



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 417 OF 2014

JOSEPH KIBIRU MBATIA.....PLAINTIFF

=VERSUS=

GICHERU MBATIA & ANOTHER.....DEFENDANTS

=AND=

JENNIFER M GICHERU & 2 OTHERS.....INTERESTED PARTIES

RULING

1. The Plaintiff/Applicant is a brother to the first defendant Gicheru Mbatia (deceased). The applicant had filed this case against the deceased and the second defendant who is said to have purchased a portion of LR No.Dagoretti/Waithaka/508. It is the plaintiff's contention in the suit that the deceased held half of LR No.Dagoretti/Waithaka/508 in trust for him. It is his contention that the deceased sold a portion of that property to the second defendant in order to defraud him of his share.

2. As the suit was pending, the deceased died. The applicant tried to persuade his widow and sons to take out letters of administration but they declined to do so. The deceased died sometime in 2015 and by the time the applicant filed the Notice of Motion dated 5th October 2016, the suit as against the deceased had abated.

3. The applicant now wants the suit against the deceased revived and that the widow of the deceased and her children be compelled to take out letters of administration in respect of the estate of the deceased after which they be enjoined in this suit as representing the estate of the deceased.

4. The applicant tried to take out letters of administration in respect of the estate of the deceased but his efforts were in vain as the Family Division Registry could not accept his documents without a letter from the chief. The area chief had declined to give him a letter because he is not a beneficiary of the estate of the deceased.

5. When I started preparing for the ruling whose ruling date had been fixed for 26th April 2018, I noticed that there was no replying affidavit by the respondents. There were also no submissions by the respondents. I adjourned the ruling and directed the Deputy Registrar to write to the defendants counsel to provide a copy of replying affidavit and their submissions if any were filed. The Deputy Registrar wrote a letter on 30th April 2018. There has been no response to that letter. I assume that no replying affidavit and or submissions were filed and I therefore treat this application as an undefended application.

6. The issues which emerge for determination are firstly whether the suit against the deceased should be revived or not. Secondly whether this court can compel the widow of the deceased and her children to take out letters of administration in respect of the estate of the deceased. Related to the second issue is whether this court can order that once the widow of the deceased and her children have obtained letters of administration , they should be enjoined in this suit

7. Order 24 , Rule 7(2) provides that a plaintiff may apply to revive a suit which had abated if he proves that he was prevented by any sufficient cause from proceeding with the suit. In the instant suit, the plaintiff has sworn an affidavit that the deceased who was his brother died sometime in 2015. He tried to persuade his wife and children to take out letters in respect of the estate of the deceased in vain. He attempted to take out letters by himself but he was not successful as the registry could not accept his documents without a letter from the area chief. These averments by the applicant are not controverted. The widow of the deceased and his children may not be willing to take out letters of administration because that will open them up to being sued in place of the deceased. I find that the applicant has demonstrated that he was prevented from proceedings with this suit because of lack of a legal representative of the deceased defendant. I therefore find that prayer (1) for revival of the suit and extension of time is well founded. I allow the same.

8. On the issue as to whether I should order the deceased's widow and his children to take out letters of administration, I do not think that this court has the jurisdiction to do so. The court with jurisdiction to give such an order is the Family Division of the High Court. The applicant should make an appropriate move to have the deceased's widow and his children to take out letters of administration. I therefore decline to grant prayer (2). In view of the finding in respect of prayer (2), prayer (3) is as well declined. The costs of this application shall be costs in the cause.

9. In summary thereof, it is only prayer (1) of the Notice of Motion dated 5th October 2016 which is allowed. As already stated hereinabove the costs of this application shall be costs in the suit.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 28th day of June 2018.

E.O.OBAGA

JUDGE

In the presence of :-

Mr Maina for applicant

Court Clerk: Hilda

E.O.OBAGA

JUDGE