



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 11 OF 2017 (ORIGINATING SUMMONS)

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT (CHAPTER 22)

AND

IN THE MATTER OF TITLE NO. NGANDORI/KIRIGI/18

BETWEEN

PHINEAS ISAIAH NYAGA.....PLAINTIFF

VERSUS

CHARLES NJAGI IRERI.....DEFENDANT

AND

PETER PHINEHAS MUREITHI.....1ST APPLICANT

SAMUEL P.N. NYAGA.....2ND APPLICANT

VERSUS

MERCY KARIMI alias MERCY

KARIMI MUGAMBI.....RESPONDENT

RULING

1. By a notice of motion dated 29th September 2017, the Applicants sought the following orders;

a. The ruling of this court dated 27th July 2017 and delivered on 27th July 2017 be set aside and/or reviewed.

b. That the dismissal order of 18th September 2002 be set aside.

c. That the Applicants herein Peter Phineas Mureithi and Samuel P. N. Nyaga substitute the Plaintiff herein, Phineas Isaiah Nyaga (deceased)

d. That the Respondent herein, Mercy Karimi alias Mercy Karimi Mugambi substitutes the Defendant herein, Charles Njagi Ireri (deceased).

e. That costs be in the cause.

2. The said application was based upon the grounds shown on the face of the motion and supported by the affidavit of the 1st and 2nd Applicants sworn on 29th September 2017. It was averred in the said affidavit that the suit herein was dismissed on 18th September 2002 for default of attendance by both parties. It was further stated that for several years, neither the parties nor the court noticed the dismissal order

hence no steps were taken to have the said order set aside.

3. The Applicants contended that it would be fair and just to set aside the dismissal order to enable the Applicants to ventilate their claim before the court. They also contended that the Respondent would not suffer any prejudice should the orders sought be granted.

4. The Respondent filed a statement of grounds of opposition dated 8th February 2018 in response to the said application. The Respondent stated that the said application was *res judicata* since the matters raised therein were conclusively determined in the Applicants' earlier application dated 8th November 2013. It was further contended that the Applicants had not met the threshold for review under **Order 45 of the Civil Procedure Rules**; that the Applicants had filed a notice of appeal against the dismissal of the earlier application; and that the instant application was an abuse of the court process.

5. When the said application was listed for hearing on 8th February 2018, the advocates for the parties agreed to canvass it through written submissions. Consequently, the Applicants filed their submissions on 21st February 2018 whereas the Respondent filed hers on 6th June 2018.

6. In their submissions, the Applicants reiterated their case as stated in their notice of motion and supporting affidavit. It was submitted that none of the parties were aware of the dismissal order made on 18th September 2002 hence they continued participating in the suit for another 15 years. It was, therefore, submitted that it would be just to set aside the dismissal order and allow the Applicants to be heard on the merits of the suit.

7. The Applicants relied on the case of **Burhani Decorators & Contractors Vs Morning Foods & Healthy U 2000 Ltd, NBI Civil Appeal No. 604 of 2012 [2014] eKLR** and **Muranga ELC No. 55 of 2017 Allan Kamau Gichuhi v. Samuel Gichuhi Kimani & 2 Others [2017] eKLR** in support of their application.

8. The Respondent, on the other hand, submitted that the instant application was *res judicata* on account of the ruling delivered by this court in respect of an earlier application dated 8th November 2013 for revival of the suit. It was, therefore, contended that the instant application violated the provisions of **section 7 of the Civil Procedure Act (Cap 21)** since the matters directly and substantially in issue were also directly and substantially in issue in the previous application which was conclusively determined by the court. The Respondent relied on the case of **John Florence Maritime Service & Another Vs Cabinet Secretary for Transport & Others [2015] 2 EA 243** on the application of the doctrine of *res judicata* and the public policy considerations upon which it is predicated.

9. The Respondent also submitted that the instant application was an abuse of the court process since the Applicants had also initiated an appeal against the order of this court dismissing their application of 8th November 2013. It was contended that the Applicants ought to have sought a review first before filing a notice of appeal.

10. The Respondent also opposed the said application on the basis that the Applicants had failed to demonstrate any of the grounds for review of an order contemplated under **Order 45 of the Civil Procedure Rules**. It was submitted that no error of law apparent on the face of the record, discovery of a new and important matter, or any other sufficient cause had been demonstrated. The Respondent cited the case of **Muyodi Vs ICDC [2006] 1 EA 243** in support of this submission.

11. The court has considered the Applicants' notice of motion dated 29th September 2017, the grounds of opposition thereto and the respective submissions of the parties. The court has also considered the ruling dated 27th July 2017 on the Applicants' notice of motion dated 8th November 2013.

12. The court is of the view that the following issues arise for determination;

- a. Whether the notice of motion dated 29th September 2017 is *res judicata*.
- b. Whether the said application is an abuse of the process of court.
- c. Whether the Applicants have made out a case for setting aside the dismissal order made on 18th September 2002.
- d. Whether the Applicants have made out a case for review of the ruling dated 27th July 2017.
- e. Whether the Applicants have made out a case for substitution of the deceased parties.
- f. Who shall bear the costs of the application.

13. The court has considered the issue of *res judicata* raised by the Respondent. In the Applicants' notice of motion dated 8th November 2013, they had sought an order for revival of the suit which had abated and for substitution of the deceased parties under the provisions of **Order 24 of the Civil Procedure Rules** (hereinafter the Rules). Vide the ruling dated 27th July 2017, the court held that the suit had not abated but had been dismissed for default of attendance during the lifetime of the Plaintiff. On that account, the court dismissed the said application in its entirety since there was no prayer for setting aside the dismissal order.

14. In the instant application, the Applicants have sought the setting aside of the dismissal order of 18th September 2002 and for substitution of the deceased parties under **Order 12 rule 7, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules and section 3A of the**

Civil Procedure Act. It is, therefore, evident that the issue of setting aside the dismissal order of 18th September 2002 was not directly and substantially in issue in the previous application. It was not canvassed and no final order was made thereon since it was not one of the prayers sought.

15. The court is of the opinion that a party who seeks revival of a suit on the mistaken belief that it had abated is not forever barred from seeking reinstatement of the same suit upon discovery that it was actually dismissed for default of attendance. It may well be the case that the consequential orders sought in the earlier application are the same as the ones sought in the instant one, that is, substitution of the deceased parties, but that cannot trigger the application of the doctrine of *res judicata*. The instant application must be considered as a whole. The court, therefore, finds that the instant application is not *res judicata*.

16. The 2nd issue is whether the instant application is an abuse of the process of court. According to **Black's Law Dictionary (9th Edition)** abuse of process is the improper use of "a legitimately issued court process to obtain a result that is either unlawful or beyond the scope" of the process. According to **Bullen & Leake and Jacobs Precedents of Pleadings (12th Edition)**, a pleading is considered to be an abuse of the court process where it is meant to misuse the machinery or process of the court.

17. The court has considered the instant application. It is the first time that the Applicants are seeking the setting aside of the dismissal order made on 18th September 2002. A party seeking reinstatement of a dismissed suit cannot be said to abuse the court process simply because they had previously sought an order for its revival on the basis of ignorance of material facts.

18. The Respondent also contended that by filing a notice of appeal against the ruling dated 27th July 2018, the Applicants were precluded from filing an application for review under **Order 45 of the Civil Procedure Rules**. The court is of the view that a notice of appeal is a mere expression of intention. A party needs to take further steps as required by the Court of Appeal Rules. A party who files a notice of appeal and does nothing else cannot be said to have a pending appeal. A notice of appeal is only useful under **Order 42 of the Civil Procedure Rules** and the **Court of Appeal Rules** for the purpose of seeking an interim order such as a stay or temporary injunction pending the filing of the appeal at a later stage. The court does not, therefore, find that instant application an abuse of the court process.

19. The 3rd issue is whether the Applicants have made out a case for setting aside the dismissal order dated 18th September 2002. The court has considered the material on record and the circumstances of the case. There is no dispute that the dismissal order was made in default of attendance by both counsels for the parties. In the case of **Burhani Decorators Vs Morning Foods Ltd & Another** (*supra*) the court was faced with an appeal against a refusal by the trial magistrate to reinstate a suit which had been dismissed for default of attendance. The High Court held, upon referring to previous authorities, that the court has discretion to set aside default judgements and default orders in order to do justice between the parties.

20. In the case of **Mbogo & Another Vs Shah [1967] EA 116 at P. 123** it was held, *inter alia*, that;

"...The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice, the motion should be refused."

21. There is no indication on record that the Applicants are seeking to delay or obstruct the course of justice. There is no material on record to indicate that there is any mischief or ulterior motive in seeking the setting aside of the dismissal order. There is also no indication that the Respondent would suffer any prejudice which cannot be put right by an award of costs.

22. In the circumstances, the court is of the opinion that the interest of justice would be better served by setting aside the dismissal order of 18th September 2002 to enable the Applicants to be heard on the merits of the suit. The court will make an appropriate order on costs of the application at the conclusion of this ruling.

23. The 4th issue is whether the Applicants have made out a case for the review of the ruling dated 27th July 2017. The court has considered the material on record and finds that the Applicants have completely failed to demonstrate any of the grounds for review stipulated in **Order 45 of the Rules**. The Applicants have not demonstrated any mistake apparent on the face of the record, or discovery of any new and important matter which was not available when the earlier application for revival of the suit was filed, or any other sufficient reason to warrant a review. The court, therefore, agrees with the Respondent that there is no merit in the application for review even though it does not agree that "any other sufficient cause" in **Order 45 Rule 1** should be construed *ejus dem generis* with the preceding grounds.

24. The 5th issue is whether the Applicants have made out a case for substitution of the deceased parties. The court is aware that the Applicants have previously made a false start by seeking revival of the suit and substitution of the deceased parties. In the court's opinion, that does not prejudice their right to move the court appropriately upon the dismissal order of 18th September 2002 being set aside. As was held in the case of **Burhani Decorators & Contractors Vs Morning Foods Ltd & Another** (*supra*) not every mistake or blunder by an advocate should be visited upon the client. A party should not be driven out of the seat of justice without a hearing on the merits on account of a default by his advocate.

25. In the circumstances of this case, the court is inclined to allow the prayer for substitution of the deceased parties. The court is satisfied from the circumstances of this case that such prayer ought to be allowed to allow the suit to proceed to full hearing.

26. The final issue is on costs of the application. The general rule on costs is that costs shall follow the event. A successful party is thus entitled to costs unless the court, for good reason, directs otherwise. The court is aware that it was the duty of the Applicants' counsel to attend court on 18th September 2002 when the dismissal order was made. The advocate cannot downplay his default by contending that the Respondent's advocate also failed to attend court. The court is of the view that the Applicants should be deprived of costs and instead

ordered to pay the Respondent costs of the application dated 29th September 2017 in the sum of Kshs 5000/-.

27. The upshot of the foregoing is that the Applicants' notice of motion dated 24th September 2017 is hereby allowed in terms of prayers 2, 3 and 4 thereof only. The prayer for review of the ruling dated 27th July 2017 is hereby dismissed. The Applicants shall pay the Respondents costs of the application in the sum of Kshs 5000/-.

28. In view of the circumstances and the age of this suit, the Applicants are hereby directed to take steps to prosecute the suit within the next 90 days in default of which the suit shall stand dismissed for want of prosecution under **Order 17 of the Civil Procedure Rules**.

29. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 26th day of JULY, 2018.

In the presence of Mr. P.N. Mugo holding brief for Mr Ithiga for the Applicants and Mr Mureithi holding brief for Mr. Morris Njage for the Respondent.

Court clerk Mr. Muinde.

Y.M. ANGIMA

JUDGE

26.07.18