



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 230 OF 2018

HENRY WAITHAKA WACHIRA (Suing as the legal representative of

JOSEPH WACHIRA WAITHAKA (Deceased).....**PLAINTIFF**

VERSUS

CONSOLATA NJERI MAINGI (Sued as the legal representative of

CHARLES MAINGI MACHARIA(deceased).....**1ST DEFENDANT**

SAMUEL KIMANI MUCHURI AND 12 OTHERS.....**2ND DEFENDANTS**

RULING

(Application for extension of time to substitute the plaintiff and deceased 1st defendant and also to revive the abated suit; plaintiff having died in 2012; application filed in 2019; considerable time having lapsed before the filing of the application; court not persuaded that there was any sufficient cause which barred the applicant from filing the application much earlier; application dismissed)

1. The application before me is that dated 18 February 2019 filed by Henry Wachira Waithaka the legal representative of the plaintiff in this matter who is said to be deceased. There are 17 prayers listed in the application but principally, the applicant wishes to have the following orders :-

(a) That the applicant Henry Wachira Waithaka be substituted for the deceased plaintiff Joseph Wachira Waithaka.

(b) That the deceased 1st defendant, Charles Maingi Macharia, be substituted with his wife and legal representative Consolata Njeri Maingi.

(c) That this suit which has since abated be revived.

(d) That the orders of 30 January 2015 be reviewed and/or set aside (the said ruling marked this suit as abated).

(e) That the following persons be enjoined as defendants in this suit being :- Nakuru Kiamunyeki Company Limited, the Land Registrar Nakuru, the Attorney General, George Karanja Maina, David Wainaina, Stephen Njenga Gichuru, Richard Onchweri Aduke, Faith Njeri Wambugu, and Jeremiah Maina Mwangi.

(f) That the 1st defendant be restrained from subdividing or dealing any further with the land parcels Dundori/Lanet Block 5/257 and 261 pending hearing and determination of this suit.

(g) That there be orders restraining any dealings in the land parcels Dundori/Lanet Block 5/2302, 2303, 2304, 2305, 2306, 2307, 2308, 2459, 2460 and 2461 pending hearing and determination of this suit.

2. There are 24 grounds listed in support of the application but I think the issues will become clear once I give the background leading to this application.

3. This suit was commenced through a plaint which was filed on 13 July 2009 by Joseph Wachira Waithaka (now deceased) and registered as Nakuru High Court Civil Suit No. 195 of 2009. The plaintiff was at the time being represented by the law firm of M/s Waiganjo & Company

Advocates. The plaintiff averred that he was the registered owner of the land parcels Dundori/ Lanet Block 5/ 257, 259 and 261 (Kiamunyeki 'A') (hereinafter referred to as Plots Nos. 257, 259 and 261). He pleaded that on 16 June 1989, he entered into a sale agreement with the named 1st defendant, Charles Maingi Macharia (now also deceased), where he sold to him the land plots No. 259, 261 and 273 at Kshs.500,000/=. However, two of these plots, Nos. 261 and 273, did not belong to the plaintiff and the plaintiff averred that the agreements were thus unenforceable. The plaintiff also pleaded that the 1st defendant was to pay Kshs.450,000/= upon transfer of the property which was not done due to uncertainties created in the agreement. The plaintiff further averred that the agreement was subject to consent being given by the Land Control Board, which consent was not given thus rendering the entire transaction null and void. He pleaded that in the month of April 2009, the 1st defendant unlawfully offered the properties for sale to members of the public including the 2nd, 3rd, 4th and 5th defendants (Samuel Kimani Muchiri, Jeremiah Maina Mwangi, Francis Macharia Maingi and Fr. John Munji respectively). The plaintiff contended that this was fraudulent inter alia for reasons that the 1st defendant was offering for sale plots that he knew did not belong to him. In the suit, the plaintiff sought orders that the defendants be perpetually enjoined from trespassing or dealing with the said plots No. 257, 259 and 271.

4. The defendants appointed M/s Gordon Ogola & Associates advocates who filed a joint statement of defence. It was pleaded that the plots Nos. 257, 259 and 271, were sold to the 1st defendant on 16 June 1989, and that reference in the agreement to plots No. 272 and 273 was an honest mistake which arose as a result of the exchange of plots between the plaintiff and one Geoffrey Muthoga Nganga in which the plaintiff took the plot No. 257 which he sold to the 1st defendant. It was further pleaded that the plaintiff could not have sold the plot No. 273 to the 1st defendant as it belonged to a third party and that all parties were *ad idem* with regard to the actual plots being sold. The 1st defendant averred that he took possession of the plots No. 257, 259 and 261, and has been in possession even at the time the suit was filed. He further pleaded that transfer of the parcels of land was done in the register of the members where the plaintiff was registered and that he did make payment of Kshs.450,000/= as was required of him upon transfer of the shares. He pleaded that the transaction was not subject to the consent of the Land Control Board, but that even if it were, the issue was now being brought too late in the day. The 2nd and 3rd defendants acknowledged purchasing land from the 1st defendant but it was pleaded that the 4th defendant was son to the 1st defendant and has no individual interest in the land other than that derived through his father. It was pleaded that the plaintiff, between 22 and 28 October 2007, illegally and fraudulently inserted his name in the register without the consent or authority of the 1st defendant, while he was aware that he has sold his entitlement to the 1st defendant. The 1st defendant also filed a counterclaim where he sought orders of cancellation of the title that the plaintiff had acquired to the land parcels No. 257, 259 and 261. He sought a declaration that he is the legal owner of these parcels of land and a permanent injunction to restrain the plaintiff from the same.

5. The plaintiff filed a reply to defence and defence to counterclaim. He pleaded inter alia that the mistake in the description of the plots sold went to the root of the contract and the 1st defendant could not claim to have bought what was not in the sale agreement. He pleaded that if the 1st defendant took possession of the plots Nos. 257, 259 and 261, this was illegal. He denied that transfer was done in the register of members and put the 1st defendant to strict proof. He further pleaded that he lawfully obtained the title deeds to these parcels of land following the records held at Nakuru Kiamunyeki Company Limited.

6. Not much happened in the matter save for some preliminary orders that parties make ready their cases, and with the creation of the Environment and Land Court, the matter was transferred to this court in July 2013. On 24 July 2013, the defendants filed an application dated 15 July 2013, seeking orders that the suit be dismissed because it has abated and it was pointed out that the plaintiff died on 26 March 2012. The ruling to that application was delivered on 30 January 2015 where the learned Judge (Waithaka J) ruled that both the main suit and the counterclaim have abated and ordered that each party bear his/her own costs. There followed an application filed on 12 May 2016 by M/s Waiganjo & Company Advocates on record for the plaintiff, seeking orders to revive the abated suit and have Henry Waithaka Wachira, substitute the deceased plaintiff. That application remained unprosecuted until this court issued a notice to dismiss for want of prosecution. It was then explained that the plaintiff's representative has appointed M/s Kamau Kuria & Company Advocates to act on his behalf. This application was thereafter filed.

7. In the grounds in support of the application, the applicant has averred that before the 1st defendant's death on 21 July 2016, the 1st defendant had embarked on a corrupt and fraudulent project to deprive the late plaintiff of his ownership of the three suit plots. It is claimed that the said project entailed first removing the plaintiff's name from the membership register of Nakuru Kiamunyeki Company Limited, and getting the Land Registrar Nakuru to cancel arbitrarily the plaintiff's title and issue parallel titles to the 1st defendant and thereafter the 1st defendant subdividing the three suit plots. He has averred that the cancellation of the titles of the plaintiff was done in 2015, three years after his death. The supporting affidavit to this application is sworn by the applicant, Henry Waithaka Wachira. He has deposed inter alia that he is the executor of the will of the plaintiff who is his late father. He has averred that at the time of his father's death, his father was registered as proprietor of the plots Nos. 257, 259 and 261 which titles were issued to him by virtue of being a shareholder at Nakuru Kiamunyeki Company Limited. He has referred to a suit Nakuru HCCC No. 33 of 1998, where the 1st defendant and 5 others filed suit against Nakuru Kiamunyeki Company Limited, Stephen Mbote, Evans Kiriungi, Paul Chiera, Moses Karanja, Mathew Gitahi and David Kabuga, and they sought orders that the lawful members and owners of the company be deemed those recognized by the general meeting of 1987, and they be issued with title deeds. The said suit was compromised by the parties and was not heard for a judgment to be delivered. A decree was thereafter issued on 18 December 2002. There followed applications to vary the said decree all of which were unsuccessful. The effect of the rulings was to prevent alteration of the members' register and subdivision of land among shareholders after 1987. He has contended that it was his father, and not the 1st defendant, who ought to have been recognised as member of the said company. He has deposed that the company corrected the mistake by entering his father's name into the register in the year 2007 and thereafter he was issued with title deeds to the plots Nos. 257, 259 and 261 and subsequently this suit was filed. He has stated that he was never served with the application dated 15 July 2013, despite being an executor of his father's will, and that he only became aware of the dismissal of this suit in the year 2016, after which he filed an application for Consolata Njeri Maingi to be issued with a grant *ad litem* in the year 2018. He has deposed that he did a search of the properties and found out that the 1st defendant became registered as proprietor of the three suit properties, and he, or somebody else, then embarked on subdivision of the said parcels of land. He has averred that the plot No. 257 is proposed to be subdivided into 11 plots, which are yet to be registered. The plot No. 259 has been subdivided into the plots Nos. 2305-2308, with the plots No. 2305 and 2308 being transferred to the name of the 1st defendant, Plot No. 2304 to the name of Consolata Njeri Mwangi (1st defendant's wife), plot No. 2302 to the name of George Karanja Maina; plot No. 2303 to the name of David Wainaina; plot No. 2306 to the name of Stephen Njenga Gichuru; plot No. 2307 to the name of Richard Onchweri Otake; plot No. 2459 to the name of Faith Njeri Wambugu; plot No. 2460 and 2461 to the name of Jeremiah Maina Mwangi. He has deposed that the Land Registrar published in the Kenya Gazette of 17 July 2015 that he would cancel the titles of his late father following the decision in Nakuru HCCC No. 33 of 1998. He has contended that nowhere in the

said judgment was there an order for cancellation of the titles of his late father. He has also stated that he was never served with the application which led to the order of 30 January 2015 yet he was already executor of his father's will. He then filed the application dated 11 May 2016 to review that order through M/s Waiganjo & Company Advocates which application he has stated that he has since withdrawn.

8. The application is opposed by Consolata Njeri Maingi, the widow of the 1st defendant. She has pointed out that the plaintiff died on 26 March 2012 and there was no substitution, which led to the filing of the application dated 15 July 2013 for an order that the suit has abated. It is averred that at the time of dismissal, the applicant had filed succession cause No. 881 of 2012 but made no effort to sustain this suit. She has further disclosed that the applicant filed an ad litem application being No. 45 of 2015, for purposes of pursuing this case, and the grant was issued on 2 March 2015, but the applicant took no step to revive the suit until 15 months later when the application dated 11 May 2016 was filed. It is pointed out that the applicant did not prosecute this application and the 1st respondent believes that this is a clear sign of indolence. She has deposed that upon dismissal of the suit, her late husband used other channels to obtain title to the three plots Nos. 257, 259 and 271. She has averred that after her late husband purchased the plaintiff's shares, his name was entered in the register of Nakuru Kiamunyeki Company Limited against the three plots and that the company passed a resolution in 1987 approving the said register for issuance of titles. Due to fraud, a wrong register was sent to the Land Registrar for issuance of titles, and it is this which culminated in the filing of the suit Nakuru HCCC No. 33 of 1998, which case was compromised by consent. She has averred that several attempts to set aside this consent have been futile and she has stated that it is the decree issued following the consent which led to the cancellation of the titles of the plaintiff. She has also presented that the titles held by the deceased plaintiff were declared fraudulent after investigation by the police. She has deposed that the District Land Registrar did issue notices to the wife of the plaintiff to produce the title documents, but there was no compliance, which led to the Land Registrar giving notice of revocation of the titles, which notice has never been challenged to date. The Land Registrar further gazetted intention to register the 1st defendant as owner of the parcels of land which notice has never been challenged. She has averred that thereafter her husband subdivided the parcels of land and transferred them to the respective buyers. She believes that the application is unmerited and should be dismissed.

9. A supplementary affidavit was filed by the applicant where he deposed inter alia that it is correct that he petitioned for a grant of probate in 2012 but no grant was issued due to an objection by one Boniface Maina Wachira. He has deposed that in October 2018, the judge handling the succession matter directed that the petition be gazetted so that any formal objection may be made. He has argued that because he was appointed as executor, he derived authority from the will, and thus it was not necessary for his former advocates to file the case Nakuru HCC Succession Cause No. 45 of 2015 for a grant ad litem. He has deposed that his former advocates made serious mistakes of law and that he should be excused. He has faulted the use of the alternative route used by the 1st defendant to cancel the titles held by his late father, pointing out that this was done after his father had died, and no opportunity given for his legal representative to be heard. He deposed that the authority of M/s Waiganjo & Company to act for his late father ended after his death and thus serving the application dated 15 July 2013 upon the said law firm was wrong. He also deposed that the Land Registrar has no authority to cancel title deeds and cited various authorities to support this position. He has asserted that the company needs to demonstrate that it complied with its Articles of Association in transfer of shares to the deceased 1st defendant. He faulted the conclusion by the police that his father's title was fraudulent.

10. Mr David Wainaina and Mr. Richard Atuke, sought to be enjoined to this suit, did not oppose the application. The other persons sought to be enjoined did not file anything to oppose the motion and neither did they attend court.

11. I invited counsel to file written submissions which they duly did and I have taken these into account before arriving at my decision.

12. What is before me is an application to revive an abated suit, and once revived, to have the applicant substitute the deceased plaintiff, and Consolata Njeri Maingi to substitute the deceased 1st defendant. In the event that the suit is revived, the applicant wishes to continue this case and also have enjoined some new persons who have purchased subdivisions of the suit properties herein.

13. I will start with the question whether or not to revive this abated suit and it is worth setting down the provisions of Order 24 which apply in such scenario. The situation that we have in this case is one of a sole plaintiff and thus Rule 3 and 7 of Order 24 do apply. They are drawn as follows :-

Rule 3 (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (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 recovered from the estate of the deceased plaintiff :

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

Rule 7 (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.

14. It will be seen from the above, that a suit will abate within one year of death. In our case, the plaintiff died on 26 March 2012. It follows that the suit abated one year thereafter on 26 March 2013 as no application for his substitution was ever filed. Thereafter the defendants filed the application dated 15 July 2013, seeking dismissal of the plaintiff's suit and what the court did was to affirm that the suit had abated, which applied to both the main suit and the counterclaim. The applicant herein has tried to raise a complaint that he was not served with the application dated 15 July 2013 and that service upon the law firm of M/s Waiganjo & Company, who were at the time on record for the deceased plaintiff was ineffectual, since counsel ceased to have instructions upon the demise of the plaintiff. He has also claimed that he

needed to be served as executor of the will of the deceased plaintiff. These arguments hold no water. In fact, it was not necessary to file the application dated 15 July 2013 for the suit to be ordered to have abated. Abatement of suit takes place automatically by operation of law. It is however prudent for parties to point out to court that a suit has abated so that the court may formally make the order of abatement in the court record. Whether or not the applicant was served with the application would not have made any difference to the fact that the suit had already abated by that time. I see no issue with the lack of service upon the applicant, or with service upon M/s Waiganjo & Company Advocates. What was important was for the court to be informed of the fact that the plaintiff had died more than one year ago so that the court would record the order of abatement and this was in my view properly done. The applicant cannot claim any benefit from not being personally served with the said application.

15. The applicant herein was certainly aware of the death of his own father, and he must have known, that his father had this case going on. Indeed, nowhere in his affidavits does he claim that he was not aware of this case. He himself did not move the court to have him substitute his deceased father within one year of death and he cannot fault the defendants for not effecting substitution. He himself could very well have applied for substitution. I do note that in his further affidavit, he has mentioned that there was a challenge to him being granted probate because of an objection in the succession matter that he filed of his late father, which is Nakuru High Court Succession Cause No. 881 of 2012. That could not in any way prevent him from seeking a special grant ad litem for purposes of continuing this suit on behalf of the estate of his late father. In fact, I do note that he did exactly that through Nakuru High Court Succession Cause No. 45 of 2015, where he successfully applied for and obtained a grant of letters of administration ad litem on 2 March 2016. He has not adequately explained why it took three years and more for him to apply for a grant ad litem.

16. Be that as it may, I do observe that he filed an application dated 11 May 2016, for revival of the abated suit, which application remained unprosecuted and the court indeed issued notice for dismissal for want of prosecution. In as much as he has tried to say that it was mistake of counsel to file the said ad litem motion and the application dated 11 May 2016, on my part I do not see any mistake, and I in fact hold the view that the applicant was properly advised by his erstwhile lawyers. Even if his lawyers were wrong, which I do not think they were, the application for a grant ad litem must have been made upon his instructions and so too the application dated 11 May 2016. They were not applications of his erstwhile advocates but his own applications and the latter application remained unprosecuted until it was withdrawn after he opted to file this motion. I will thus take it that this is the principal motion for revival of the abated suit.

17. That being the position, the first issue I need to take note of, is the fact that the application has been filed close to 7 years after the death of the plaintiff. That by any stretch is a long time given that a party is supposed to apply to substitute within one year of death. For this court to revive an abated suit, pursuant to Order 24 Rule 7 which I have outlined above, the applicant needs to demonstrate that he was prevented "by sufficient cause" from continuing the suit. On my part, I am not persuaded that the applicant has demonstrated to this court any sufficient cause. He himself has asserted being executor of the will of his deceased father, and being seized of that responsibility, it behoved upon him to act swiftly to substitute his deceased father. His explanation is that there was an objection in the main succession matter, but this, as I have pointed out earlier, did not bar him from seeking a limited grant to continue this suit, and indeed, it does appear that he was properly advised to seek one. If his argument is that he did not need the grant ad litem, why then didn't he come to court to say that he is executor of his father's will and thus entitled by virtue of that fact alone to continue this case? Nothing prevented him from doing so. I am not therefore persuaded that the applicant has provided me with any good reason to revive this abated suit. The time lapse of more than 6 years or so, from the time his father died to the time that this application has been filed, is certainly considerable and therefore the applicant needed to furnish very good reason for his inactivity, of which I am not persuaded that he has done so.

18. Given that I am not persuaded that there is sufficient cause demonstrated by the applicant in failing to apply for substitution and revival of this suit much earlier, I am not inclined to revive this abated suit. Now that I am not persuaded to revive the abated suit, the suit remains abated, and thus pointless to deal with whether or not the persons sought to be enjoined ought to be additional parties and neither can I make any further orders regarding the properties in issue within this case since there is no longer an existing suit.

19. The upshot of the above is that I find no merit in this application and it is hereby dismissed with costs, the said costs to be shouldered personally by the applicant. All interim orders that I had granted are also hereby lifted.

20. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 30th day of September 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Ms. Chege present for the plaintiff/applicant.

Mr. R.K Langat holding brief for Mr. Ogola for 1st defendant.

Other parties: Absent.

Court Assistants: Nancy Bor/Alfred Cheron.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU