



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL & LAND CASE 493 OF 2008

KURIA THARAO.....1ST PLAINTIFF

JAMES WAINGANJO GITUNGO2ND PLAINTIFF

VERSUS

JAMES KINYANJUI MWAHI.....1ST DEFENDANT

JOSEPH WARARI GATHOGA.....2ND DEFENDANT

LAND REGISTRAR KIAMBU.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. The applicants hereinafter have filed a Notice of Motion dated 7th May 2012 under order 24 Rule 3(1) & (2) of the Civil Procedure Rules & Section 1A & B & 3A of the Civil Procedure Act seeking the following orders;

i. That this Honourable Court do grant leave to extend time to the applicants to substitute after expiry of 1 year.

ii. That this Honourable Court be pleased to substitute Francis Ng'ang'a Kanyara alias Francis Ng'ang'a Kamiri, Joseph Kuria Tharao and Karugu Njenga alias Isaack Karugu Njenga the personal representatives of the Estate of James Waiganjo Gitungo (deceased) the 2nd plaintiff herein and they be made parties to this suit and be allowed to proceed on with it.

iii. That the plaintiffs be granted leave to file further amended plaintiff to include the substituted 2nd plaintiff.

iv. Costs be in the cause.

The application is based on the following;

i. That the 2nd plaintiff died on 27/4/2012

ii. That this suit is pending hearing and it survives his estate/

iii. That the applicants have obtained special limited grant of probates for the said Estate vide succession cause No. 2280 of 2011 and would wish to be substituted to prosecute this suit for the Estate of the deceased 2nd plaintiff.

iv. That delay is not inordinate and has not been occasioned by fault of the applicants.

v. That the delay is by only 10 days.

vi. That no prejudice will be suffered by the other parties if the orders are granted *ex parte* as the same will only substitute the 2nd plaintiff who is deceased and enable the personal representatives to finalize the suit.

2. A joint supporting affidavit of Francis Ng'ang'a Kanyara alias Francis Ng'ang'a Kamiri, Joseph Kuria Tharao and Karugu Njenga alias Isaac Karugu Njenga dated 7th May 2012 was filed in support of the application and they depone as follows; That they are the joint executors named in the will of James Waiganjo Gitungo (deceased) the 2nd plaintiff herein. That they have been appointed the joint personal representatives of the Estate of the late James Waiganjo Gitungo vide a special limited grant issued on 2.5.2012. That the deceased is a proprietor in common of L.R No. Limuru Township/196 the subject of this suit hence his interest survives this suit. They pray that this Honourable Court do extend time to substitute since one year lapsed on 27.4.2012 and they are now 10 days late. That the delay is not inordinate or intentional and was occasioned by facts beyond their control as the original petition was filed on 17.10.2011. That they now wish to be substituted as 2nd plaintiff to represent the Estate of the deceased in this suit and extension of time will not prejudice the parties to this suit. That it is now important to further amend the amended plaint to include their names as 2nd plaintiff's acting as personal representatives of the Estate of the deceased.

3. The 1st defendant Joseph Kinyanjui Mwai filed a Replying affidavit dated 31st May 2012. In his affidavit he depones how the parties appeared before Justice Muchelule and the orders that were given that the plaintiffs herein do filed and serve the requisite application for substitution for the deceased 2nd plaintiff within 21 days from that date that is on or before 9th April, 2012 and later the Judge disqualified himself. At paragraph 6 of his affidavit he explains the dispute between the parties and states that the matter heard and determined in the Chief Magistrate's Court Civil Case Number 8039 of 1998 Nairobi between Joseph Warari Gathoga (the 2nd defendant/respondent herein) Vs. James Waiganjo Gitungo (the deceased 2nd plaintiff herein) and Kuria Tharao (the 1st plaintiff/applicant herein where judgment was delivered with a decree being issued declaring that the 2nd defendant/respondent herein was the legitimate owner of the subject suit property herein. The decree has not been set aside. He further depones that the plaintiffs' have in their conduct have unduly taken advantage of the deceased 2nd plaintiff's demise so as to delay the determination of the applications to strike out the suit.

4. The 2nd defendant filed Grounds of Opposition and stated the following; the 2nd plaintiff's suit has already abated and the orders/remedies sought would not be granted in the circumstances. The 2nd plaintiff's application is incompetent and bad in law as the suit has not been revived. There is no suit by the 2nd plaintiff and as such the application is incompetent and bad in law. The applicant and/or his estate's advocates are guilty of laches and inordinate delay and as such undeserving the remedies sought. The applicant and/or the Estate's Advocates have come to these Courts of equity with unclean hands and as such undeserving the discretionary remedy sought. There are no good grounds pleaded for the delay and for granting the application as drawn. Counsel for the 2nd defendant made oral submissions to support these grounds.

5. Counsels made oral submissions in Court which I have carefully considered, I have also gone through the Court file and I find as follows; the application is not incompetent or bad in law as stated by the 2nd respondent. Under order 24 (3) (2) it is provided that;

“where within one year no application is made under sub rule (1) the suit shall abate so far as the

deceased plaintiff is concerned and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit to be recorded from the estate of the deceased plaintiff;

Provided the Court may, for good reason on application, extend the time.”

The applicant is seeking to have leave extended to substitute after expiry of a year. Mrs. Muhuhu explained that their application is 10 days late, the reason the delay was because the applicant had appointed joint executors of the deceased estate who made an application in Court on the 7th October 2011 and the special limited grant was obtained on 2nd May 2012. That the grant was not issued on time and for this reason they seek that the Court extend time and that no prejudice will be suffered as even in the absence of the 2nd plaintiff the suit is still alive as the 1st plaintiff is alive. That there is the issue of common ownership and the interest of the deceased has not been extinguished by them. She explained that the delay was not intentional and she asked this Court to exercise its discretion and not to lock out the litigant. She explained further that issue is between the parties on validity of the two titles that exist and that it is important that the same be determined. She also acknowledged that there are applications in the matter that need to be determined. I find that the applicant has sufficiently explained the reasons for the delay in filing the matter. Order 24 Rule 3(2) states that an application must be made within a year; this was not done for the reasons stated. It provides further that the Court may for good reason on application extend the time. Although the defendants object I find that there are issues between the parties that must be determined. The applicant has exhibited a special limited grant that was issued on the 2nd of May 2012. This application was filed on the 7th of May 2012. I note that the applicant moved to Court immediately with this application on the 7th of May 2012 after they obtained the special grant on the 2nd of May 2012. The delay of 10 days is not too long for me to conclude that the applicant is delaying the matter. Justice Muchelule gave orders on how they were to move and counsel for the applicant has submitted that they filed the application for letters in October 2011. Although the respondents advocate say that there is nothing to be extended I find that the applicant has moved to Court properly to seek an extension as stated in the application. There could be a delay by the applicant but I find that it has been sufficiently explained. From the size of the Court file and what has been deponed by the respondents it is clear that the parties have contentious issues between them and all parties should be given a chance to be heard on the issues raised in this suit.

6. I find that the application is not bad in law. I find merit in the application and I do grant leave to extend time to the applicants to substitute after an expiry of a year as sought in prayer 2. I also grant prayer 3. Having done so the suit filed by the 2nd plaintiff is revived. I also grant prayer 4. The amended plaint shall be filed within 21 days of the date of this ruling and served on the respondents. The respondents are at liberty to file amended defences if need be within 15 days from date of service. Cost shall be in the cause.

Orders accordingly.

Dated signed and delivered this 5th day of July 2012

**R. OUGO
JUDGE**

In the Presence of:-

..... For the Applicant

.....For the 1st Respondent

..... For the 2nd Respondent

.....For the 3rd Respondent

.....For the 4th Respondent

..... Court Clerk