

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT CASE NO. 3 of 2013

WILSON NATO..... PLAINTIFF

VERSUS

FRANCIS SIMIYU WEKESA.....DEFENDANT/RESPONDENT

AND

JOSEPH NAMASAKA NATOAPPLICANT

RULING

1. The application up for ruling is the one dated 9th September 2010 brought by the Applicant JOSEPH NAMASAKA NATO. It seeks the following orders;

- a) Reinstatement of the suit.
- b) Plaintiff herein Wilson Nato now deceased be substituted and be replaced by Joseph Namasaka Nato the applicant herein.
- c). That the L.R **No. Bungoma/Kabisi/323** registered in the names of the defendant is nullified, deregistered and or revoked.
- d) That the L/.R. **No. Bungoma/Kabisi/323** be registered in the names of the applicant Joseph Namasaka Nato.
- e). Costs be provided for.

2. The application initially had been granted as presented on 7th March 2012 by Chitembwe J. while the matter was still a Kakamega High Court file. Subsequently the Defendant filed an application dated 23.7.2012 seeking to set aside the orders of the court of 7th March 2012. The Application dated 23.7.2012 was allowed in terms of prayer (b) on 5th December 2012 again by Chitembwe J.

3. Thereafter this file was transferred to Bungoma High Court for hearing and determination. In the confusion when the application dated 9th September 2010 came for hearing, I was under the mistaken belief that this application had already been dispensed with wholly. I made a ruling that there was nothing more for me to determine. Mr. Ingotsi for the Defendant has since clarified this. I have perused the record a second time and confirmed that the orders allowing the application dated 9th September 2010 was already set aside on 5th December 2012.

4. The present application (dated 9.9.2010) sought to reinstate the suit, substitute the deceased plaintiff among other prayers. The application is opposed and the Defendant submitted that prayer (c) & (d) cannot be granted at an application stage. The Defendant submitted that prayer (b) cannot be granted as the suit had abated on 11th February 1997. That no reason had been given why the suit was not prosecuted between 1990 – 2001. He urged the court to disallow the application.

5. The application had earlier been granted. To unseat the Applicant completely from the seat of justice

he had earlier tasted will is quite harsh in my view. The other issue raised in opposition by the defendant is that the previous owner of the suit property was the settlement trust fund in terms of counting time for adverse possession. In my mind that is a matter that can only be determined during the hearing of the main suit and not in the interlocutory proceedings.

6. The Applicant also submitted that previously they were represented by Shitsama & Co. advocates hence he may not be able to explain why the suit took long before it was prosecuted. Although this suit was dismissed for want of prosecution in 2001 and no valid explanation has been offered. However given the applicant has moved the court, it is only fair and just that he is given a chance to be heard on merit of his suit. Consequently, I grant prayer (a) & (b) of the application. Prayer (c) & (d) are disallowed as the issues raised can only be ventilated during the hearing of the suit and not vide interlocutory mode. The costs of the application are awarded to the Defendant.

DATED, SIGNED and DELIVERED this 13th day of May 2014

A. OMOLLO

JUDGE.