



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO 41 OF 2009

LYDIA NJOKI WANYIKA.....APPELLANT

Versus

GERALD MWANGI KUGURA.....RESPONDENT

(Appeal arising from the ruling of Hon. L.W. GITARI

Chief Magistrate, Nyeri in Civil suit No. 191 of 1989)

JUDGMENT

1. This is an appeal from the ruling of L.W. Gitari delivered on 8th April 2009 in respect of an application by the Appellant dated 13th February 2009 wherein she sought leave to be substituted in place of the deceased in civil suit No. 191 of 1989.
2. The said application was supported by the affidavit of the Appellant sworn on 13th February 2009 wherein she deponed that she is the daughter of the late ALICE WANGUI GACHERU who died on 26th November 1996 and that before her death she had filed suit against the Respondent herein and ruling therein delivered on 26th September 1991.
3. That her father was the registered owner of land known as CHINGA/KIAGUTHU/114 and her mother subsequently obtained letters of administration but due to her age and ignorance the land was registered in the names of the Respondent and that she subsequently filed reference No. 7 of 2002 at Othaya.
4. The trial magistrate ruled that the suit appealed from was dismissed on 26th September 1991 and that the plaintiff sought to be substituted had died on 26th November 1996.
5. Being aggrieved by the said ruling the Appellant filed this appeal and raised the following grounds of appeal
 1. ***The learned magistrate erred in disregarding the certificate issued by this honourable court namely LIMITED GRANT OF LETTERS OF ADMINISTRATION AD LITEM which said certificate would enable me to be substituted in civil case No. 191 of 1989 as per my application.***
 2. ***The learned magistrate erred in allowing the Respondent/Defendant adduce evidence in the matter which its pleading had already been closed and that there was no way the Respondent/Defendant in that suit would have been allowed to adduce such evidence directing the same to me as all what the Respondent/Defendant adduced could have been directed to my late mother now deceased but not to me as at the time of arguments of my application for substitution I had not been made a party to the suit.***
 3. ***The learned magistrate erred in law in not considering that the Respondent/Defendant did not demonstrate to the learned magistrate how he got the***

land from my late mother as at no time did the Respondent/Defendant produced the agreement between my late mother and himself showing how he purchased the land from my late mother who was very old at the time of my father's estate which my late mother had filed in court to obtain letters of administration for my father's estate and this when the Respondent/Defendant in the said succession managed to mislead my mother by pretending that he was assisting my mother and he managed to cause the land in dispute to be registered in his name.

4. *The learned magistrate erred in law in not taking into account that the dispute in the matter touches land problem as the learned magistrate's duty was only to substitute me in the suit by the strength of the certificate issued by this honourable court thereafter I would follow up the matter in court of law as it is required by law.*
 5. *The learned magistrate failed to consider that the Respondent/Defendant had explained to the learned magistrate that I had filed a succession cause in the High Court which is not true as the cause which I had filed in High Court is only the one which I had applied for limited grant ad litem.*
 6. *The learned magistrate erred in not considering that I had only applied in court for my substitution in the said suit out of time and also failed to note that the tribunal court at Othaya had directed me in court to seek the remedy of the suit as the Respondent/Defendant was unable to explain to the said court how he got the land from my late mother.*
1. The Appellant therefore prays that the ruling of the magistrate be set aside and prayers sought for substitution be allowed.
 2. Directions were given that this appeal be determined by way of written submissions which have now been filed.

SUBMISSIONS

3. On behalf of the Appellant it was submitted that the trial magistrate did not take into account the limited grant of letters of administration ad litem issued to the same to enable her follow up the suit in place of her deceased mother and that unless she is substituted in the above suit and review the conduct of the said suit and how the court arrived in its decision not to return the land to her late mother the Respondent will always be enjoying the estate of her late father and mother.
4. On behalf of the Respondent it was submitted that there was no order sought to be appealed against annexed and that the case filed by the Appellant's deceased mother was dismissed on 26th September 1991 and that there was no appeal lodged before her death on 26th November 1996 and that the application for substitution had been lodged after twelve and a quarter years after the death of her mother.

ISSUES

5. From the submission herein there is only one issue for determination and that is whether the trial court was right in dismissing the application for substitution.
6. It is not in dispute that the Appellant's mother who was one of the plaintiffs in CMC civil case No. 191 of 1989 died on 26th November 1996 and that her suit therein was dismissed on 26th September 1991 for being time barred and it is also not in dispute that the Appellant sought leave to be substituted long after the suit had been dismissed and therefore any action can only be taken after the Appellant has been substituted.
7. I have noted that by the time when the suit was dismissed the Appellant's mother was in actual occupation of the suit land and therefore this is a case where court ought to exercise its discretion in favour of the Appellant to enable her take the necessary steps on behalf of her deceased mother having explained why she did not take any action in good time. In this holding I find support in the decision of OKWENGU J as she then was in Nyeri HIGH COURT CIVIL CASE NO. 165 OF 1995 APUFIA WANGARI MURAGURI V DAVID WANJOHI MURAGURI.

8. By virtue of the provisions of Article 159 of the Constitution of Kenya 2010 I hereby allow the appeal herein and substitute the trial court decision in dismissing the Appellants application for substitution with the granting leave to the Appellant to be substituted in place of her late mother in CMC suit No. 191 of 1989 noting that the Respondent will suffer no prejudice as he still has the remedy in resisting any action taken by the Appellant in respect of the said suit.
9. I therefore allow the appeal herein with no order as to cost.

Dated at Nyeri this 3rd day of October 2013.

J. WAKIAGA

JUDGE

Court: The judgment is read in open court in the presence of the Respondent and in the absence of the applicant leave granted to the respondent to file an appeal against the courts judgment if need be.

J. WAKIAGA

JUDGE