



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 11 OF 2017

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

AND

IN THE MATTER OF TITLE NUMBER NGANDORI/KIRIGI/18

BETWEEN

PHINEAS ISAIAH NYAGA.....PLAINTIFF

VERSUS

CHARLES NJAGI IRERI.....DEFENDANT

AND

PETER PHINEHAS MUREITHI

SAMUEL P.N. NYAGA.....APPLICANTS

VERSUS

MERCY KARIMI Alias MERCY KARIMI MUGAMBI.....RESPONDENT

RULING

1. By a notice of motion dated 8th November 2013 the Applicants sought an order for revival of the Plaintiff's suit which had abated. They also sought an order for substitution of the deceased Plaintiff and the deceased Defendant with their respective personal representatives.
2. The grounds upon which the application was based were that the Plaintiff and Defendant were brothers who died before the suit was determined, that the current personal representative of the Plaintiff was issued with letters of administration on 24th April, 2012; and that the Applicants became aware of the appointment of the Defendant's personal representative in October, 2013.
3. The said application was supported by an affidavit sworn jointly by the Applicants on 8th November 2013 affirming that both the Plaintiff and the Defendants were deceased. They exhibited copies of the relevant death certificates, letters of administration and copies of some medical records in support of the said application.

4. The said application was opposed by Morris Njage & Co Advocates for the Respondent who appears to be the personal representative of the deceased Defendant. He filed both grounds of opposition and a replying affidavit. It was stated in the grounds of opposition that this suit was dismissed on 18th September 2002 for non-attendance by both parties with no order as costs. It was further stated that no cause of action survived the deceased parties because the suit was dismissed during their lifetime. The Respondent further opposed the application on account of laches and delay.

5. When the parties' advocates appeared before me for hearing of the said application on 8th March 2017, they agreed to dispose the same through written submissions. Consequently, the Applicants filed their written submissions on 21st March 2017 whereas the Respondent filed hers on 10th May 2017. The application was thereafter fixed for ruling on 27th July 2017.

6. The Applicants submitted that even though the suit was dismissed on 18th September 2002 for non attendance of both the Plaintiff and the Defendant, the file continued being active for about 15 years thereafter without objection from the court or any of the parties. It was suggested that the dismissal order may have been set aside along the way even though the record does not indicate so. It was also submitted that the proceedings between 18th September 2002 and 3rd June 2003 could be missing and that the court may have reviewed the dismissal order during that period.

7. It was further submitted by the Applicants that land cases are very emotive and that parties should be allowed to ventilate their disputes to their logical conclusion. They therefore urged the court to allow the application for revival of the suit and substitution of parties.

8. In response to the Applicants' submissions, the Respondent's counsel simply reiterated and expounded upon the grounds raised in the grounds of opposition. He submitted that no suit ever abated and that there was nothing to revive. He further submitted that the order for dismissal of the suit made on 18th September 2002 was made when both litigants in the suit were still alive hence by the time they died several years later, there was no cause of action which survived them. It was further submitted that the Applicants had not explored the remedy provided under **Order 12 Rule 7 of the Civil Procedure Rules** which provides for setting aside of a dismissal order upon application by an aggrieved party. The Respondent also submitted that there was undue delay in filing the instant application.

8. The issues in the instant application are quite clear. The first is whether the suit between the Plaintiff and the Defendant ever abated. The second is whether the Applicants have made out a case for revival of the suit. The third is whether the Applicants are entitled to the order for substitution of the deceased parties.

9. The court has perused the court record and noted that it is not in excellent condition. However, the handwritten proceedings are well paginated and there is a record of the suit having been dismissed by Hon Justice D.M. Rimita on 18th September 2002 in the absence of both parties. This appears on folio 15 of the record of proceedings. The said folio also shows that on 11th December 2002, barely 3 months later, the Plaintiff's advocate took a hearing date for hearing of the originating summons on 3rd and 4th June 2003.

10. The record further shows that the suit was listed for hearing on 3rd June 2003 before Hon Justice Githinji (as he then was) when the matter was adjourned at the instance of the Plaintiff's counsel. The coram for 3rd June 2003 was recorded in the succeeding folio No. 16. The rest of the folios are consecutively numbered all the way to folio 31 which was recorded on 15th June 2017. In my assessment, there is no possibility of any handwritten folio having gone missing in the course of the proceedings. There is also no application on record for setting aside of the dismissal order.

11. In my opinion, the order of dismissal made on 18th September 2002 during the lifetime of the parties still stands. It cannot simply be ignored or wished away. It shall have the force of law until and unless it is reviewed, varied or set aside. The fact that further proceedings took place without objection from any

party cannot wipe away the dismissal order. I think the only reason why further proceedings continued without objection by the parties is that both of them were absent when the dismissal order was made. So it is quite possible that they were unaware of it for a long time. The Plaintiff's counsel may also have been unaware of it when she fixed the suit for hearing at the registry on 11th December 2002.

12. The court is therefore of the view that the Plaintiff's suit did not abate under the provisions of **Order 24 of the Civil Procedure Rules** a year after the death of the Plaintiff or the Defendant, but that it stood dismissed on 18th September 2002. The answer to the first question is therefore in the negative.

13. The answer to the second issue really depends upon the determination on the first one. In view of my holding on the first issue, it follows that the Applicants are not entitled to an order for revival of the suit since there was no abatement in the first instance. The Applicant's remedy may lie in making an application for both setting aside of the dismissal order and for substitution of the deceased parties.

14. The answer to the third issue is also dependent upon the answers to the first and second issues. Given that both those questions have been answered in the negative, it would follow that the answer to the third question is also in the negative. A substitution of the deceased parties cannot be granted before reinstatement of the dismissed suit. There being no application before me for setting aside the dismissal order, I shall not consider the same.

15. The upshot of the foregoing is that the court finds no merit in the Applicant's notice of motion dated 8th November 2013 and the same is hereby dismissed. There shall be no order as to costs since the parties appear to be family members.

16. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **27th** day of **JULY, 2017**

In the presence of Ms Muriuki holding brief for Mr Ithiga for the Plaintiff and in the absence of the Defendant.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

27.07.17