



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 18 OF 2014

MNANG'AT STEPHEN PAMBA.....1ST PLAINTIFF

SALOME CHEPKEMEI LOSIANGOLE.....1ST PLAINTIFF

VERSUS

JAMES MARIACH KOKITA.....1ST DEFENDANT

VERONICA C. AKOKOR.....1ST DEFENDANT

RULING

1. By an amended notice of motion dated 25/6/2019 and filed on 26/6/2019, the applicants/plaintiffs seek the following orders against the respondents/defendants:

- (1) That the order of the court made on the 5/2/2018 together with all other consequential orders be reviewed, varied and/or set aside.**
- (2) That the time within which substitution of the 1st defendant is to be made be extended.**
- (3) That Veronica C. Akokor and Pauline Kokita be made parties in this suit to substitute or in place of James Mariach Kokita deceased, the 1st defendant.**
- (4) That the costs of this application be in the cause.**

2. The grounds on which the application is based are that the 1st defendant died on the 14/2/2016; that a limited grant of letters of administration ad litem to the estate of **James Mariach Kokita** the deceased has been granted to **Veronica Akokor** and **Pauline Kokita** hence it is necessary for them to be made parties herein as the legal representatives of the deceased defendant; that the subject matter is land hence the cause of action survived the deceased 1st defendant; that on the 5/2/2018 the court ordered that the plaintiffs take measures towards substitution of the 1st defendant within **30 days** and in default the suit do stand dismissed for want of prosecution; that the plaintiffs were not able to obtain a limited grant within the time set by the court hence the suit stands dismissed; that failure to obtain a grant was not due to fault or wrongdoing on the part of the plaintiffs; that the plaintiffs are keen on prosecuting their suit as they still feel aggrieved by the actions of the defendants; that no appeal has been preferred against the order of 5/2/2018; that the delay occasioned herein is not so inordinate or great as to be considered inexcusable and that in the interests of justice, the said order sought to be reviewed and the suit be reinstated for hearing and determination.

3. The application is supported by the affidavit of the 1st plaintiff who swore it on his behalf and on behalf of 2nd plaintiff sworn on 25/6/2019.

4. The 2nd defendant filed two replying affidavits one dated 11/7/2018 and another one dated 2/10/2019. The second affidavit was filed after the amendment of the original notice of motion. Her collective response contained therein is that the plaintiffs failed to move the suit for a period of one year and on 5/2/2018 the court ordered that substitution be done within 30 days failure to which the suit stood dismissed; that 30 days elapsed on 4/3/2018; that consequently she applied for a decree and decree was issued; that she is already a party and therefore she cannot substitute the 1st respondent as there is a conflict of interest between the 1st defendant's estate and herself; that Pauline Kokita who is named as the proposed co-substitute for the 1st defendant is a stranger to the applicants and their transaction with the deceased and cannot assist the court; that the deponent is the registered owner of **West Pokot/Keringet "A"/4050** and she desires that this suit be brought to an end with expedition; that the court in **Kapenguria PMCCR. No. 540 of 2014** had found that the 2nd defendant did not receive any money from the applicants and therefore she did not sell any land to them; that this suit was properly dismissed and cannot be revived but the

applicants may file afresh suit subject to limitation. It is clearly stated in that affidavit that the applicants transacted with the deceased alone without any family members being involved and therefore it is difficult for the 2nd defendant to get any tangible evidence of the transaction.

5. The plaintiffs filed their submissions on **16/10/2019**. I have perused the court and found no submissions filed on behalf of the 2nd defendant or Pauline Kokita, one of the proposed substitutes for the deceased 1st defendant. I have considered those submissions.

DETERMINATION

Issues for Determination

6. The following issues arise for determination in the instant application:

(1) Whether the order made on the 5/2/2018 and all other consequential orders should be set aside and the suit against the 1st defendant revived and reinstated for hearing and if so the time within which the substitution of the 1st defendant should be extended.

(2) Whether the 2nd defendant and one Pauline Kokita should be made parties in the suit as administrators of the deceased 1st defendant.

(1) Whether the order made on the 5/2/2018 and all other consequential orders should be set aside and the suit against the 1st defendant revived and reinstated for hearing and if so the time within which the substitution of the 1st defendant should be extended

7. On 5/2/2018 this matter came before this court and Mr. Nyakundi holding brief for Mr. Tigogo for the 2nd defendant applied for the suit be dismissed with costs to the 2nd defendant. Mr. Musamia holding brief for Mr. Ingosi for the plaintiffs sought time to substitute the deceased 1st defendant and stated that the plaintiff is keen to prosecute the suit.

8. The court found that no indication has been given by the plaintiff's counsel as to which defendant is deceased but upon further inquiry Mr. Nyakundi indicated that the 1st defendant is deceased.

9. The court observed that substitution should be an effort of either party and gave the plaintiffs the last chance and ordered that they take measures towards ensuring substitution is pursued within 30 days failure to which the suit would stand dismissed for want of prosecution.

10. The instant application arises from that order, for the plaintiffs did not show that they took measures toward ensuring substitution for the 1st defendant within 30 days as ordered and the suit stood dismissed and the end of that period.

11. I have noted that the plaintiffs' advocate filed the instant notice of motion on 13/6/2018, that is, 3 months and 10 days after the expiry of the 30 day period granted by the court.

12. The motion is supported by an affidavit that annexes a limited grant of letters of administration ad litem issued on 7/6/2019 which names the 2nd defendant and one Pauline Kokita as the administrators for the purpose of representing the deceased in **Kitale ELC No. 18 of 2015**, that is, the instant suit.

13. It would appear that the letters of administration to the deceased's estate were first issued to the 2nd defendant alone on 17/5/2018 and on the basis thereof the instant application was filed; however it became necessary to amend the application when the grant of letters of administration ad litem was amended to include one Pauline Kokita. Part of the amendments to the notice of motion was for the purpose of including the latter as a proposed substitute for the deceased 1st defendant.

14. Ordinarily matters concerning the demise of litigants bring a lot of confusion especially when the proper persons within their families or those who would have otherwise been rightfully expected to apply for letters of administration fail to do so.

15. In the instant case the 2nd defendant failed to take out letters of administration and after the plaintiffs took out letters of administration in her name in May, 2018.

16. It turned out that her co-wife had been left out of the grant of letters of administration.

17. As can be seen from the foregoing the delay that occurred in the substitution proceedings need not be blamed entirely on the plaintiffs since they have demonstrated that they sought a grant of letters ad litem which the 2nd defendant had failed to do.

18. It is noteworthy that this court had on 5/2/2018 observed that the responsibility of obtaining the grant is applicable to all the parties in the litigation.

19. I therefore find that in the circumstances of this case the plaintiffs have demonstrated that they exerted sufficient effort to drive this litigation forward but were bogged down by matters beyond their control in the succession proceedings.

20. Other than delay for which I have found that the plaintiffs have given a proper explanation hereinabove, the other ground upon which the

2nd defendant objects to the application for revival and substitution is that she is already a party in the suit and therefore she cannot substitute the 1st defendant and that there is a conflict of interest between the 1st defendant and herself which cannot allow for such substitution. She also avers that she is not a beneficiary of the estate of the 1st defendant.

21. As to the allegation that she is already a party in the suit and therefore she cannot substitute the deceased defendant, this court notes that she has no alternative having been named as a co-administrator in the limited grant of letters of administration exhibited in the supporting affidavit which she does not deny.

22. As to whether there is a conflict of interest between the 1st defendant and herself which cannot allow for such substitution, I note that this is the plaintiff's case and the letters of administration identify the 2nd defendant as an administrator. The plaintiff has chosen to have her as the co-administrator of the estate of the deceased for reasons that cannot be examined in this suit but which could have been examined in the succession proceedings giving rise to the grant.

23. The third point that the 2nd defendant raises is that she is not a beneficiary of estate of the deceased. However in her replying affidavit she has clearly stated that she is the registered owner of West Pokot/Keringet "A"/4050 which is the subject matter of this suit. Therefore whatever capacity she is enjoined in this suit does not matter, for it appears that the fact of her registration as proprietor of the suit land subject matter herein compels this court to consider her as a necessary party. However since the 1st defendant who had been sued is now deceased and she has been named as an administrator to his estate I find that it is necessary for her to be enjoined in that capacity too alongside her co-administrator.

24. For the above reasons I find that the amended notice of motion dated 25/6/2019 has merit and I grant it in terms of prayer nos. (1), (2) (3), (4) and (5) thereof. The amended plaint showing the details of substitution as allowed shall be filed and served within 14 days of this order.

Dated, signed and delivered at Kitale on this 28th day of October, 2019.

MWANGI NJOROGE

JUDGE

28/10/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Nyakundi holding for respondent

Mr. Ingosi for applicant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

28/10/2019