



ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC SUIT NO. 166 OF 2007 (O.S)

RUTH KAVINDU NGUI.....PLAINTIFF

VERSUS

SAMWEL MWANIKI NGUI.....DEFENDANT

RULING

1. The Plaintiff and the Defendant in this case are all deceased. The two were sister and brother respectively. The Plaintiff had sued her brother seeking orders of adverse possession in respect of LR No. 209/4744/78 (suit property). The Plaintiff died on 19th December, 2015 whereas the Defendant had died on 2nd December, 2011.

2. The Plaintiff's son John Kennedy Luseno took limited grant of letters ad litem in respect of the Plaintiff's estate. Based on the limited grant he filed a Notice of Motion dated 25th May, 2016 in which he sought the following orders:-

1. THAT the Applicant herein be substituted for the late Ruth Kavindu Ngui as Plaintiff in this suit.

2. THAT the order of dismissal of this suit for want of prosecution given on 25th November, 2011 be set aside.

3. THAT Beatrice Mbulwa Mwaniki and Richard Ndeti Mwaniki widow and son respectively of the late Samuel Mwaniki Ngui, being the heirs apparent of the deceased Defendant intermeddling with the estate of the said Samuel Mwaniki Ngui be declared executors de son tort and consequently be substituted for the deceased Defendant in this suit.

3. The Applicant stated that the deceased Defendant was his uncle who died on 2nd December, 2011; that his uncle was survived by his wife and son who have been unsuccessfully demanding rent from the suit property; that since the two have been intermeddling in the estate of the late Defendant, they should be declared as executors de son tort with regard to the estate of the Defendant.

4. The Applicant contends that though the Notice to show cause why the suit should not be dismissed was served upon the Advocate for his late mother, the Advocate did not attend Court on 25th November, 2011 resulting in the dismissal of the suit for want of prosecution. The Applicant contends that non-attendance of the Advocate in Court on 25th November, 2011 was due to the fact that his mother's Advocate had an amputation on his leg.

5. The Applicant's application was opposed by a replying affidavit sworn by Richard Ndeti Mwaniki one of the sons of the deceased Defendant who is also a proposed administrator of the estate. The Respondent contends that the suit should not be reinstated as the Applicant's Lawyer failed to attend Court and the reason for nonattendance is not convincing; that the application for reinstatement has been made five years after the dismissal; that if the Plaintiff was ailing, arrangements should have been made for someone to substitute her through a power of attorney and that the pendency of this suit will cause prejudice to the Respondent.

6. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties herein. This is a classic case of what delay in concluding cases can cause. The dispute between the two siblings started in 1995 when the Defendant in this case sued her sister in NBI HCCC NO. 763 of 1995. The Plaintiff in this case was the Defendant therein and one of the Defendant's was the Plaintiff herein. This suit was triggered by a consent which the Plaintiff herein had recorded with another person called Elias Murungu Kariuki who was the 2nd Defendant in Nairobi HCCC No. 763 of 1995.

7. There is yet another case that is Nairobi HCCC No. 1727 of 1996 which is related to this one. An order had been made by Justice Koome as she then was that the case be consolidated with this one but that never happened. Because of the passage of time, the Advocates for the parties herein appear to have forgotten about what had happened in this case. The suit herein was never dismissed on 25th November, 2011 as all Advocates seem to think.

8. When the case came up for Notice to Show Cause why it should not be dismissed, Mr. Mbulwa was represented by Mr. Kamanda whereas Mr. Mutua was represented by Mr. Ngigi Advocate. The suit was spared dismissal by Justice Mugo who observed that sufficient cause had been shown why the suit ought not to be dismissed. The Judge directed that the suit be fixed for hearing within 60 days taking into account Justice Koome's ruling of 22nd October, 2010.

9. The suit was not set down for hearing within 60 days as directed. The record shows that the Plaintiff's Advocate filed his list of documents on 11th January, 2012. From that date, nothing happened until a second notice to show cause was issued for 17th March, 2015. On this date neither the Plaintiff's Counsel nor the Defendant's Counsel were in Court. The suit was dismissed by Lady Justice Gitumbi on 17th March, 2015.

10. The application for substitution of the Plaintiff with her son was made in time before the suit had abated. Though the Defendant had not been substituted with his legal representatives, his three sons have since obtained letters of administration in respect of his estate. From the background given herein, it is clear that, that none of the prayers can be granted. This is because there can be no substitution in a case which was dismissed and there is no valid prayer for its reinstatement. This suit was not dismissed on 25th November, 2011 and no order can be given based on that misconceived prayer. Equally prayer 3 cannot be granted as this Court has no jurisdiction to issue orders touching on succession which is a preserve of the Family Division of the High Court. I therefore find that the Applicant's application is misconceived. The same is hereby dismissed with no order as to costs.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **10th** day of **June, 2019**.

E.O.OBAGA

JUDGE

In the absence of parties who had been notified of the date and time of delivery of Ruling.

Court Assistant - Kajuju