. Being a discretionary remedy, it must be exercised in a manner that is fair and lawful bearing in mind always that the duty of a Court is to do justice to the parties. Has the applicant herein demonstrated such good reason or in other words sufficient cause to warrant the grant of the orders sought?

In my view, the applicant has satisfied me that there is ***“good reason”*** to warrant the grant of the orders which she is seeking from this Court. It is the applicant’s case that the deceased plaintiff and the deceased 1st defendant and respondent herein had recorded a consent to the effect that the land No. INOI/MBETI/280 would be transferred wholly to the deceased plaintiff. I have had a look at the said consent which Mr. Mahan advocate has deponed was signed in his presence. It reads as follows:-

“By consent, the suit land INOI/MBETI/280 be and is hereby transferred back to the 1st defendant who in turn transfers to the plaintiff. The 2nd defendant undertakes to sign all necessary documents to effect transfer. The 2nd defendant does not claim any improvements from the said land at all. Each party to bear its own costs”

The above consent was subsequently filed in High Court of Nyeri Civil Suit No. 86 of 1988 in which the deceased plaintiff had filed suit against the 1st defendant (now deceased) and the respondent herein in the following terms:-

“Upon reading the consent order dated 8th February 2008, it is hereby ordered that suit land INOI/MBETI/280 be and is hereby be transferred back to the 1st defendant who in return transfer to the plaintiff.

The 2nd defendant undertakes to sign all necessary documents to effect the transfer. The 2nd defendant does not claim any improvement from the said land all (sic)”

The applicant’s explanation for not filing this application within the prescribed time is found in paragraph 7, 8 and 9 of her supporting affidavit in which she has deponed as follows:-

7: “That the 2nd defendant has all along been willing to transfer the said parcel of land to the plaintiff/deceased but his sons keep on misleading him. Attached are copies of the Land Control Board applications duly signed by the 2nd defendant marked EMM 3.”

8: “That negotiations have been going on since my mother died between the two families and much time has lapsed”

9: “That finally, the respondent/2nd defendant refused to attend the Land Board to finalize this matter without necessary (sic) coming to Court”

The respondents reply is basically to argue that there were no consent orders and that in any case, the application is out of time. It is instructive to note that the consent orders signed by the Deputy

Registrar at High Court Nyeri in Civil Case No. 86 of 1988 have never been set aside and the advocate before whom it was signed has indeed confirmed that the parties therein signed it. What the applicant is telling this Court therefore is that in line with that consent, negotiations were going on between the parties and it was only when the respondent refused to keep his part of the bargain that she moved to Court to apply for letters of Administration in respect of her late mother’s Estate which she obtained on 5th May 2014 and thereafter filed this application on 10th July 2014. The period between 7th August 2011 and 5th May 2014 has been explained in that negotiations were going on between the families and this has not been rebutted by the respondent. In my view, a

Court in considering whether or not **“good reason”** has been shown by an applicant must consider not only the reasons for the delay in filing the application but also the conduct of all the parties involved especially where there is an attempt one of the parties to overreach. In this case, there is clear evidence that not only has the respondent been procrastinating about signing the transfer but he is also determined to renege on a lawful consent. This is both a Court of law and equity and it will not fold its hands and allow a party to blatantly circumvent a Court order. It is of course also true that equity will not come to the aid of the indolent but as I have shown above, the applicant has explained to my satisfaction why it took her long to apply for letters of Administration in respect of her late mother’s Estate and after she obtained the limited grant of letters of Administration Ad litem in May 2014, she promptly filed this application in July 2014. I have said enough, I believe, to show that the applicant has demonstrated good reason why this Court should grant her the orders sought.

Ultimately therefore, the applicant’s Notice of Motion filed herein on 10th July 2014 is allowed with no order as to costs.

B.N. OLAO

JUDGE

9TH OCTOBER, 2015

9/10/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Abubakar for Mahan for Applicant - present

Mr. Githuka for Chomba for Respondent- present

COURT: Ruling delivered this 9th day of October, 2015 in open
Court.

Mr. Abubakar for Mr. Mahan for Applicant – present

Mr. Githuka for Mr. Chomba for Respondent – present.

B.N. OLAO

JUDGE

9TH OCTOBER, 2015