



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 107 OF 2008

TERESIAH WANJIRU NGARI (Suing as

the legal representative of Estate of JOSEPH NGARI

NJEGA (DECEASED) PLAINTIFF

VERSUS

HENRY MBURU MARUNGO 1ST DEFENDANT

THE LAND REGISTRAR, KERUGOYA 2ND DEFENDANT

R U L I N G

The application before me is dated 5th September 2008 and filed in court on 22nd September 2008. It is expressed to be brought under order VI rule 13(1) (a), (b) and (d) of the civil procedure rules. It seeks that this court be pleased to strike out with costs the suit herein for being an abuse of the process of court. The 1st defendant also prays that the costs of the application be provided for.

The grounds upon which the application is anchored are that the plaintiff has no legal basis to bring this suit as she is a stranger to the estate of one, **Joseph Nyaga Njega** – deceased. The Plaintiff's marriage with the deceased whom she is claiming to be the legal representative of was actually dissolved vide a decree dated 19th March 1998 issued in Kerugoya SRMCCC No. 183 of 1995. Further the Plaintiff had earlier on filed Kerugoya SRMCCC No. 84 of 2008 in which she sought an injunction restraining the medical officer of Health, Kerugoya District Hospital from releasing the remains of the deceased to his wife, **Lydia Muthoni Ngari**. The said application was subsequently withdrawn with costs to the said **Lydia Muthoni Ngari**, the real representative of the estate of the deceased vide an order dated 28th March 2008. That the Plaintiff being a stranger to the estate of the deceased had no legal basis and or locus standi to institute this suit against the 1st defendant whatsoever.

The application was further supported by an affidavit sworn by the 1st defendant. In the said affidavit, the 1st defendant merely reiterated and expounded on the grounds in support of the application aforesaid. Suffice to add however that the plaintiff's verifying affidavit was pure perjury when she deponed that she was the legal representative of the estate of the deceased while it was within her full knowledge that she was a stranger to the said estate. Accordingly the suit disclosed no reasonable cause of action, was

scandalous, frivolous and vexatious.

Through **C.M. Kingori, Esq, Advocate**, the Plaintiff filed a replying affidavit. In pertinent paragraphs he deponed that the Plaintiff instituted this suit for and on behalf of the estate of the deceased having been issued with limited grant of letters of Administration. That the cause of action accrued against the 1st defendant for fraudulent and irregular dealings with the subject land. The previous suits were irrelevant as they were not concerned with the determination of the matrimonial property between herself and the deceased, neither did they decide on the distribution of the deceased's estate.

Pursuant to leave granted on 15th December 2008, by court the 1st defendant filed a reply to the replying affidavit in which he pointed out that the limited grant was obtained through fraud. The respondent did not disclose to court when she applied for limited grant that her marriage to the deceased had been dissolved on 19th March 1998. That she also failed to disclose to the court that the deceased had subdivided land parcel **Mutira/Kangai/62** and transferred **Mutira/Kangai/2224** which was a resultant number to the 1st defendant before his death and its only the title deed that was issued later. The respondent too failed to disclose to the court that the estate of the deceased is the subject of Kerugoya SRM's court succession cause number 209 of 2008 in which she had filed a caveat. To date however, she had failed to file objection papers. The respondent also failed to disclose to the court that the deceased's estate which consisted of **Mutira/Kangai/2223**, a subdivision of the original **Mutira/ Kangai/62** was the subject of succession cause number 209/08 filed by **Lydia Muthoni Ngari**, the legal representative of the deceased.

When the application came up for interpartes hearing on 27th July 2009, **Mr. Mwai** and **Kingori**, learned counsel for the 1st defendant and Plaintiff respectively agreed to argue the same by way of written submissions. They subsequently filed and exchanged written submissions which I have carefully read and considered.

This application must be allowed on two main grounds; locus standi on the part of the Plaintiff to mount this suit and want of candidness on the part of the Plaintiff. The estate of the deceased has been the subject of Kerugoya succession cause number 209 of 2008. That cause was advertised and or gazetted on 5th September 2008 going by the Kenya Gazette annexed to the 1st defendant's affidavit in reply to the replying affidavit. That Kenya Gazette was specific that if no objection will not have been lodged within thirty (30) days from the date of Gazettement, the court would proceed to make the grant. It is been a year plus since that gazette Notice. Accordingly a grant has been issued to the said **Lydia Muthoni Njega**. The respondent in the same succession cause filed a caveat but failed to pursue objection proceedings. So that by the time she was seeking the limited grant, she was well aware of the petition filed in Kerugoya by **Lydia**. There was therefore no basis for the respondent to again rush to this court and obtain a limited grant unless for reasons of mischief and fraud. There can be no two or more contempreneous succession causes over the same estate of a deceased person. I am certain that had the respondent disclosed the fact that there was another succession cause involving the same estate elsewhere the court would have declined to issue to her the limited grant. As it is therefore, that grant was issued due to non-disclosure of material and essential facts and therefore counts for nothing in my view. That being the case, the limited grant issued to the respondent is as good as nothing. Accordingly, the suit field by the respondent has no legs to stand on.

The respondent clearly has no legal basis to mount this suit. The marriage between her and the deceased was dissolved vide Kerugoya SRMCCC No. 183 of 1995. She ceased immediately to have anything to do with the deceased once the decree of divorce was made absolute. I am certain in applying for the limited grant aforesaid, the Plaintiff must have proclaimed herself as a widow of the deceased. That was wrong. She had no legal capacity to institute legal proceedings as the legal representative of the deceased. The legal representative of the deceased was one **Lydia Muthoni Ngari** who was granted letters of administration. The Plaintiff has even categorically pleaded in paragraph 4 of the plaint that the deceased was her husband, which information she knows is incorrect. She was divorced from the deceased as far back as 19th March 1998. The deceased parted company with this world on 7th March 2008. How can the respondent claim to be a wife to a person who divorced her 10 years down the line.

This is not a succession cause where a wife is defined to even include any former wife or wives. Had these been succession proceedings, her claim would have been considered by the court much as she is a divorced woman. However this is not the case here!

Reading through her replying affidavit, one gets the distinct feeling that the Plaintiff is pursuing her claim on the basis that the suit premises formed part of the matrimonial property that would have been the subject of distribution between her and the deceased upon dissolution of their marriage aforesaid pursuant to the provisions of the married women property Act. That is not a claim she can maintain now. She could have successfully litigated on the issue had she sued for the same before the dissolution of the marriage. The act is about married women property Act. It is not about unmarried women property Act. The moment she allowed the Divorce to go through without having filed a claim under the married women property Act, she ousted herself from the perview of that Act as she was no longer a married woman. She cannot seek therefore to ride on the instant suit for a cause which otherwise should have been prosecuted under the married women property Act.

As correctly submitted by **Mr. Mwai**, the deceased was the absolute proprietor of the land parcel **Mutira/Kangai /62**. He caused the same to be subdivided in his lifetime. He transferred resultant parcel number **Mutira/Kangai /2224** to the 1st defendant. He transferred that parcel of land on 13th March 2008 and the title was issued on 17th March 2008. From the certificate of official search, the title to land parcel **Mutira/Kangai/62** was closed on 28th January 2008 upon subdivision. By then the deceased was very much alive. It cannot be heard from the respondent that the transaction was thus fraudulent and irregular.

The respondent has submitted that having obtained letters of administration ad Litem, she has been clothed with the requisite capacity for purposes of this suit. On the face of it, that argument looks attractive. However the truth of the matter is that the grant was issued to the respondent due to non-disclosure on her part of essential and material facts. She was less than candid. If a party comes to court on an exparte application or Petition as the Plaintiff did herein, she was expected to present all material facts in her favour as well as those against her so that a court can make an informed decision. Such party is not expected to suppress some material if they are not in her favour. An Order issued on the basis of material non-disclosure of fundamental facts is liable to be vacated immediately the true facts come to light. In the circumstances of this case, the respondent lied regarding her relationship with the deceased. She also failed to disclose the previous litigation she has heard with one **Lydia** over the estate of the deceased. It is not sufficient to merely submit that those previous proceedings were not relevant to this suit. The law requires that you state if there is any suit pending or whether there have been previous proceedings in any other court between the parties. The respondent should have said so and then proceeded to plea that the two suits were irrelevant to the instant suit.

Under Order VI rule 13 (1) (a) of the civil procedure rules, no evidence is admissible on an application under this rule but the applicant has to state concisely the grounds on which he has made the application. I do not think therefore that this application falls for consideration under this subrule since the 1st defendant has filed affidavits in support of the application. That is evidence. The application therefore falls for consideration under Order VI rule 13(1) (d) of the civil procedure rules. From what I have managed to outline

hereinabove, this suit is clearly an abuse of the court process since the respondent has no legal basis to bring it and she is guilty of non-disclosure of material facts.

For all the foregoing reasons, I would allow the application dated 5th September 2008 with costs of the suit as well as this application to the applicant.

Dated and delivered at Nyeri this 8th day of October 2009

M. S. A. MAKHANDIA

JUDGE