



**REPUBLIC OF KENYA**  
**IN ENVIRONMENT AND LAND COURT OF KENYA**  
**AT ELDORET**

**E&L NO. 955 OF 2012**

*Formerly HCC 174 OF 2009*

**SAMUEL KIPKURUI KUTO.....PLAINTIFF**

**VS**

**CHARLES MAINA NJUGUNA & OTHERS.....DEFENDANTS**

***(Application for assignment of suit; Order 24 Rule 8; principles to be applied; plaintiff seeking to assign suit to another person; plaintiff stating that his interest in the suit land is as administrator; registration showing that plaintiff was registered as sole absolute proprietor not as administrator; whether such suit can be assigned; power of attorney; assignee holding power of attorney; application allowed on the basis of the power of attorney)***

**RULING**

The application before me is that dated 30 August 2013 filed by the plaintiff. It is an application said to be brought under the provisions of Order 24 of the Civil Procedure Rules and seeks an order that this suit be assigned to one Daniel Kimogony Kuto.

Before I embark on the application, I think it is best that I shed some light as to the nature of the suit.

The plaintiff filed this suit on 23 October 2009. He inter alia pleaded that on 20 March 2003, he became registered as proprietor of the land parcel Uasin Gishu/Kondoo/472 (the suit land), after acquiring letters of administration to the estate of Kuto Boit (deceased), who was his grandfather and previous owner of the suit land. He has further pleaded that on 22 July 2009 he caused a search to be done at the land's office and found that the 1st defendant has been registered as proprietor of the suit land. It is his view that this registration of the 1st defendant as proprietor was done fraudulently in collusion with the 2nd defendant who is the District Land Registrar. It is stated that the 1st defendant presented a non-existent court order so as to have himself registered as proprietor of the suit land. In the case, he wants an order revoking the title of the 1st defendant and for his registration as proprietor to be restored.

The defendants entered appearance and filed defence. The case of the 1st defendant is that he purchased the suit land from one Jeremiah Muriuki in the year 1978, who in turn, had bought the land from Kuto Boit (now deceased). They mutually agreed that Kuto Boit will transfer the land to the 1st defendant, but Kuto Boit, died in the year 1989 before the transfer could be effected. In the year 1992, owing to tribal clashes, the 1st defendant vacated the land, but when he came back in the year 1993, he found one Micah Kiprono Ruto, a brother of the plaintiff, having taken possession of the land. The 1st defendant then filed a complaint before the Uasin Gishu Land Disputes Tribunal, which tribunal rendered an award in his

favour, and ordered the suit land to be transferred into the name of the 1st defendant. The award was filed in the Eldoret Chief Magistrate's Court as Award No. 27 of 2003 and a decree was issued. The 1st defendant then became registered as proprietor of the suit land on 12 December 2005. It is his position that the plaintiff has no claim over the land.

The position of the 2nd - 4th defendants is that the registration of the 1st defendant as proprietor was done legally and in accordance with the law.

Not much seems to have happened in the matter until this application was filed.

The grounds upon which the application is based are that :-

- (a) The plaintiff was registered as owner of LR Uasin Gishu/Kondoo/472 as trustee.*
- (b) The land initially belonged to the estate of the late transferred into the plaintiff (sic).*
- (c) The deceased Kuto Boit was father to Daniel Kimongony Kuto.*
- (d) The plaintiff holds the land for and on behalf of and for the benefit of this father's family.*
- (e) The plaintiff has by virtue of his work and commitments and other personal reasons been unable to attend court and handle the case.*
- (f) The plaintiff has assigned his interest in the case and land to his father.*
- (g) The ends of justice and fair play (sic).*

The application is supported by the affidavit of Samuel Kipkurui Kuto, the plaintiff. It is a brief supporting affidavit, in which it is stated that he has decided to assign the suit to his father, Daniel Kimongony Kuto. He has averred that he was only registered as owner of the suit land as trustee, on behalf of, and for the benefit of, his father, step mother, brothers and sisters. He has stated that owing to his work he is unable to attend court and handle the case to conclusion.

The application is opposed by the 1st defendant who has filed Grounds of Opposition in the following terms :-

- (1) That no leave has been sought by the plaintiff to obtain the orders sought as required under Order 27 Rule 8.*
- (2) That an assignment can only take effect upon registration of the same under Section 28 (b) of the Registered Land Act, as such the purported assignment of interest in land by the plaintiff to one Mr. Daniel Kimogony is unsubstantiated.*
- (3) That the plaintiff has never been a trustee at all of the land parcel number Uasin Gishu/Kondoo/427 as such the assignment of interest in the case and the parcel of land is invalid.*
- (4) That the plaintiff being the legal representative of the deceased's estate cannot assign his rights and responsibilities as legal representative to another party without following the required procedure.*
- (5) The application before court is made in bad faith, lacks merit and ought to fail.*
- (6) The orders sought by the plaintiff are prejudicial to the 1st defendant and are only meant to defeat justice.*

After the grounds of opposition were filed, a supplementary affidavit was filed by the plaintiff in which a power of attorney was annexed. The power of attorney is dated 15 October 2013 and it appears to have

been registered on 22 October 2013. In the power of attorney, the plaintiff has donated to Daniel Kimogony Kuto, the power to take over and prosecute this suit.

In his submissions, Mr. Momanyi for the applicant submitted that Order 24 Rule 8 of the Civil Procedure Rules allows an assignment of a suit subject to leave being sought. He submitted that this application is the application for leave. He further submitted that S. 28 of the Registered Land Act (CAP 300) (repealed) does not apply. He further submitted that the issue of the plaintiff being trustee can be canvassed within the main suit. He was also of the opinion that the situation herein is not that of an assignment of the duties of an administrator.

Mr. Nyairo for the 1st defendant on the other hand contended that S. 28 of the Registered Land Act applies and that there has to be a registration of the interest being assigned. He further submitted that the plaintiff can only assign his responsibilities as legal representative through the succession case in which letters of administration were obtained. He further submitted that the power of attorney was obtained after this application was filed.

I have considered the application, the grounds of opposition and the submissions of counsel. This application is said to be brought under the provisions of Order 24 of the Civil Procedure Rules. Order 24 deals with assignment of suits and principally covers assignments upon the death or bankruptcy of the parties. Rule 8 however deals with the general assignment of a suit, falling outside the bracket of death or bankruptcy of the parties. It provides as follows :-

*Rule 8(1) In other cases of assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved.*

*(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of subrule (1).*

From the above, it appears that a suit can indeed be assigned. It may happen that the interest or subject matter of litigation has devolved to another entity, or person, who is not one of the original parties to the suit. In such instance, the original litigant no longer has an interest in the suit, but this does not mean that the suit must abate. The person upon whom the interest has devolved can be made a party to the said suit, or in appropriate instances, the suit may be deemed as having continued, with the person upon whom the interest has vested as being a party to the suit.

This is indeed what transpired in the case of ***Telkom Kenya Limited v Jeremiah Achila Gogo, Court of Appeal at Kisumu, Civil Appeal No. 153 of 2004, (2007) eKLR***. In this case, a suit had been filed by the respondent, as plaintiff, against Kenya Posts and Telecommunications Corporation. The Corporation was later dissolved and its assets distributed among the Postal Corporation and Telkom Kenya Ltd. Through the legal notice No. 132 of 2001, Telkom Kenya Limited was stated to be the successor of the suit. The suit proceeded as filed and damages of Kshs. 400,000/= were awarded to the respondent. The respondent moved to attach the assets of Telkom Kenya Ltd which brought forth objection proceedings. The High Court judge held for the respondent which invited an appeal to the Court of Appeal. The Court of Appeal held that although it would have been prudent to amend the pleadings to have Telkom Kenya Ltd as the defendant, the suit had properly been assigned to Telkom Kenya Ltd, and they were liable to settle the decree.

However, I do not think it is the case that a party can simply assign a suit to another without first demonstrating how the interest in the suit has become vested in the new entity sought to be brought into the matter. Thus a company which has merged with another to form a new entity, can have the suit assigned to the new entity, as in this instance, it is clear that the interest of the former company has been assumed by the new company. The demonstration of the transfer of the interest in the suit is essential, so as to bar a litigant simply giving another his/her suit to continue under the guise of an assignment.

Probably, that is where Mr. Nyairo's argument, that there has to be a registration of the interest before

there can be an assignment, is coming from. That said, I do not buy Mr. Nyairo's argument that this application must fail as there has been no leave granted as required by Order 24 Rule 8. This application is the application seeking leave to assign and is the application contemplated by Order 24 Rule 8. Neither do I think that the applicant has to first assign his interest as administrator in the succession cause. I would have been persuaded by that argument if the plaintiff had filed this suit as administrator of the estate of Kuto Boit. But he has not filed this suit as administrator, but as the person who is entitled to be registered as proprietor. I have looked at the title deed exhibited by the plaintiff, and I have not seen that the plaintiff became registered as owner of the suit land as administrator of the estate of Kuto Boit. Neither was he registered as trustee. His registration, at least from the material before me, appears to be that the plaintiff was registered as absolute proprietor. I assume that the succession cause was concluded, and at the confirmation stage, the suit land was distributed to the plaintiff as the new owner.

I would have dismissed this application for the reason that it has not been demonstrated to me how the plaintiff's interest has become devolved to Daniel Kimogony Kuto. However, there is a power of attorney, which in my view changes the position of Daniel Kimogony Kuto, so that he does not need to demonstrate any assignment of interest of the suit land, nor indeed any personal interest in the suit itself. A power of attorney places one in the shoes of the donor, and the donee does not have to demonstrate any interest, since through a power of attorney, the donor assigns his rights to the donee. I agree with Mr. Nyairo that the power of attorney ought to have been registered before this application was filed and technically the application was premature. I have weighed whether or not to dismiss the application based on this reason, and I have thought to myself, that all that the applicant will do is to file a new application with the same material that I have before me, and I will have no choice but to allow it since he now holds a power of attorney. I will utilize my discretion, given this position, and in the interests of justice, consider the application in light of the power of attorney, in as much as the power of attorney came a little late in the day, having been donated after this application was filed.

It is solely for the reason that Daniel Kimogony Kuto holds a power of attorney, that I will allow this application but on no other ground.

The upshot of the above is that this application is allowed. I will however make no orders as to costs.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF JUNE 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

***Delivered in the presence of:***

***Mr. E.M. Makuto of M/s Nyairo & Co Advocates for the 1st defendant/respondent***

***N/A for M/s Anassi Momanyi & Co Advocates for the Plaintiff/applicant***

***N/A for the state Law Office for the 2nd – 4th defendants/respondents.***