



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC NO. 141 OF 1992

RICHARD MUGO KAUGE

JOHN MBUTURA

JOHNSON M'RINTARI Suing on behalf of 247 members of NTARANGWI

SETTLEMENT SCHEME SELF HELP GROUP.....PLAINTIFFS

VERSUS

HON ATTORNEY GENERAL..... 1ST DEFENDANT

MINISTRY OF LAND HOUSING & SETTLEMENT.....2ND DEFENDANT

MERU COUNTY GOVERNMENT.....3RD DEFENDANT

MERU COUNTY GOVERNOR.....4TH RESPONDENT

RIGATHI KIRUGUYA

MBOGORI MARETE

CATHERINE MBIUKI Suing on behalf of 210 members of NTARANGWI SETTLEMENT

SCHEME SELF HELP GROUPINTERESTED PARTIES/APPLICANTS

RULING

1. The Notice of Motion before me is dated 29/01/2020 and is brought under **Section 3A of the Civil Procedure Rules** where the applicants/ interested parties seek the following orders:

- a. **THAT Rigathi Karuguya Kibira the 1st applicant (deceased) be substituted with N'kanata Murithi.**
- b. **THAT the proceedings from 2013 to date be set aside on the ground of illegality as they were conducted while 1st and 2nd plaintiffs were deceased and no substitution was done.**
- c. **THAT upon the foregoing this matter be referred to Alternative Dispute Resolution (mediation) or to any other ADR that this court may deem appropriate for a faster and expeditious disposal of the matter.**
- d. **THAT the costs be in the cause.**

2. The application is premised on the grounds set out in its body and in the supporting affidavit of Catherine Mbiuki, one of the officials of Ntaragwi Settlement Self-Help Group, sworn on 29/01/2020. It is averred that this matter has been ongoing without the necessary substitution being effected in respect of Richard Mugo Kauge and John Mbutura who are deceased. Nevertheless, the applicants desire that the matter should be heard on a priority basis for a majority of the parties are now deceased or in their twilight years. Thus, ADR will enable

the matter to be concluded faster considering the duration it has been in court.

3. The applicants submitted that from the year 2013, substitution was never made for the 1st and 2nd plaintiffs who were deceased. Therefore, the foregoing proceedings were illegal and a nullity, hence they should be set aside as there was no compliance with **Order 24 Rule (2) and (3) of the Civil Procedure Rules**. It is further submitted that the parties should explore and embrace ADR.

4. The application was opposed by the plaintiffs vide the replying affidavit of Rintari Johnson, one of the plaintiffs, sworn on 14/02/2020. He contended that the suit was brought in a representative capacity of the members of Ntorongwi Settlement Scheme where members appointed the three plaintiffs including the deponent as their representatives to represent their entire interests in common. Thus, the death of the 1st and 2nd plaintiffs did not affect the rights of the other 246 members who still exist. Therefore, him being one of the living representatives of the group, the suit is proper before the court.

5. On the issue of ADR, plaintiffs aver that they have over ten (10) times attempted ADR but with no success. They even filed and served a proposal. The 3rd defendants only filed their defence in 2015. The 1st and 2nd defendants have never filed their defence save for memorandum of appearance dated 25/05/1992. The defence has always promised to negotiate from 1992. That An interlocutory judgment was entered on 11/02/1993 against the defendants, but in a bid to negotiate they have been patient until 2019 when the suit was started. There have been no good intentions by the defence on ADR, hence that issue is now a delay tactic.

6. The plaintiffs are not opposing the prayer for substitution of the 1st interested party as long as the legal provisions of law are met.

7. The plaintiffs submitted by reiterating what they had earlier stated adding that ADR mechanism has been exhausted and that is why hearing of the suit commenced. They urge the court to dismiss the application of the interested parties which they term as a delay tactic.

8. The application was also opposed by the 3rd and 4th respondents vide the replying affidavit of their advocate, one Winnie Matiri sworn on 20.7.2020i. She deponed that they have no objection to prayer (a) (substitution of the 1st interested party). However, they contend that there is no legal requirement to substitute a deceased party in a representative suit as long as the members being represented consent to the remaining representation. There is no illegality in how the matter proceeded after the death of the 1st and 2nd plaintiffs as the plaintiffs were still represented by the 3rd plaintiff. Nonetheless, if the applicants had an issue they should have raised the same soonest. It would be unjust to set aside proceedings noting that this is a 1992 matter. They have attempted ADR severally but have been unsuccessful necessitating full hearing of the matter.

9. The 3rd and 4th respondents submitted by reiterating what they had stated. They relied on the case of **Civil Case No. 2269 of 1997; Kithaka Nthiga & 3 others v Nyaga Matumbi [2011] eKLR** to support their submissions.

10. The issues for determination are:

a. Whether to substitute Rigathi Karuguya Kibira the 1st applicant (deceased) with N'kanata Murithi.

b. Whether to set aside proceedings from 2013 as a result of the death of the 1st and 2nd plaintiffs who were never substituted.

c. Whether to refer the matter to Alternative Dispute Resolution (mediation).

11. On the issue of substitution of Rigathi Karuguya Kibira the 1st interested party with N'kanata Murithi, I find that the proposed substitution has not been opposed by the other parties. However, the applicants have not told this court who N'kanata Murithi is, neither is there any authorization from the latter to substitute her/him as a party to this suit. Further, the said N'kanata Murithi does not possess a grant of representation in respect of the deceased Rigathi Karuguya. The prayer for substitution of the 1st interested party therefore fails.

12. The second issue is whether to set aside proceedings from 2013 as a result of the death of the 1st and 2nd plaintiffs who were never substituted. **Order 24 of the Civil Procedure Rules** provides as follows:

“Rule 1

1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

Rule 2

2. Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants”.

13. This is a representative suit which was initiated by the plaintiffs, where Richard Mugo Kauge, John Mbutura and Johnson M'Rintari were suing on behalf of the 247 members of Ntorongwi Settlement Scheme Self Help Group. The death of the 1st and 2nd plaintiffs, who were among the representatives of the scheme, does not cause the suit to abate for the cause of action survives. This is because the plaintiffs were appointed by the members as their representatives to represent their interest in common. In spite of their death the members had no problem

with the 3rd plaintiff being their representative.

14. Since 2013 the matter has been ongoing and the issue of the death of the 1st and 2nd plaintiffs was never raised. Therefore, it is apparent that there was consent for the remaining plaintiff to represent the members. It was therefore not illegal for the matter to proceed after the death of the 1st and 2nd plaintiffs if the members are at ease with the 3rd plaintiff being their representative. I agree with the rest of the parties that if indeed the applicants had a problem with this issue, they would have raised the same the moment they were enjoined in these proceedings way back on 4.4.2017.

15. Further, it is noted that the interested parties have not given tangible evidence to show that the two plaintiffs had passed on by year 2013. Catherine Mbiuki has only availed a paper with a photograph of a person with the inscription; **“EULOGY OF THE LATE RICHARD MUGO BORN 1936 DIED 2015”** in so far as the claim of death of 1st plaintiff is concerned. With regard to the death of the 2nd plaintiff, Catherine Mbiuki had this to say; **“The information I have from the chief is that John Mbutura died in 2013!”**. What resonates from these averments is that the 1st and 2nd plaintiffs are dead, but certainly the interested parties do not know their date of death.

16. In the circumstances, I find that the prayer to set aside proceedings from 2013 as a result of the death of the 1st and 2nd plaintiffs who were never substituted is not merited.

17. The third issue is whether to refer the matter to Alternative Dispute Resolution (Mediation). The applicants are of the view that this matter be referred to ADR so that it may be heard faster considering that the parties involved are very old and some have passed on. However, this court vide its order issued on 24/04/2018 did refer the matter for ADR. The court order reads as follows;

“Parties to explore ADR and mention on 23.7.2018 for possible settlement. In the event that ADR fails, then hearing on 1.10.2018. Case to be heard on priority basis”.

18. It is quite clear that ADR has been given a chance. Further, the court has been alive to the fact that this case is very old, that is why the court gave a rider for the matter to be heard on priority basis if ADR failed. Indeed the trial took off as scheduled on 1.10.2018 but for one reason or another the matter has now stalled. This is an old matter which began about twenty – eight (28) years ago.

19. I also find that the plaintiffs as well as the 3rd and 4th defendants have asserted that this matter had been referred to ADR severally but unsuccessfully. This has not been refuted by the applicants.

20. In the circumstances, there is no reason to refer the matter again to ADR. Parties should endeavour to expedite the trial. However, nothing prohibits the parties from exploring any kind of settlement even as the trial is on going. This court is ready and willing to record a settlement at any stage of the trial as long as this happens before the final judgment is delivered.

21. In the final analysis, I find that the application dated 29.1.2020 is unmerited and the same is hereby dismissed with costs to the plaintiffs and 3rd and 4th defendants.

DATED, SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF OCTOBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 28.9.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE