



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 127 OF 2006

PHYLIS WANJIRU MBUTHIA.....PLAINTIFF

VERSUS

TARACISIO NDUNGU KAMAU.....DEFENDANT

AND

STEPHEN MBUTHIA WANJIRU.....1ST INTERESTED PARTY

MARTHA NYAMBURA WANJIRU.....2ND INTERESTED PARTY

CAROLINE WANGARI WANJIKU.....3RD INTERESTED PARTY

RULING

1. Taracisio Ndungu Kamau, the Defendant herein took out the motion dated 3rd July 2014 in which she sought for the following orders:
 1. ***THAT this honourable court be and is hereby leased to certify this application as urgent and the same be heard ex-parte in the first instance.***
 2. ***THAT pending the hearing and determination of this application this honourable court be and is hereby pleased to order the INTERESTED PARTIES to pay rent to the Applicant and/or in a joint interest earning account jointly and severally in the sum of ksh.40,000/= per month.***
 3. ***THAT upon hearing and determination of this application this honourable court be and is hereby pleased to order the INTERESTED PARTIES to pay accumulated rent arrears to the Applicant jointly and severally and or from the estate of the deceased Plaintiff from the month of April 2012 to June 2014 in the sum of ksh.s1,040,000/=.***
 4. ***THAT in default of the above the Applicant be at liberty to evict the INTERESTED PARTIES upon issuance of a thirty (30) days notice and levy distress for rent.***
 5. ***THAT upon hearing and determination of this application this honourable court be and is hereby pleased to order that the suit herein has abated.***
 6. ***THAT the cost of this application be borne by the Defendants.***
2. The Defendant swore an affidavit and a further affidavit in support of the motion. When served, Stephen Mbuthia Wanjiru the 1st Interested Party herein swore two replying affidavits to oppose the motion.
3. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

4. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed for and against the motion. I have further considered the rival written submissions.
5. It is the submission of the Defendant/Applicant that she is the registered proprietor of the parcel of land known as Nairobi/Block 77/137 in Buruburu. She also argued that since the suit filed by Phylis Wanjiru Mbuthia, the Plaintiff herein claiming purchaser's interest abated upon her death and no substitution has been done nor have those illegally occupying the suit premises paid rent, then she is entitled to the orders she is seeking vide this motion. The Defendant further argued that between 2006 and the time of her death the Plaintiff enjoyed an order for stay of eviction and has never made arrangements to pay the rent arrears nor prosecute her suit. As a result of the Plaintiff's inertia in prosecuting the suit the Plaintiff has accumulated rent arrears of over ksh. 2 million which amount continues to accumulate since the suit property is now being occupied by the Interested Parties, who are the Plaintiff's children who have refused to pay for the alleged arrears of rent. The Defendant also asked this court to find that the Interested Parties occupation of the suit premises are trespassers since they failed to pay rent. The 1st Interested Party opposed the motion on behalf of the other Interested Parties. He confirmed that Phylis Wanjiru Mbuthia passed away on 28th march 2012. He argued that prior to her death she had entered into a sale agreement to purchase the suit premises with the Defendant. The 1st Interested Party pointed out that the deceased had in fact paid a deposit of kshs.1,000,000/= out of the purchase sum of kshs.2,300,000/= . Pursuant to the aforesaid payment of the aforesaid deposit, the Plaintiff was allowed to take occupation. It is also argued by the 1st Interested Party that what was only payable was the outstanding rent of two months as stated in the sale agreement. He further argued that since the agreement entered between the deceased and the Defendant was that of sale then the question of payment of rent does not arise. The Interested Party informed this court that since he came back from the U.K it took time for him to settle therefore there was a delay in applying for substitution.
6. After a careful consideration of the material placed before this court in support and against the motion, it is apparent that this court is being asked to issue substantive orders directing the Interested parties to pay accumulated rent arrears to the Defendant. This court has also been asked to issue an order of eviction in default of payment of rent arrears. It is clear in my mind that the Interested Parties in this suit are not tenants of the Defendant hence the demand for payment of arrears or rent cannot issue. If well advised the Applicant should seek for the appropriate remedies available to her in law. The basis of this court's finding is that there exist a dispute as to whether the aforesaid transaction between M/ Solid Rock Estates and the late Phylis Wanjiru Mbuthia was a sale or a lease agreement. Secondly, there is no dispute that arising from the aforesaid transaction, the late Phylis Wanjiru Mbuthia paid a deposit of Ksh.1,000,000/= to M/s Solid Rock Estates. The question is what happens to that deposit.
7. The Interested Parties are the peripheral parties hence no substantive orders can issue against them.
8. This court has been urged to declare that abated. A careful examination of Order 24 of the Civil Procedure Rules will reveal that a court does not have to make a formal declaration in order for a suit to abate. It would appear the rules are clear on the circumstances and timelines which must exist in order for a suit to abate. Since the law is unambiguous i decline to delve into the arena as invited by the defendant.
9. In the end I see no merit in the motion. It is dismissed with costs abiding the outcome of this suit.

Dated and delivered in open court this 9th day of October, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant