



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC SUIT NO. 2843 OF 1996

EUNICE WANGUI MUTURI.....PLAINTIFF

=VERSUS=

FRANCIS KAMANDE.....DEFENDANT

PATRICK KAMAU NDETE.....INTERESTED PARTY

RULING

1. This is a ruling in respect of two separate applications brought by the legal representatives of the deceased defendant (applicants).

The first application is dated 27th October 2014, and it seeks the following reliefs:-

a. Spent

b. That Florence Njoki Kamande and Hellen Wanjiku Muchemi do substitute Francis Kamande (Deceased) in this suit.

c. That the Orders issued on 22nd July 2014 be set aside and the application dated 13th March 1997 be reinstated to be heard on merit.

d. That upon grant of the orders of reinstatement of the application the orders that were issued on 13th March 1997 to be enforced.

e. That the costs of this application be provided for.

The second application is the one dated 11th March 2015, and it seeks the following reliefs:-

a. Spent

b. That Florence Njoki Kamade and Hellen Wanjiku Muchemi the legal representatives of the Defendant/Applicant be granted an extension of time for substitution of the defendant/deceased Francis Kamande in the suit.

c. That the costs of this application be in the cause.

2. The history of the two application can be traced from 1995 when one Patrick Kamau Ndete entered into a sale agreement with Francis Kamande Gitau (Deceased) in respect of a property known as LR No. 209/11658 (suit land). The deceased paid a deposit of Kshs.50,000/= and later made a further payment of Kshs.20,000/= leaving a balance of Kshs.20,000/= . It would appear that before the deceased could clear the balance, the vendor entered into another agreement with Eunice Wangui Muturi, the Respondent in these two applications.

3. The deceased wrote to the vendor asking him to collect the balance of kshs.20,000/= from the offices of his lawyer but the vendor could not do so. The deceased was forced to file a suit against the vendor in Nairobi Chief Magistrates Court Civil case No. 454 of 1996. As the case between the deceased and the vendor Patrick Kamande Ndete went on, the vendor proceeded to transfer the suit land to the Respondent herein.

4. The Respondent having had the suit land transferred to her went on to file the present suit against the deceased in which she sought for injunctive orders and demolition of structures on the suit land. The Respondent then filed an amended chamber summons which was filed in Court on 28th January 1997 which among other prayers sought for orders of demolition of structures which were on the suit land. The application was placed before justice (RTD) Mbito who having been satisfied that there was proper service granted the application as prayed.

5. The Respondent's advocates then moved to court and obtained orders of demolition of the structures on the suit land by a court bailiff under supervision of the O.C.S , O C P D , Pangani Police Station as well as the area Chief Kasarani . The orders were given on 20th February 1997. The Court bailiff moved to execute the court orders prompting the deceased's advocate to file an application dated 13th March 1997 in which the deceased sought review of the orders of 20th February 1997 including stay orders among other prayers. The deceased obtained stay orders and the application of 13th march 1997 came up for inter-partes hearing but the same could not proceed for one reason or the other.

6. The Respondent's advocates filed a Notice of Motion dated 3rd June 2014 and filed in Court on 4th June 2014 in which she sought dismissal of the deceased's application dated 13th March 1997 for want of prosecution . Hearing notice for the application was duly served upon the deceased's advocates who never attended court for hearing. The hearing of that application proceeded ex-parte and was allowed on 17th July 2014 in a brief ruling delivered immediately after the Respondent's lawyer finished submitting. This is what triggered the present applications.

7. The applicants contend that they were not aware that the deceased had been sued in the present suit. That they were only aware of the case in the lower Court which was heard to conclusion and judgement given in favour of the deceased. That though the lawyer for the deceased in this case as well as the one in the lower court was the same, he did not inform them that the deceased had another suit against him in the High Court.

8. The applicants blame their erstwhile Advocate and plead that their lawyer's negligence should not be visited upon them and that the deceased should not lose his property because of negligence by the advocate who did not inform them of the existence of the present suit. The applicants also contend that when their present advocates perused the court file, they realised that the Respondent's advocates had filed an application for dismissal of the application dated 13th March 1997 for what of prosecution. The application was served upon their erstwhile advocate who received the hearing notice under protest but that when the matter came up for hearing, the hearing proceeded and the application of 13th March 1997 was dismissed for want of prosecution.

9. The applicants further argue that the Respondent proceeded with the application for dismissal when the deceased had already died and that therefore the orders arising from that application are null and void.

10. The Respondent opposed the two applications based on the replying affidavit sworn on 25th February

2015,` and 10th April 2015 respectively. The Respondent contends that the applicants' application is bad in law, incompetent and is an abuse of the process of the law. That the deceased trespassed on to the suit land and she moved the court which issued demolition orders. The deceased filed an application for stay but never prosecuted it. The Respondent thereafter applied for its dismissal. The hearing notice was duly served but the deceased's lawyer did not attend court and the same was allowed.

11. The Respondent further contends that she had every right to move and have the application filed by the deceased dismissed. That the demolition orders were lawfully given and that the applicants claim that she moved to demolish the structures on the suit land illegally is unfounded. That the applicants are only intent on delaying the case so as to perpetuate the applicants' interference with the suit land.

12. The Respondent further contends that the applicants' claim that they did not know of this suit is not true as the deceased was represented by the same advocate in both the lower court case and the High court case. That there is no explanation given why the applicants who obtained letters of administration in respect of the estate of the deceased did not move to revive the suit in time. The grant of representation was confirmed on 26th July 2004.

13. I have considered the applicants application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties herein. The applicants are seeking setting aside of the orders issued on 22nd July 2014 and reinstatement of the application dated 13th March 1997. They also seek to be allowed to be substituted as legal representatives of the deceased. I will first begin with the issue of whether the orders issued on 22nd July 2014 should be set aside and the application of 13th March 1997 reinstated.

14. The Orders which were issued on 22nd July 2014 were given on 17th July 2014. These are the orders which dismissed the application of 13th March 1997. The question of whether to set aside an order or not is an exercise of discretion which should be based on sound legal principles governing the exercise of such discretion. The principles for exercise of discretion in setting aside an ex-parte judgement are the same for setting aside ex-parte proceedings resulting in orders just as in this case. In the Court of Appeal at Nairobi in Civil Appeal No. 181 of 1994 between **Njagi Kanyunguti alias Kiringi Kanyunguti & 4 others** and **David Njeru Njogu**, the Court of Appeal had this to say regarding exercise of discretionary jurisdiction ;-

“ The discretion being judicial is exercised on the basis of evidence and sound legal principles. The Court's discretion is wide, provided it is exercised judicially (see Pithon Waweru Maina Vs Thuku Mugiria (Civil appeal No. 27 of 1982) (unreported) , Patel vs E A Cargo Handling Services Ltd 1974 (EA 75). The Court is ,also enjoined to consider all the circumstances of the case both before and after the judgement being challenged before coming to a decision whether or not to vacate the judgement”.

15. In the instant case, the application which was dismissed for want of prosecution was filed on 13th March 1997 . It sought the following reliefs:-

i. That the Court be pleased to review and set aside its orders dated 20th February 1997.

ii. That there be a stay of execution pending interpartes hearing of the application herein.

iii. That the Court do stay the matter herein pending the hearing and determination of RMCC 454 of 1996.

iv. That in the alternative, the court do order the transfer and consolidation of the matter herein with RMCC 453 of 1996.

v. That the costs be in the cause.

16. The deceased's advocate obtained stay orders pending inter-partes hearing. The stay orders were obtained on 14th March 1997. The application was last in Court on 12th February 1999. The deceased's advocate applied for adjournment to go and re-consider the facts and issues regarding the application. It is apparent that the deceased's Advocate chose to apply for adjournment to reconsider the application for a good reason. This is because most, if not all prayers in that application had been over taken by events.

17. Judgement in the lower court case was delivered on 1st April 1998. This effectively rendered prayer (2) and (3) obsolete. The Lower Court case had been heard to conclusion and as such there could be no consolidation with the present case. Prayer (1) was seeking review and setting aside of the court's order of 20th February 1997. The orders which were given on this date were directing the OCS , OCPD and chief of Kasarani to supervise the court bailiff demolish the structures on the suit land. The mentioned officers complied with the court order and supervised the demolition of the structures. It will therefore serve no purpose even if those orders were to be set aside. The court's orders had been complied with and structures on the suit land demolished. There was actually nothing to stay. This explains why the deceased's Advocate opted to abandon the application which was later dismissed for want of prosecution.

18. The deceased's advocates had been properly served with a hearing notice for the application for dismissal. They did not attend court. The court went ahead to dismiss the application dated 13th March 1997. Receiving a hearing notice under protest is no ground for a court to adjourn a matter. The judge took all the circumstances into account before dismissing the application through a ruling delivered on the spot. I have already explained in detail herein above the futility of reinstating the application of 13th March 1997, for hearing. I therefore find that there are no grounds for setting aside the orders which were given on 22nd July 2014, as to do so will be giving life to an application which has no value to add to this case.

19. I now turn to the issue of whether or not to allow substitution of the deceased by his legal representatives. **Order 24 Rule 4 (1)** of the Civil Procedure Rules provides as follows:-

“Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.”.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant”.

20. The deceased died on 15th April 2003. The applicants obtained certificate of confirmation of grant in respect of the deceased's estate on 26th July 2004. As per the law the suit against the deceased abated one year after his demise. The application for substitution was made over 10 years after the suit abated. Just like in a case of a plaintiff where an application is made to revive a suit which has abated, an application seeking to substitute a defendant where a suit against him has abated has to provide sufficient reasons why such application was not made within one year. In the instant case, the applicants obtained a confirmed grant on 26th July 2004. This means that the letter of administration must have been obtained within one year of the demise of the deceased.

21. The applicants' only reason why they did not apply for substitution is that they did not know of the existence of this suit. They say that they only knew about the case in the lower court. This cannot be true because the advocate for the deceased in both the case in the lower court and the present one was the same. During the hearing of the lower court case, it was an open secret that the suit land had already been sold to a third party who is the Respondent herein. There were attempts to have the present case stayed pending the conclusion of the lower court case but this was not possible as the deceased's advocate did not pursue the application which sought those orders. There was even demolition of structures built by the deceased. The applicant cannot claim that they were unaware of this case in the face of all these developments where the deceased was represented by the same advocate. The applicants are simply

choosing to know one case for obvious reasons that a judgement had been entered in favour of the deceased.

22. For all the years that this case has been in court, the deceased seemed not to have filed any defence to the Respondent's claim. This case was filed over two decades ago. Public policy demands that litigation has to come to an end. The applicants did not bother to come into this suit despite knowing of its existence. If they are blaming their erstwhile lawyers, they are free to pursue them for professional negligence. It would not serve any purpose if the applicants were to be allowed to come into this suit this late when no good explanation is given why they did not do so within the required time. I proceed to dismiss the two applications with costs to the Respondents.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* on this *31st* day of *July, 2017*

E.O.OBAGA

JUDGE

In the absence of parties who were duly notified of the date and time of delivery of ruling.

Court Assistant: Hilda

E.O.OBAGA.

JUDGE