



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC APPEAL NO. 3 OF 2017**

**NAOMI NJERI GITHINJI .....1<sup>ST</sup> APPELLANT**

**WANDERI GITHINJI.....2<sup>ND</sup> APPELLANT**

**JOHN KIMANI GITHINJI.....3<sup>RD</sup> APPELLANT**

**VS**

**JOHN KIMANI KAMAU.....RESPONDENT**

**RULING**

1. The Appellants being aggrieved by the ruling of the Learned Principal Magistrate J.O MAGORI dated 13.6.2012 in PMCC No. 136 of 2009- Kangema and appealed against the entire ruling and raised the following grounds of appeal;

- a. The Learned Magistrate erred in law and in fact for failing to hold that the application was an abuse of the Court process.
- b. The Learned Magistrate erred in law and in fact in ordering an injunction to persons who were not parties to the suit.
- c. The Learned Magistrate erred in law and in ordering the three Respondents to be substituted when he had no capacity to do so as they had not been legally appointed legal representatives of the deceased.
- d. The Learned Magistrate erred in law and in failing to consider the submission made before him by the Respondent's Advocate and as a result failed to grasp the importance of that submission.

2. The Appellant prays for the appeal to be allowed and the ruling of the lower Court be set aside.

3. The appeal was opposed and the Respondent was represented by the firm of J M Kagwi & Co. advocates. The appeal was initially filed at the High Court at Nyeri on 20.03.2013 and later transferred to this Court on 10.02.2017.

4. Parties choose to canvas the appeal by way of written submissions.

**The Appellant's case**

5. The Appellants in their submissions reiterates their submissions before the trial Court in opposition to the application that had been filed by the Respondent herein. It was their submission through counsel before the trial Court that the three Respondents had not been appointed as legal representatives of the estate of the deceased Defendant at the time the application was brought to the trial Court and for that reason they were of the opinion that injunctive orders could not issue against them as they were not parties to the suit. They fault the trial magistrate for finding that under Order 24 rule 5 of the Civil Procedure Rules the Court had power to appoint legal representatives to the estate and going ahead to injunct the three Appellants. The Appellants submit that without them being appointed ad corrigenda bona the trial Court had no powers to proceed to issue any further orders against them. They are of the view that the entire ruling and subsequent orders were an abuse of Court process and have urged this Court to set them aside with costs to the Appellants.

**The Respondent's case**

6. The Respondent submitted that under order 24 rule 5 of the Civil Procedure Rules the Court has powers to determine questions raised in regard to whether any person is a legal representative of a deceased Plaintiff or deceased Defendant. He claims that based on that rule the trial Court addressed the issue of whether the three Appellants were representatives of the deceased Defendant. In opposition to the Appellant's ground of appeal that the trial Court issued injunctive orders against person who were not parties to the suit the Respondent

submits that the trial magistrate first allowed the substitution of the deceased Defendant then proceeded to issue the injunction orders.

7. He further submits that the application before the trial Court was intended to preserve the subject matter of the suit before the trial Court being the land parcel no. LOC. 10/KAHUTI/3787 in which the deceased Defendant would have been buried and he claims there is no other way the burial would have been prevented other than by the orders sought in the said application. He referred the Court to Article 159(2)(d) of the constitution and is of the view that the trial Court did substantial justice by allowing the application and issuing the orders therein. He also submits that in order to obtain a limited grant for substitution of the deceased the Court would have required a death certificate whilst in the instant case the deceased had not been buried and to obtain a death certificate a burial permit is required. He refers to order 51 rule 10(2) which would maybe cure that technicality. He avers that the Appellants did not deny before the trial Court that the Defendant had died and they planned to bury him on the suit land while he had another parcel of land.

8. Further that the Appellants failed to demonstrate they would suffer prejudice if the orders sought were granted. He maintains that the Appellants relied on mere technicalities that did not affect the substance of the application. He also faults the Appellants for failing to bring to the attention of the Court that the deceased Defendant had since been buried. He claims that the trial Court determined the application on merit and never erred either in law or in fact as alleged.

### **Back ground of the Appeal.**

9. The Respondent herein filed suit against Githinji Kamau via a plaint dated 30.09.2009 seeking to evict the Defendant from the suit land parcel no. LOC. 10/KAHUTI/3787 with reasons that the Plaintiff was the registered owner of the suit land but the Defendant used to reside on the suit land before subdivision of LOC. 10/KAHUTI/1639. That after the subdivision the Defendant's house and crops remained on the suit land. That the Defendant had another parcel of land registered in his name LOC. 10/KAHUTI/2039 and the Plaintiff intended to in addition to that transfer to the Defendant parcel no. LOC. 10/KAHUTI/3786 which was registered in the name of the Plaintiff after subdivision of LOC. 10/KAHUTI/1639.

10. It was the Plaintiff's claim that the Defendant had refused to vacate from the suit land. The Defendant had filed a defence claiming not to have been privy to the subdivision of the land and the same was done maliciously by the Plaintiff in order to encroach on his parcel of land. Before the suit was heard the Plaintiff filed the application dated 11.01.2011 brought by way of certificate of urgency in chamber summons under order 39 rule 1,2 and 3 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Rules seeking that the Defendant Respondent be restrained from constructing any structure on the suit land parcel no. LOC. 10/KAHUTI/3787 pending the hearing and determination of the suit.

11. The Defendant opposed the application and filed grounds of opposition. During the pendency of that application the Defendant passed on, on 1.06.2012 and as result of his death the Respondent filed Notice of Motion under Order 24 rule 1 and 5 and Order 40 Rules 1,2,3,4 and 5 of the Civil Procedure Rules seeking;

- a. The Respondents be substituted as Defendants in his case in place of the deceased Defendant
- b. That the Respondents be restrained from burying the remains of Githinji Kamau on the suit land.
- c. That the orders if granted be served upon the OCPB Kahutu police patrol base and the chief Githiga location to ensure compliance.
- d. Costs to be provided.

12. The Respondents opposed the application on grounds that they had not been appointed as the legal representatives of the estate of the deceased and that injunction orders should be issued against them as they were not parties to the suit.

13. The Appellants are widow and sons of Githinji Kamau who the Defendant Respondents in the application was dated 11.01.2011 and the proposed Respondents in the application dated 01.06.2012.

14. The application dated 01.06.2012 was allowed in terms of prayers c, d and e and costs to be in the cause. The trial Magistrate relied on Order 24 rule 5 and Order 51 rule 10(2) of the Civil Procedure Rules and the fact that the dispute on ownership of the suit land had not been resolved in reaching her conclusion

### **Determination**

15. The Appeal is premised on 4 grounds of appeal which have been reduced to 2 issues for determination.

16. As to whether the trial Court erred in law in substituting the Defendant without them being appointed as legal representatives of the estate. Order 24 Rule (3) sub-rule (1) and (2) which provides as follows: -

“24(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.”

17. The position is that a legal representative of the estate must first be appointed before the application for substitution is done. I have not

seen on record any application for appointment of a legal representative. The Applicant's contention was that there was need to preserve the suit property in that regard the appropriate form of legal representation ought to have applied for is that of ad corrigenda bona. I therefore agree with the Appellants that the trial Magistrate erred in law for ordering for substitution of the deceased Defendant by the Appellants herein while they had not been appointed his legal representatives. This is not a mere technicality as contended by the Respondent as it is an express statutory provision that lays down the procedure to be followed in substituting a deceased party to a suit. The appointment of a legal representative gives the appointee locus to be a party to a suit.

18. As to whether injunctive orders were legally issued against the Appellants, having found that the Appellants had not been properly substituted as legal representatives of the deceased it then follows that they were indeed not parties to the suit. In the circumstances injunctive orders could not issue against the Appellants whilst they were not parties to the suit.

19. The Respondent has brought to the attention of the Court that the deceased has since been buried but has not disclosed in which parcel of land his remains were interred.

20. In the end the appeal is allowed and the ruling in the lower Court is set aside. The Respondent to meet the costs of this appeal and that of the application in the lower Court.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20TH DAY OF MARCH 2018.**

**J G KEMEI**

**JUDGE**