



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ELC CASE NO. 403 OF 2017
(formerly Nairobi HCCC NO. 2304 of 1995 (OS))

PAUL KINYANJUI WARUINGI (Deceased)

GRACE NYOKABI MARIPET

TOM KAAPE WARUINGI

BERNARD CHEGE WARUINGI

MERGERY WANGUI KABUYA.....PLAINTIFFS

VERSUS

PUBLIC TRUSTEE (Sued as the representative of the estate of

MOHAMED ALI WEID).....DEFENDANT

RULING

The application for determination is the Applicants' Notice of Motion dated 31st March, 2011 brought pursuant to Order L Rule 1, Order XLIX Rule 5 and XXIII rule 4 (1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. The Plaintiffs seek the following orders:

1. That this Honourable Court be pleased to enlarge time within which to file this application.
2. That this Honourable Court be pleased to substitute the name of the Plaintiff hereinabove with GRACE NYOKABI MARIPET, TOM KAAPE WARUINGI, BERNARD CHEGE WARUINGI and MERGERY WANGUI KABUYA, the Administrators of the Plaintiff's estate.
3. That the costs of this application be in the cause.

The application is based on the following grounds which in summary is that the Plaintiff is deceased, the suit is still pending and the applicants were granted Letters of Administration intestate on 12th November, 2009.

The application is supported by the affidavit and further affidavit of BERNARD CHEGE WARUINGI one of the Applicants herein, where he deposes that he is one of the Administrators of the estate of PAUL KINYANJUI WARUINGI who was the Plaintiff herein. He avers that the Plaintiff herein passed away on

6th June, 2003 and they were issued with Letters of Administration intestate on 12th November, 2009. He claims they are interested in pursuing this suit to conclusion and that their previous advocate J. NJENGA NJAU is deceased and his files were taken over by messrs J. NGAI GIKONYO & Co. Advocates. Further that messrs J. NGAI GIKONYO & C. Advocates had failed to take further steps in this case and they then instructed messrs. O. T. NGWIRI & CO. Advocates to take over conduct of this case and this made them not file the application within the stipulated time.

He reiterates that the firm of O.T NGWIRI & Co. Advocates filed the instant motion as they were then on record representing the Plaintiff but the sole partner within the said firm Obadiah Thiongo Ngwiri died on 23rd November, 2012 when the application had not been set down for hearing. He confirms that after the death of Obadiah Thiongo Ngwiri his files were taken over by the firm of messrs WAWERU MUNYI & Co. Advocates including the Plaintiff's file. Further that with his brother TOM KAAPE WARUINGI they issued further instructions to the said firm. Further that the matter was set down for hearing on 17th December, 2013 but Mr. Munyi became unavailable after being furnished with all the prerequisite documents culminating in the Applicants instructing the firm of NDUNGU GITHUKA & CO., Advocates to take over the conduct of the matter. He contends that the firm of messrs WAWERU MUNYI & Co. Advocates did not prosecute the application to substitute the Plaintiff first before seeking to set the suit for hearing. Further that the delay to substitute the deceased Plaintiff with the Administrators is not attributable to the applicants. He reaffirms that in the interest of justice, fairness and equity, the consequences of the misfortunes, default, faults and errors of the Advocates who have been engaged in this matter in the past, ought not to be visited upon them as they deserve a chance to substitute the Plaintiff so that they get an opportunity to prosecute the Originating Summons filed hereon on 20th July, 1995.

The Public Trustee was served but did not file any response to oppose the instant application.

On 5th December, 2017 the Counsel for the Applicants Mr. Githuka submitted on the application and reiterated the facts as presented above. He stated that the Applicants had been on the suit property since 1968 and sought for enlargement of time to substitute the Plaintiff to enable them proceed with the instant Originating Summons (OS).

Ms. Kanogo who was Counsel for the Respondent stated that they did not oppose the application for enlargement of time to substitute the Plaintiff with the Applicants.

Analysis and Determination

Upon perusal of Notice of Motion dated 31st March, 2011 including the supporting affidavit as well as the further affidavit, the only issue for determination is whether the Court should enlarge time for the Applicants to substitute the Plaintiff in this suit.

I note that the Respondent did not file any response to the application and its Counsel expressly stated that they did not oppose it.

Section 95 of the **Civil Procedure Act** provides as follows: ' **Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.**'

Order 50 Rule 6 of the **Civil Procedure Rules** stipulates that: '**Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.**'

I note the Originating Summons raises weighty issues on adverse possession which ought to be heard and determined on merit. Based on the facts above, and the fact that two advocates passed on including the Plaintiff and the firm of messrs WAWERU MUNYI & Company failed to set the instant application for hearing, I find that mistake to Counsel cannot be visited upon the Applicants. Further in the circumstances, I find that in the interest of justice, it is pertinent for the Applicants to substitute the Plaintiff and proceed with the OS on its merits.

It is against the foregoing and in relying on Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules that I allow the Applicants Notice of Motion dated the 31st March, 2011. The Applicants are directed to set the suit down for hearing within the next sixty (60) days from the date hereof.

Dated signed and delivered in open court at Kajiado this 24th day of January, 2018.

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Githuka for Applicant

Ms Ramogo for Public Trustee