



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1389 OF 2014

(Formerly Nairobi High Court Misc. Application No. 1273 of 2002 (OS))

KAMUOHO NGETHE.....PLAINTIFF

=VERSUS=

SAMSON MWANGI NGERU.....1ST DEFENDANT

BARCLAYS BANK OF KENYA LTD.....2ND DEFENDANT

LAND REGISTRAR, KIAMBU DISTRICT.....3RD DEFENDANT

R U L I N G

1. On 5/11/2002, Kamuoho Ngethe (now deceased) took out an Originating Summons seeking the following declarations and orders:

- (a) A declaration that the applicant has been in continuous and uninterrupted occupation of half portion of the suit land for more than 12 years.
- (b) A declaration that Land Parcel Number Ndumberi/ Ndumberi/T 765 was registered in the name of George Mungai Ngethe to hold in trust for himself and the Applicant.
- (c) A declaration that the transfer of Land Parcel Number Ndumberi/Ndumberi/T765 to the 2nd Respondent by George Mungai Ngethe was fraudulent.
- (d) A declaration that the applicant has acquired prescriptive rights to ½ portion of Land Parcel Number Ndumberi/Ndumberi/T 765.
- (e) A declaration that the applicant is entitled to be registered as owner and or proprietor of half portion of Land Parcel Number Ndumberi/Ndumberi/T765.
- (f) An order directing the 3rd Respondent to sub-divide Land Parcel Number/Ndumberi/Ndumberi/T765.
- (g) An order directing the 3rd Respondent to issue a title document in favour of the Applicant for half portion of Ndumberi/Ndumberi/T765 into two equal portions.
- (h) An order restraining the 1st and 2nd respondents either by themselves, their agents, servants, officers and or any other persons and or authority connected therewith from trespassing or selling, transferring, alienating or in any other manner interfering with Land Parcel Number

2. Kamuoho Ngethe died on 26/8/2005 and he was substituted with his personal representative, Mary Wanjiku Kamuoho, vide a consent dated 15/6/2006 and adopted by the court on 18/8/2006.
3. Mary Wanjiku Kamuoho too died on 20/12/2008. Eight years later, Jane Njambi Kamuoho, a daughter to the late Mary Wanjiku Kamuoho, brought a Notice of Motion dated 13/3/2017, seeking substitution and revival of this suit. That application is the subject of this ruling. The application is vehemently opposed by the 1st and 2nd defendants.
4. The applicant concedes that this suit abated in December 2009. She attributes the delay in bringing the application for substitution and revival to financial constraints. While making oral submissions, counsel for the applicant attributed the delay to the demise of the plaintiff's previous advocate but he was not able to name the alleged advocate. The applicant relies on the decision of **Rosemary Wanjiru Kungu Vs Elijah Macharia Githinji & Another (2014) eKLR** and urges the court to exercise its discretion under Article 159(2) (d) of the Constitution to override Order 24 Rule 7 of the Civil Procedure Rules and grant the prayers sought.
5. The 1st defendant in opposing the application contends that the original plaintiff died in 2005 and was substituted with Mary Wanjiku in 2006. She in turn died on 20/2/2008. The 1st defendant contends that it has taken the applicant inordinately long to bring the present application. Secondly, the 1st defendant adds that there is no evidence that the plaintiff's previous advocate passed on. Thirdly, there is no evidence of any effort made to retrieve the file from the unnamed deceased advocate's firm. The 1st defendant contends that the estate of the deceased original plaintiff has been indolent and the delay is unjustified and inexcusable. He urges the court to reject the application.
6. The 2nd defendant too opposes the application. It contends that the delay in bringing proceedings for substitution and/or revival is inordinate, inexcusable and has not been explained. He relies on Order 24 rules 3 (2) and 7(2) of the Civil Procedure Rules which require administrators of a deceased litigant to supply the court with sufficient cause before an abated suit is revived.

Determination

7. The issue for determination in this application is whether the applicant has satisfied the criteria for grant of an order of substitution and/or revival of an abated suit under Order 24 of the Civil Procedure Rules.
8. The court's power to grant an order of substitution and/or revival is a discretionary one. The discretion is to be exercised judiciously, taking into account all the unique circumstances of the case, guided by the law and the relevant jurisprudential principles.
9. Order 24 rule 3 enjoins an applicant who seeks an order of revival or substitution to tender good reason before the order is granted.
10. In the present suit, the motion seeking revival of the suit was filed on 13/3/2017. The original plaintiff, Kamuoho Ngethe died on 26/8/2005. Mary Wanjiku Kamuoho who came in as a personal representative of the late Kamuoho Ngethe too died on 20/12/2008. No effort was made to effect substitution or bring revival proceedings for a period of more than 8 years. The unsubstantiated reason presented for the inordinate delay is that the then advocate on record passed on and the applicant was facing financial constraints. The allegations about a deceased advocate were made from the bar during oral submissions. Counsel was not able to name the deceased advocate or tell the court when that advocate died. The affidavit in support of the application did not allude to the alleged demise of an advocate involved in this suit. From the court record, the plaintiffs were represented by the firm of Kariuki Muigua & Co. Advocates. The applicant's current advocates, Kimani Kagwima & Co. Advocates, filed a notice of change of advocates on 13/4/2017, replacing the firm of Muigua Kariuki & Co. Advocates.

11. Similarly no evidence was tendered to support allegations of financial constraints.

12. In light of the foregoing, I am not satisfied the applicant has been candid in alleging that the inordinate delay was caused by the demise of a previous advocate and/or financial constraints. I am therefore not satisfied the applicant has met the requirements of Order 24 of the Civil Procedure Rules which enjoin the applicant to present to the court a good reason before a substitution or revival order is granted. Indeed, the Court of Appeal emphasized this criteria in **Said Sweilem Gheithan Saanum V Commissioner of Lands (being sued through Attorney General) & 5 others (2015) eKLR.**

13. Even if the applicant had satisfied the above criteria, or even if she had sought substitution within the 12 months during which the suit of the deceased plaintiff remained alive, the applicant would still have had to surmount challenges of *locus standi*. I say so because the Grant of Letters of Administration annexed to the supporting affidavit attached to the Notice of Motion seeking substitution/rival is in respect of the Estate of the Late Mary Wanjiku Kamuoho. The late Mary Wanjiku Kamuoho's involvement in this suit was as an administrator of the Estate of the late Kamuoho Ngethe. It follows that, for Jane Njambi Kamuoho (applicant) to have *locus standi*, she would need to take out substitution proceedings in **Kiambu Succession Cause No. 6 of 2006; In the Matter of the Estate of Kamuoho Ngethe** and replace Mary Wanjiku Kamuoho as administrator of the Estate of the late Kamuoho Ngethe. Only after she replaces Mary Wanjiku Kamuoho as administrator of the estate of the late Kamuoho Ngethe, will she have locus standi to come into this suit as administrator of the Estate of the late Kamuoho Ngethe. Regrettably, in the present application, she erroneously considers herself to have *locus standi* by virtue of being the administrator of the estate of the late Mary Wanjiku Kamuoho. My understanding of the legal framework in the Law of Succession Act is that, until she is appointed as an administrator of the Estate of Kamuoho Ngethe, she has no *locus standi* in this suit because Mary Wanjiku Kamuoho is not the original plaintiff.

14. The upshot of my findings is that the Notice of Motion dated 13/3/2017 seeking substitution and revival orders under Order 24 of the Civil Procedure Rules lacks merit. The same is dismissed. The 1st and 2nd defendants shall have costs of the Application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF FEBRUARY 2018.

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B M EBOSO

JUDGE

In the presence of:-

Mr. Kimani for the Plaintiff

Mr. Kavagi holding brief for Kimiti for the 1st defendant

Mr. Kavagi holding brief for Chacha Odera for 2nd defendant

Halima - Court clerk