



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 611 OF 2011 (O.S.)

MARY WAIHERA (SUING AS THE REPRESENTATIVE OF

JOHN KINYANJUI NG'AARU.....PLAINTIFF

=VERSUS=

MARY NYOKABI NGUGI.....1ST DEFENDANT

NJENGA NGUGI.....2ND DEFENDANT

RULING

What is before me is a Notice of Motion application dated 19th November, 2018 brought by one, Mary Waitthera, a legal representative of the estate of John Kinyanjui Ngugi Ng'aaru ("deceased"). The application is seeking reinstatement of this suit which abated following the death of the deceased, the substitution of the deceased with the applicant and a temporary injunction restraining the defendants ("respondents") from trespassing on, occupying or interfering in any way with the applicant's quiet possession, use and occupation of L.R No. Limuru/Ngecha/2811 ("the suit property") pending the hearing and final determination of the suit.

The application is brought on the grounds that the deceased died on 11th September, 2017 and it took the applicant some time to obtain grant of letters of administration in respect of the deceased's estate and when the applicant ultimately obtained the grant, she found out that the suit herein had been dismissed on or about 1st October, 2018. The applicant has stated that she learnt of this development when the 1st respondent served her with the order of dismissal from the court and a letter threatening to evict her from the suit property. The applicant has averred that she was not served with any notice before the suit was dismissed and that unless the orders sought are granted, she risks being evicted from the suit property which she has occupied with her family since 1985.

The application was served upon the 1st respondent and purportedly the 2nd respondent. I am saying purportedly because it is on record that the 2nd respondent died in 2015 and has not been substituted. The process server could not therefore have served the 2nd respondent "on the 2nd respondent's offices which are located at Hazina towers....". The 1st respondent did not respond to the application. When the application came up for hearing on 30th October, 2019, Mr. Okemwa advocate who appeared for the applicant informed the court that the application was not opposed and urged the court to allow the same as prayed.

I have considered the application together with the supporting affidavit. From the record, it was the 1st respondent who brought to the attention of the court the fact that the plaintiff had died on 11th September, 2017. That was on 12th February, 2018. The advocates who were then acting for the deceased plaintiff did not attend court on that day. Following subsequent failures by the plaintiff's said advocates to attend court and advise the court whether the estate of the deceased plaintiff was interested in pursuing the suit, the court issued an order that a notice be served upon the said advocates to appear in court and show cause why the suit should not be dismissed. A notice to show cause was issued and served. The plaintiff's advocates failed to appear in court pursuant to the said notice. On 1st October, 2018, the court made an order that this suit had abated and awarded the 1st respondent costs of the suit.

It appears that it is this order of 1st October, 2018 that woke up the deceased's legal representative from slumber leading to the filing of the present application on 19th November, 2018. Due to the nature of the dispute between the parties, I am persuaded that a case has been made out for the reinstatement of the suit and the substitution of the deceased plaintiff with the applicant so that the same can be heard on merit. However, in view of the conduct of the advocates who were acting for the deceased plaintiff alluded to earlier, I will condemn the applicant to pay thrown away costs to the 1st respondent.

The applicant had also sought an order of a temporary injunction to restrain the respondent from interfering with her quiet possession of the suit property. In support of this prayer, the applicant had relied on a letter dated 30th October, 2018 that was addressed to her by the 1st

respondent's advocates demanding that she vacates the suit property following the abatement of this suit. This demand letter was not illegal in my view. The 1st respondent is the registered owner of the suit property. The deceased plaintiff brought this suit claiming that he had acquired the property by adverse possession. Following the abatement of the suit that had been brought by the deceased, it was not wrong for the 1st respondent to demand that the applicant vacates and hands over possession of the suit property now that there was no suit pending in court. This demand cannot therefore form a basis for an order of a temporary injunction as it was not wrongful. A prima facie case has therefore not been established to warrant a grant of the injunction sought by the applicant who has not even been substituted as a plaintiff in the suit.

It has also not been demonstrated that the applicant would suffer irreparable harm if the injunction is not granted. In the letter dated 30th October, 2018 which provoked the present application, the 1st respondent's advocates had stated that if the applicant failed to vacate the suit property, legal proceedings would be taken against her. The 1st respondent did not threaten to evict the applicant from the suit property extra judicially.

For the foregoing reasons, the applicant's application succeeds in part and is allowed on the following terms;

1. The orders issued herein on 1st October, 2018 are set aside as concerns the 1st respondent and the suit is reinstated for hearing on merit as against the 1st respondent only.
2. The applicant is substituted as plaintiff in place of the deceased, John Kinyanjui Ng'aru and in the regard the Originating Summons shall be amended accordingly to effect the substitution.
3. The prayer for injunction is dismissed.
4. The applicant shall pay to the 1st respondent forthwith thrown away costs assessed at Kshs.7,000/=.

Delivered and Dated at Nairobi this 31st day of October, 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

N/A for the Applicant

N/A for the Defendants/Respondents

C. Nyokabi-Court Assistant