

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO.116 OF 2007(O.S)

KIARIE WAINAINA.....PLAINTIFF

VERSUS

NJERI NJOROGE (Sued as the Administrator of the estate of

NAOMI WANJIRU NJOROGE.....DEFENDANT

AND

DOMINIC NJUGUNA KIARIE.....APPLICANT

RULING

The Applicant filed the application dated 29/3/2018 seeking to set aside the order made on 26/1/2012 by Lady Justice P. Nyamweya dismissing this suit. The Applicant also seeks an order to reinstate the suit, and substitute the Plaintiff with his administrator, Dominic Njuguna Kiarie, and also substitute the Defendant with her administrator, Damaris Mwihaki Mwaura.

The application is based on grounds that the Plaintiff's inaction was occasioned by his long term illness suffering from cancer and old age, and his untimely demise on 29/6/2017. Further, that the Plaintiff's previous advocate, G. Kamonde Advocate died, and it was therefore difficult for the Applicant to access the physical file for purposes of taking further steps in the suit.

The application was supported by the affidavit of Dominic Njuguna Kiarie sworn on 29/3/2018. He deponed that this suit was commenced by the Plaintiff who is now dead, on 18/5/2007 and was dismissed on 26/1/2012 for want of prosecution. He explained that the Plaintiff's long illness and old age prevented him from prosecuting the suit. He annexed a copy of the Plaintiff's death certificate, which shows that the Plaintiff died of cancer aged 88 years on 29/6/2017. He deponed further that his father's advocate, Mr. G. Kamonde also died making it difficult to make follow-ups on the matter. He was issued letters of administration *ad litem* in **Kiambu Succession Cause No.18 of 2018**, on 14/2/2018, which enabled him to take action in this suit. He averred that the Defendant also died in the course of proceedings and was substituted with her administrator, Njeri Njoroge, who has since died as well. He annexed a copy of the grant of letters of administration issued to Damaris Mwihaki Mwaura in Kiambu **Succession Cause No. 224 of 2017** in respect of the estate of Naomi Wanjiru Njoroge and asked the court to substitute her as the Defendant. The application was not opposed by the Defendant.

The court has considered the application, supporting affidavit, annexures thereto and oral submissions by counsel for the Applicant. The court record reflects that the court served a notice to show cause under order 17 Rule 2(1) & 4 of the Civil Procedure Rules on G. Kamonde & Co. Advocates on 17/1/2012, which was on record for the Plaintiff at the time. It is not clear when G. Kamonde died and whether he was the sole proprietor of the firm. It is also not clear whether the Plaintiff was notified of the notice to show cause by the said firm. The record shows that the notice to show cause was served on the Defendant by way of registered post. It is not clear whether the Defendant received the said notice. The matter came up for notice to show cause why the suit should not be dismissed for want of prosecution on 26/1/2012, then it was dismissed in the absence of both parties.

The court is satisfied that it would be in the interest of justice for the parties to get an opportunity to ventilate their claims at the trial. The order made on 26/1/2012 dismissing the Plaintiff's suit is set aside. The suit is reinstated and parties substituted as prayed. The Plaintiff will pay the Defendant the costs of the application. Parties are directed to comply with the provisions of Order 11 of the Civil Procedure Rules within 21 days of the date of this ruling to facilitate the expeditious disposal of the suit failing which the suit will stand dismissed.

Dated and delivered at Nairobi this 1st day of April 2019

K.BOR

JUDGE

In the presence of:-

Mr. V.Owuor- Court Assistant

Ms. F. Njoroge for the Plaintiff

No appearance for the Defendant