



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

E.L.C MISC. APPLICATION NO. 5 OF 2014

(Formerly Nyeri High Court

Misc. Application No. 30 OF 2014)

JAMES NDUMIA GITONGA.....APPLICANT

-VERSUS-

TERESIA WANGECHI KAIRU.....RESPONDENT

RULING

1. By a notice of motion dated **17th July, 2014** the applicant **James Ndumia Gitonga**, seeks leave to file a suit against the respondent out of time.

2. The application is premised on the grounds that on 19th August, 2005 the applicant entered into an agreement with the respondent's husband, Kairu Nguru (deceased); that the respondent's husband passed on before the property was transferred to the applicant; that attempts to enforce the terms of the agreement have been in vain. The applicant blames the respondent for having intentionally refused to take out letters of administration in respect of the deceased's estate hence making it impossible for him to institute a suit for enforcement of the terms of the agreement entered into between himself and the deceased.

3. The application is supported by the affidavit of the applicant in which the following documents are annexed:-

1. the sale agreement executed between the applicant and the respondent's husband;
2. The title in respect of the suit property;

(iii) Land Control Board's letter of consent to sub-divide the suit property dated 7th September 2005;

(iv) Letter from the Ag. Sub-Chief Gathuthi Sub-Location dated 27th November, 2013 confirming that the deceased was survived by the respondent;

(v) Demand letter to the respondent dated 7th

- August, 2012;

(vi) Reply to demand notice dated 3rd September, 2012;

(vii) Demand letter dated 18th October, 2012 and

(viii) A draft of the intended suit (plaint).

4. The respondent though served with the application, neither filed a response thereto nor attended court for hearing of the application. Being satisfied that the respondent was served but failed to attend court for hearing of the application, the court agreed to have the application heard and determined in the absence of the respondent.

5. Counsel for the applicant **Mr. Mugo**, urged the court to allow the application as it was unopposed.

6. Despite the application being unopposed, it is the duty of this court to consider the case urged by the applicant in order to determine whether a case has been made for granting of the orders sought.

7. From the averments contained in the affidavit sworn in support of the application and the documents in support thereof, it is clear that the estate in respect of which the applicant intends to file a suit belongs to a deceased person and has not been administered.

8. Whereas the applicant contends that the respondent is by virtue of being the wife of the deceased the legal representative of the deceased, that position is not supported by law. In this regard see **Section 3** of Cap 160 which defines a personal representative as **“the executor or an administrator of a deceased person”**.

9. **Section 3** aforementioned defines an administrator as a person to whom a grant of letters of administration has been made under the Act and an executor as a person to whom the execution of the last will of a deceased person is, by the testator appointed, confided.

9. Paragraph 6 of the applicant’s supporting affidavit makes it clear that the respondent is not the personal representative contemplated under **Section 3** of Cap 160 by pointing out that the respondent has not taken letters of administration in respect of the deceased’s estate.

10. **Section 45** of Cap 160, makes it an offence for a person who is not a personal representative of a deceased person to dispose of, or otherwise intermeddle with, any free property of a deceased person.

11. Free property of a deceased person is defined under **Section 3** of Cap 160 to mean the property which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.

12. In the circumstances of this case, despite the deceased having executed an agreement in favour of the applicant, his interest in the suit property did not terminate upon his demise. If that were the case, the applicant would not require the input of the respondent in enforcement of the agreement.

13. Whereas I have no doubt that the applicant has sufficient interest in the suit property, I reiterate that the same cannot be pursued against the respondent until and unless she has been made a legal representative of the deceased. Consequently, I find the orders sought in this application incapable of issuing against the respondent or the deceased’s estate.

14. I urge the applicant to use the right process if he wants to enforce his rights under the agreement in question. As a beneficiary of the estate of the deceased, the applicant can cite the respondent or any other person with an interest to the deceased’s estate to apply for grant of letters of administration in respect of the deceased’s estate, failing which he will be able to apply for the said grant himself. In this regard see **Rule 22** of the Probate and Administration Rules which provides as follows:-

“A citation may be issued at the instance of any person who would himself be entitled to a

grant in the event of the person cited renouncing his right thereto.”

15. In my view, if upon citing the respondent to take a grant of letters of administration of the estate of her deceased husband, the applicant would be entitled under **Section 66** to apply for grant of letters of administration, if not for the whole of the estate of the deceased, for the portion he claims, as a “creditor” of the estate.

16. The upshot of the foregoing is that the application by the applicant, in so far as it is directed at a person who is not an administrator of the estate of the deceased, is fatally defective. Consequently, I dismiss it with no orders as to costs.

Dated, signed and delivered at Nyeri this 7th day of October, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. King'ori h/b for Mr. Mugo for the applicant

Teresia Wangechi Kairu – respondent

Court assistant - Lydia