



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

HIGH COURT CIVIL SUIT NO. 5911 OF 1992 (O.S)

KIGERA MUIRURI.....PLAINTIFF

VERSUS

JOHN GITAU GETHANYA.....1ST DEFENDANT

BERNARD MWAURA GATHENYA.....2ND DEFENDANT

RULING

The Defendants' Application

The application before the court in respect of which this ruling is given is a Notice of Motion dated 29th June 2013 filed by the Defendants, in which they seek the following orders:

- a. That the Honourable Lady Justice Nyamweya recuse/remove herself from hearing this present motion in the first instance.
- b. That the Orders of the late Honourable Mr. Justice Pall made on the 29th September 1994 to the effect that service had been effected upon the Defendants be set aside.
- c. That the Order made by the late Honourable Mr. Justice Pall substituting one Eunice Wambui Kigera (now deceased) as the Plaintiff in place of Kigera Muiruri (also deceased) be set aside.
- d. That the subsequent Order made on the 5th April 2011 substituting one Peter Muiruri Kigera for Eunice Wambui Kigera (deceased) be set aside.
- e. That the Orders of substitution made pursuant to (c) and (d) above be declared as having been made contrary to Section 3(1) of the Law of Succession Act Cap 160 of the Laws of Kenya, and Section 2 of the Civil Procedure Act, 2010.
- f. That the entire Originating Motion dated the 3rd November 1992 be struck out as an abuse of the process of the Court.

The application is supported by an affidavit sworn by both Defendants, and a further affidavit sworn by the 1st Defendant on 29th June 2013 and 18th November 2013 respectively. According to the Defendants, this court has made two rulings adverse to them, and they feel that it has formed and taken a jaundiced view of the Defendants' case, and that the Defendants further now feel that they will not get a fair hearing or ruling in respect of this present motion. Further, that justice may not be done in respect of the several points of law that they have raised in the present motion.

The Defendants also state that no service was ever effected upon them of the Plaintiff's Chamber Summons dated 10th November 1993, and there was and there is still is no affidavit of service filed in this Court to that effect. It was the Defendants' claim that the Order made by Pall J. on the 29th September

1994 was based on a misdirection and misrepresentation made to the Court by the late Ms. Ndaiga Advocates, then acting for the Plaintiff, that the Defendants herein had been duly served with a copy of the Chamber Summons dated 10th November 1993.

Further. that on 29th September 1994 when the late Eunice Wambui Kigera was substituted for her late husband Kigera Muiruri as the Plaintiff, she did not have a grant of letters of administration to the Estate of Kigera Muiruri and was as such not an “administrator” or “a personal representative” of the said Estate as is by law defined. The Defendants further state that on the 5th April, 2011 when the substitution of Peter Muiruri Kigera for his late mother Eunice Kigera was effected, this said Peter Muiruri Kigera did not have letters of administration to the Estate of Eunice Wambui Kigera, and no such grant has ever been availed to this Court, and as such he was neither an “administrator” nor “a personal representative” of the said Estate

The Defendants aver that a Grant of Administration to the Estate of Kigera Muiruri, the original Plaintiff in the Originating Motion dated 2nd November 1992 was only taken out on 28th November 2007 by Peter Muiruri Kigera some 14 (fourteen) years after his death, the Deceased having become demised on 16th July 1993.

The Defendants denied that they authorized and/or instructed their lawyer then on record, Mr. C. M. Ngugi to consent to the orders recorded on 5th April 2011, and disowned the same. Further, that in any event the same are not sustainable as they are illegal and unprocedural for contravening section 3 (1) of the Law of Succession Act, and section 2 of the Civil Procedure Act, 2010 and are in law a nullity.

The Plaintiff's Response

The Defendants' application was opposed by the Plaintiff who filed a replying affidavit, further affidavit and second supplementary affidavit sworn on 7th October 2013, 23rd January 2014 and 17th February 2014 respectively. It is the Plaintiff's disposition that he was joining the suit as of right under Order 1 rule 1 of the Civil Procedure Rules. He stated that his application to be joined was filed on 25th November 2004 before his mother's death on 4th June 2006, and the subsequent death of his mother was just an added reason why he should become a party to the suit. Further, that the present notice of motion and the preliminary objection dismissed on 5th December 2012 raises the same issues for consideration by the court, and that the notice of motion is thereby *res judicata*.

It was the Plaintiff's averment that the Defendants have been aware of the orders they seek to set aside for the last 19 years but not taken any steps to set them aside. That they are thus guilty of delay and laches which disentitle them to the order of setting aside which is a discretionary remedy. Further, that as of 5th April 2011 when the current Plaintiff was properly joined to this suit the matter was alive, and even if the orders of 29th September 1994 were to be set aside that would not serve any useful purpose unless the orders of 5th April 2011 are also found to be wanting. Lastly, the Plaintiff annexed a return of service dated 18/8/1994 and filed in court on 27/9/1994 attesting to the service of the Chamber Summons dated 10th November 1993.

The Submissions

The applications were canvassed by way of written submissions. The Advocates for the Defendants filed submissions dated on 10th February 2014, 14/10/2013, wherein counsel reiterated the contents of the pleadings and affidavits in support thereto. The counsel argued that the Plaintiff's disposition that the Defendants' application was *res judicata* is a misinterpretation of this court's ruling of 5th December 2012, as the court did find that the orders of Pall J. of 29th September 1994 have never been set aside. Further, that the issue of service of pleadings is neither a minor issue nor a technicality as alleged by the Plaintiff. The counsel dwelt in great detail on, and challenged the Plaintiff's representations and submissions on the issue of the service of the chamber summons dated 10th November 1993. He relied on

the decision in **Mobile Kitale Service Station vs Mobil Oil Kenya Ltd (2004) KLR** that service of summons is an integral part of the rules of engagement.

The Defendants' counsel further submitted that the time lapsed should not be used by the Plaintiff as a bar to the application to set aside an order that had been irregularly obtained. Further, that the fact that the Plaintiff's mother died before his application for joinder was heard did not absolve him from his duty to obtain a grant to his late mother's estate.

The counsel for the Plaintiff filed submissions dated 17th February 2014 wherein he argued that the effect of the prayers sought by the Defendants under Order 24 Rule 3(2) of the Civil Procedure Rules would be that the Plaintiff's claim abated on 16th July 1994, which was one year after the death of the original Plaintiff, and would amount to denying the Plaintiff his right to be heard. Further, that the Defendants were raising technical objections to defeat substantive justice.

The counsel further submitted that from the court record the Plaintiff's Chamber Summons dated 10th November 1993 was heard interpartes on 29th September 1994 when orders were granted substituting Eunice Wambui Kigera as Plaintiff. Further, that the present Plaintiff applied to be joined not as a personal representative but as of right pursuant to the provisions of Order 1 of the Civil Procedure Rules. The counsel contended that the Defendants were in this regard re-introducing issues that had been canvassed in their preliminary objection on which a ruling was given by this court on 5th December 2012, and their application was therefore *res judicata*.

Lastly, the Plaintiff's counsel contended that the remedy of setting aside an order is a discretionary one, and that an applicant must show that he has come to court promptly, on the basis of good faith and with clean hands. The counsel relied on the decisions in **Shah vs Mbogo & Another, (1967) E.A 116** and **Kenya Commercial Bank Ltd vs Nyataige & Another, (1990) KLR 443** in this regard. The counsel submitted that the delay of 20 years in making the present application could not be excused. Further, that the Plaintiff had complied with Order 11 of the Civil Procedure Rules, and the Defendants had not done so.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Defendants and Plaintiff. I will first address the preliminary issue raised by the Defendants, though not argued, that this court should recuse itself from hearing their application. Their ground for this prayer was that this court has previously given rulings in favour of the Plaintiff and is therefore biased.

This court has carefully considered this ground and finds that no justifiable reason has been given for it to disqualify itself, as the Defendants have not shown how this court, in discharging its constitutional duty of hearing and determining the disputes before it has shown bias. In every litigation that is before a court of law there must of necessity be a decision made in favour of a party, and if the other parties are aggrieved by that decision then their recourse is to apply for review or to invoke appellate jurisdiction. The fact that a decision given on merit by the court is to a party's detriment, as was the case herein, is not in itself sufficient grounds for a judge's recusal from continued hearing and determination of the case on the ground of bias. I therefore decline to recuse myself from hearing the application and suit herein.

Coming to the substantive issues for determination, there are two such issues raised by the application before the court as follows:

1. Whether the Defendants' application herein dated 29th June 2013 is *res judicata*.
2. Whether the orders given by Pall J. on the 29th September 1994 and by Okwengu J. (as she then was) on 5th April 2011 are amenable to review and/or setting aside.
3. Whether the originating summons filed herein should be struck out.

Whether the Defendants' application is res judicata

The doctrine of *res judicata* is provided for under section 7 of the Civil Procedure Act which states that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The requirements for *res judicata* to arise as stated in the said section are that :

- a. There must have been a previous suit between the same parties
- b. The issue before the court must have been finally determined in that previous suit
- c. The issue must have been determined by a court having competent jurisdiction.

Section 7 has further explanations on the application of these requirements, and the main objective of the doctrine of *res judicata* as can be seen from these explanations is to have issues in a suit litigated with finality.

This court was in this regard referred by the Plaintiff to the ruling given herein on the Defendants' preliminary objection dated 14th September 2012, which ruling was delivered on 5th December 2012. The said preliminary objection was to the Plaintiff's Notice of Motion dated 4th June 2012, which sought *inter alia* an order to set aside and/or vary the orders issued by this court on 6th February 2012 dismissing the suit herein for non-attendance and that the suit herein be reinstated for hearing on merit.

The Defendant's preliminary objection was on the grounds that the Originating Summons which was sought to be reinstated was incurably defective and bad in law, time barred under the Limitation of Actions Act, and that it was not a fact that the Plaintiff had been in continuous, uninterrupted and peaceful possession of the suit property since 1958. This court in its ruling on 5th December 2012 found that the Defendants' objection on the suit herein being incurably defective bad in law and time barred was not merited, and the objection based on the Plaintiff's possession of the suit property was misplaced as it raised an issue of fact and was not on a point of law.

This court notes that the Defendants in their submissions on the said preliminary objection had raised the arguments they have raised herein in arguing that the Plaintiff had no capacity to bring the Notice of Motion. The Defendants submissions were summarised by the court in the said ruling given on 5th December 2012 thus:

“The Defendants' submissions are dated 22nd October 2012 and filed on the same date. Counsel for the Defendants submitted that the Plaintiff has no legal capacity to bring, institute and or pursue any manner of proceedings in this matter. It is submitted that Kigera Muiruri (deceased) filed suit on 06.11.92 and on 28.01.94, Eunice Wambui Kigera, the legal representative of Kigera Muiruri was substituted in place of Kigera Muiruri (deceased). Counsel for the respondent contends that Eunice Wambui Kigera did not annex letters of administration in the application for substitution and therefore, that the order for substitution was a nullity, totally irregular and illegal.

Further, that the present Plaintiff filed a chamber summons application dated 25th November 2004, wherein he sought to be made a party in place of Eunice Wambui Kigera who was said to be too old to proceed with the case. It is stated that before the said application could be prosecuted, Eunice Wambui Kigera died on 6th June 2006, and Counsel for the Defendants submitted that since Eunice Wambui Kigera passed on before the application to substitute her was heard, it became imperative and mandatory for the present Plaintiff to obtain a grant of letters of administration to Eunice Wambui Kigera's estate before prosecuting the application, which was not done. “

The court in the said ruling delivered on 5th December 2012 rendered itself on the said arguments as follows:

“Having considered the pleadings and submissions made, I am of the view that the issue for determination is whether the objections made in the Notice of Preliminary objection and submissions by the Defendants are merited. The first objection raised by the Defendants is that of the procedures followed in the substitution of the Plaintiff. This objection was not raised in the Notice of Preliminary Objection, but was stated in the grounds of opposition and submissions filed by the Defendants.

This objection raises a point of law as to whether the Plaintiff is properly before the Court. Eunice Wambui Kigera (deceased) was made a party to this suit by orders given by this court on 29.09.94 allowing the chamber summons application dated 10.11.93 where she sought to be substituted in place of Kigera Muiruri. Equally, the Plaintiff joined this suit through a consent entered into on 5th April 2011 on his application dated 25th November 2004. It is noteworthy that the Plaintiff’s application was first dismissed for want of prosecution on 14th May 2009, reinstated on 5th November 2010 and later allowed by consent of the parties on 5th April 2011.

These orders given by this court substituting Kigera Muiruri with Eunice Wambui Kigera (Deceased), and later with the Plaintiff herein have not been set aside, varied or appealed against, and cannot be challenged by way of a preliminary objection. In any event I also do agree with the Plaintiff’s submissions that he can be joined as a party to these proceedings in his own right as this is a claim by his family for trusteeship and in the alternative adverse possession with respect to the suit property. Further, the family members did file consents which are on the court record for Eunice Wambui Kigera (Deceased), and the current Plaintiff to be made party to these proceedings. I therefore find no merit in the objection as to the current Plaintiff’s capacity to bring the proceedings herein.”

The issue in the present application is that of setting aside orders of substitution of the Plaintiff granted by Pall J. on the 29th September 1994 and by Okwengu J. (as she then was) on 5th April 2011, and if allowed the consequent striking out of the Originating summons filed herein. The issue of the substitution of the current Plaintiff was also argued by the Defendants in their submissions on their preliminary objection dated 14th September 2012. This court made a finding and decision on merit on the issue of the current Plaintiff’s joinder as a party to this suit, as shown hereinabove in its ruling on the said preliminary objection that was delivered on 5th December 2012.

To this extent the prayer seeking the setting aside of the orders of the joinder of the current Plaintiff given by Okwengu J. (as she then was) on 5th April 2011 is *res judicata*. Further, for the avoidance of any doubt, as at the time the current Plaintiff, Peter Muiruri Kigera was joined as a party to this suit, the suit herein was subsisting since the orders of Pall J. of the 29th September 1994 substituting Eunice Wambui Kigera as Plaintiff in the place of the late Kigera Muiruri had not be set aside either on review or appeal. In addition, the current Plaintiff has since then also obtained letters of administration with respect to the estate of Kigera Muiruri, which fact is not disputed.

The only outstanding prayers by the Defendants that have not been considered on merit therefore are those of the setting aside of the orders of 29th September 1994 substituting Eunice Wambui Kigera as the Plaintiff in the place of the late Kigera Muiruri, the declaration sought that the said substitution was contrary to Section 3(1) of the Law of Succession Act and Section 2 of the Civil Procedure Act, and the striking out of the Originating Summons filed herein, which I shall now proceed to determine.

Review and/or setting aside of order given on 29th September 1994

On the issue on whether the orders granted by Pall J. on the 29th September 1994 in which the late Eunice Wambui Kigera was substituted in place of the late Kigera Muiruri can be set aside, the applicable law is

the provisions of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, which avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. Order 45 Rule 1 (b) spells out conditions that must be met in an application for review of a decree or order as follows:

- i. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
- ii. mistake or error apparent on the face of the record,
- iii. or for any other sufficient reason,
- iv. the application must be made without unreasonable delay.

The Defendants rely on the grounds of lack of service of the Chamber summons seeking the substitution of Eunice Wambui Kigera as Plaintiff in the place of the late Kigera Muiruri dated 10th November 1993, and on the absence of a grant of administration to Eunice Wambui Kigera with respect to the estate of Kigera Muiruri. The Plaintiff however brought evidence of the affidavit of service of the application dated 10th November sworn on 18th August 1994 by a process server named Harrison Mwaniki that was filed in court on 27th September 1994. The ground of lack of service of the said application cannot therefore lie.

No evidence has however been brought by the Plaintiff of the grant of administration to Eunice Wambui Kigera with respect to the estate of Kigera Muiruri. This fact notwithstanding and despite this being an obvious error on the face of the record, this court notes that the application for substitution was allowed by Pall J. on 29th September 1994, almost twenty years to the day. The Defendants have not offered a reasonable explanation as to the delay in filing the application for the setting aside of the orders, which they blame on their Advocates, yet they have participated in various proceedings in this suit since the impugned orders were granted.

The ultimate objective of this court is to dispense substantive justice to both parties as is now stated in Article 159(2) of the Constitution and section 1A & 1B of the Civil Procedure Act. In the context of delay, this principle was aptly explained by Lord Denning M.R. in **Allen vs. Sir Alfred Mc Alpine & Sons Ltd, [1968]1 ALL E.R. 543 at 547** as follows:

“The principle on which we go is clear; when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straightaway ... So the overriding consideration always is whether or not justice can be done despite the delay.”

Setting aside the orders of Pall J. 29th September 1994 would have the consequence of prejudicing the current Plaintiff's position, who was joined as a party to this suit arising from the substitution of Eunice Wambui Kigera in the place of the late Kigera Muiruri, and whom this court has already found was joined in his own right as a necessary party. The Defendants on the other hand will suffer no prejudice in having their case heard and determined on its merits. It is thus my finding that the delay by the Defendants in bringing their application dated 29th June 2013 is inexcusable, and that it is in the interests of justice the suit herein should be heard on its merits.

The Outstanding Prayers

The findings of this court herein above also accordingly dispose of the declaration sought that the substitution of Eunice Wambui Kigera as Plaintiff in the place of the late Kigera Muiruri was contrary to Section 3(1) of the Law of Succession Act and Section 2 of the Civil Procedure Act.

Likewise, the prayer for the striking out of the Originating Summons filed herein was predicated on the said declaration being given, and the prayers for setting aside of the orders given by Pall J. on the 29th September 1994 and by Okwengu J. (as she then was) on 5th April 2011 for substitution of the Plaintiff

being granted. Since this court has declined to grant the said prayers, the prayer for striking out of the Originating Summons accordingly fails.

The Orders

The upshot of the foregoing is that the Notice of Motion by the Defendants dated 29th June 2013 is denied. The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 20th day of May 2014.

P. NYAMWEYA

JUDGE