REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 566 OF 2014

(Formerly Nyeri HCC NO. 86 OF 1996)

NG'ANG'A MATHENGE.....PLAINTIFF/APPLICANT

-VERSUS-

JOHN NDIRANGU MAINA.....1ST DEFENDANT/RESPONDENT

MUHOTETU FARMERS CO. LTD.....2ND DEFENDANT/RESPONDENT

RULING

Introduction

1. Ng'ang'a Mathenge (hereinafter referred to as the applicant) brought the suit herein seeking judgment against the defendants jointly and severally for:-

a) **An order for rectification of the register in respect of title number Gituamba Muhotetu Block 2/944 by cancelling and deleting the name of the first defendant in title number Gituamba Muhotetu Block 2/944 and replacing and/or substitution of his name;**

b) **Alternatively an order directing the 1st defendant to transfer the aforementioned parcel of land, Gituamba Muhotetu Block 2/944 to him**

c) **An order to the effect that the 1st defendant holds the aforesaid parcel of land, Gituamba Muhotetu Block 2/944 in trust for him**

d) **General damages for conversion and trespass**

e) **Mesne profits from the date of occupation until vacant possession.**

2. The plaintiff who claims to be entitled to the parcel of land known as Gituamba/Muhotetu Block 2/944 (hereinafter referred to as the suit property) claims that the 1st defendant obtained title to the suit property by fraud. In this regard he claims that the Chairman of the 2nd defendant and the 1st defendant while fully aware that the suit property had been allocated to him, without his knowledge fraudulently transferred it to the 1st defendant.

3. On 9th July, 1998 by consent of the advocates for the parties the dispute herein was referred to Ngarua District Land Disputes Tribunal for Arbitration. Despite the Tribunal having made its award, it appears that the award was not brought to the High Court for adoption. Consequently, the plaintiff filed the notice of motion dated 3rd January 2003 urging the court to call for the award which had erroneously been filed before the Nyeri Senior Resident Magistrate's Court.

4. Before that application could be heard and determined, the 1st defendant passed on and was not substituted until 19th January, 2015 when by consent of the parties, the 1st defendant was substituted with Ekira Muthoni Ndirangu, one of the legal representatives of the estate of the deceased.

5. The record before me shows that on 23rd March 2007 the court on its own motion dismissed the suit herein for want of prosecution.

Application for review or setting aside the order made on 23rd March, 2015

6. On 28th September, 2010, the applicant brought the motion dated 27th September, 2010 urging the court to review or set aside the order made on 23rd March, 2007 dismissing this suit for want of prosecution. In effect, the applicant urges the court to reinstate the suit.

7. The application is premised on the grounds that there existed orders barring the plaintiff from listing the suit until the 1st defendant had been substituted, that he encountered challenges in getting the 1st defendant substituted and that dismissal of the suit was done by the court *suo moto* yet they were not notified. It is the applicant's case that unless the suit is reinstated he will suffer irreparable injury.

8. In reply and opposition to the application, the Secretary of the 2nd defendant, William Gathecha Nguyo, vide the replying affidavit he swore on 5th December, 2012 has deposed that no good reasons have been given to warrant issuance of the orders sought; that the applicant was not keen in prosecuting the matter and that the delay in bringing the application for reinstatement of the suit is inordinate (a delay of more than three years). Arguing that the application is improperly before court and lacking in merit, the 2nd defendant urges the court to dismiss it.

9. When the matter came up for hearing, counsel for the applicant reiterated the averments contained in the affidavits sworn in support of the application and submitted that the applicant has made up a case for being granted the orders sought.

10. With regard to the contention that there was inordinate delay in prosecution of the suit and in bringing the application for reinstatement of the suit, he attributed the delay to challenges in getting the 1st respondent substituted and the fact that the parties were not notified about the dismissal of the suit.

11. Arguing that justice demands that parties be accorded fair hearing, he urged the court to allow the application.

12. Counsel for the 2nd respondent, Mr. Warutere, reiterated the 2nd respondent's contention that no sufficient grounds have been demonstrated to warrant issuance of the orders sought. Terming the delay in substitution of the 1st defendant and in lodging the application for reinstatement of the suit inordinate, he maintained that the applicant was indolent and as such not deserving any equitable remedy.

13. In a rejoinder, counsel for the applicant reiterated that there were challenges in substituting the 1st defendant. In this regard he pointed out that grant of letters of administration in respect of the estate of the 1st defendant were not obtained until 23rd November, 2013 and that the applicant promptly filed the application for substitution following issuance of the orders.

Analysis and determination

14. From the brief historical background of this case, I gather that there are a number of reasons that prevented the parties from prosecuting the case. For instance, the parties had by consent agreed to refer the matter for Arbitration. The court record shows that arbitration was done but the award was never returned to the court for adoption. This was so because; the award was filed with the wrong court. That anomaly necessitated filing of an application to call for the award.

15. Before the application calling for the award was heard, the 1st defendant passed on.

16. According to the applicant, despite having made efforts to get the 1st defendant to get substituted, because of lack of cooperation from the 1st defendant's successors in claim, he was unable to proceed with the suit. The applicant explains that the court had barred listing of the matter unless and until the 1st defendant had been substituted. Besides, the aforementioned challenges, it is pointed that the order of dismissal was made by the court *suo moto* (without recourse to the parties). For that reason, it took the applicant some time to get to know that the suit was dismissed for want of prosecution.

17. Whereas the 2nd respondent contends that no sufficient grounds have been demonstrated to warrant issuance of the orders sought, I note that none of the respondents has countered the explanation offered by the applicant.

18. In the absence of any evidence capable of making me disbelieve the explanation offered by the applicant, I find the delay in prosecution of the suit to be properly accounted for. I say so because there is no way the applicant would have continued with the suit in the absence of representation of the 1st defendant who, in my view, was a critical party in this suit. There being no evidence that the parties were notified of the dismissal of the suit either before or after the suit was dismissed, I am equally satisfied that the delay in filing the application for revival of the suit has been properly accounted for.

19. Concerning the contention that the application is not proper, I note that the 2nd respondent has not given any grounds or reasons in support of that contention. Be that as it may, conscious of the fact that the case against the 1st defendant abated by operation of law one year after he passed on without being substituted; and there being no evidence that the suit against the 1st defendant was revived, I find and hold that granting the orders hereto will be of no effect to the case against the 1st defendant. In this regard see the case of **Wallace Kinuthia v Anthony Nd'ung'u Muongi & 3 others [2013] eKLR where it was held:-**

> "**Order 24, Rule 4 of the Civil Procedure Rules provides the procedure to be followed in the case of death of one of several Defendants or of the sole Defendant. It states that:**
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> > **"4. (1) 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.**
> >
> > **(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.**
> >
> > **(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant."**
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> **It is clear from the said provisions that a suit abates by operation of the law when no substitution is made within one year on the death of a Defendant… The effect of a suit that has abated is that it ceases to exist in law. Black's Law Dictionary defines abatement as "the suspension or defeat of a pending action for a reason unrelated to the merits of the claim". I am also persuaded by the ruling in Kenya Farmers Cooperative Union Limited vs Charles**

Murgor (Deceased) T/A Kaptabei Coffee Estate, (2005) e KLR that in such an event the court has no jurisdiction to hear and determine a suit that has abated, until its revival as provided by law. Waweru J. stated as follows in the cited case:

"But it is really a matter that goes to the jurisdiction of the court. Does the court have jurisdiction to order substitution (except in an application to revive the suit) where the suit has already abated by operation of the law? Obviously not. Does the court have jurisdiction to hear and determine a suit that has already abated by operation of the law? Certainly not. If a suit has abated it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time."

It is therefore my finding that as at 22nd January 2013 when the *ex parte* orders were granted as to substitution of the Defendant, the suit against the Defendant had abated and had not been revived. There was thus an error of jurisdiction on the part of the court, and the 1st, 2nd and 3rd Defendants' preliminary objection is found to have merit…"

20. There being no suit against the 1st defendant on which the application for substitution of the 1st defendant can hinge, I find and hold that the consent order made on 19th January, 2015, substituting the 1st defendant with Ekira Muthoni Ndirangu was of no effect as no suit existed against the 1st defendant upon which such an order could hinge.

21. Being a necessary party to this suit and the application for reinstatement of the suit, I find and hold that the orders sought cannot issue, until and unless the 1st defendant is a party.

22. For the foregoing reason, I agree with the 2nd defendant's contention that the application herein is improperly before court and dismiss it with costs to the 2nd defendant/respondent.

Dated, signed and delivered at Nyeri this 7th day of October, 2016

L N WAITHAKA

JUDGE

In the presence of:

Mr. Karweru for the plaintiff/applicant

Mr. Muthoni h/b for Ms Mukuha for 2nd accused

N/A for 1st respondent

Court assistant - Lydia