



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

PETITION NO.37 OF 2011

KAMAU TICHU & 16 OTHERS.....PETITIONERS

VERSUS

IKERE GITAU.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

THE COMMISSIONER OF LAND.....3RD RESPONDENT

RULING

(Application for revival of an abated suit, substitution of the deceased 1st respondent, and conservatory orders; orders granted for substitution and revival of the abated suit; no conservatory orders issued but petitioners at liberty to seek the same after formally amending the petition to include the substituting parties).

1. The application before me is that dated 12 June 2018 filed by the petitioners. The application seeks two prayers, one is for revival of the suit against the 1st respondent which had abated, and for the substitution of the deceased 1st respondent with four persons namely Stephen Gitau Ikere, Loise Nyokabi Ikere, Lucy Nyokabi Ikere and Samuel Kibaru (or any of them). The second prayer is for restoration of conservatory orders which had been granted to the petitioners but later vacated when the suit was marked as abated.

2. To put the matters into context, this suit was commenced by way of a petition dated 7 December 2011. The petition alleges various violations of fundamental rights and freedoms enshrined in the Constitution of Kenya, 2010, principally the right to property. There are 17 petitioners and it is averred that the 1st petitioner is owner of the land parcel Nyandarua/South Kinangop/430 whereas the 1st respondent is the owner of the land parcel Nyandarua/South Kinangop/431. There was a dispute between the two owners, over the sizes and boundaries of their parcels of land, which was heard and determined by the High Court in the suit Nairobi HCCC No. 395 of 1997. The 1st petitioner lost the case with the court holding that he be evicted from a portion of land of about 30 acres. The other petitioners, I believe, are children of the 1st petitioner. In this petition, the petitioners claim that the judgment in the said matter violated their constitutional rights and have sought orders that the judgment in the case Nairobi HCCC No. 395 of 1997 violates their fundamental rights. They also want orders seeking that the said judgment be quashed as being unconstitutional. They further seek orders restoring their title deed.

3. The petition was filed alongside an application for conservatory orders, and the petitioners did obtain conservatory orders in the first instance, which orders were extended from time to time. The conservatory orders stopped the respondents from interfering with the possession of the petitioners in the properties in dispute. The petition was listed for hearing on 7 November 2016, but it happened that the 1st respondent had died on 15 October of the same year, and the suit was therefore held in abeyance to either await substitution or abatement. No substitution was done within one year as prescribed by the law, and on 22 November 2017, I ordered that the suit has abated against the 1st respondent, and that being the case, I further vacated the interim orders.

4. It will be observed that in this application, the petitioners now want a revival of the abated suit, and a reinstatement of the conservatory orders. They also seek to have the deceased 1st respondent substituted by his administrators. In the supporting affidavit, it is deposed that after the suit abated, Stephen Gitau Ikere, Loise Nyokabi Ikere, Lucy Nyokabi Ikere and Samuel Kibaru Ikere, applied for, and were granted letters of administration over the estate of the deceased 1st respondent. A copy of the grant is annexed to the application and I have seen that the said grant was issued on 3 May 2017 by the Chief Magistrate's Court at Naivasha.

5. Order 24 of the Civil Procedure Rules, can be applied to this petition. The said rule inter alia provides for abatement, substitution and revival of abated suits. For our purposes, rules 8 and 9 are operative. They provide as follows :-

7. *Effect of abatement or dismissal [Order 24, rule 7.]*

(1) *Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.*

(2) *The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.*

6. It will be seen from the above, that the court has discretion to revive an abated suit if the applicant shows that he was prevented by any sufficient cause from continuing the suit. I am persuaded that the applicant has demonstrated sufficient cause, for the 4 named persons, were appointed administrators on 17 May 2017. This application has been filed without undue delay from the appointment of the said persons as administrators.

7. I will thus allow the revival of the abated suit against the 1st respondent and further order that the deceased 1st respondent be substituted with the administrators of his estate, namely, Stephen Gitau Ikere, Loise Nyokabi Ikere, Lucy Nyokabi Ikere and Samuel Kibaru Ikere. I further order that the petition be amended so as to enjoin these 4 persons into the suit.

8. On the prayer for conservatory orders, I am afraid that I am not persuaded to grant the same. If I grant the said conservatory orders at this stage, I will be granting the same ex-parte, without having heard the substituted 1st respondents for at this stage of the proceedings, they are yet formally to be made parties to this suit. I am not persuaded that it will be prudent to grant conservatory orders ex-parte without first giving the 1st respondents an opportunity to be heard. If the petitioners are still keen on filing an application for conservatory orders, they can do so, after they have amended the petition and I will consider it on merits.

9. I make no orders as to costs.

10. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 23rd day of October 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Njugi for the petitioners/applicants.

No appearance for respondents.

Court Assistants : Nelima/Carlton.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU