



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI
ELC SUIT NO. 1663 OF 2000

FATUMA MOHAMED.....1ST PLAINTIFF
ASHA MOHAMED.....2ND PLAINTIFF
WANANCHI RANCHING LIMITED.....3RD PLAINTIFF

VERSUS

WANANCHI ESTATES LIMITED.....1ST DEFENDANT
HARRIS HORN ALIAS HARRY HORN.....2ND DEFENDANT
SETTLEMENT FUND TRUSTEES.....3RD DEFENDANT
COMMISSIONER OF LANDS.....4TH DEFENDANT
ATTORNEY GENERAL.....5TH DEFENDANT

RULING

The Application

The Plaintiffs filed application dated 26th April 2013 brought under Orders 51 Rule 1, Order 45 and Order 24 of the Civil Procedure Rules, Section 1A, 2A, 3A & 63(e) of the Civil Procedure Act and Article 159 (2) (d) of the Constitution. The Plaintiffs seek orders that the court be pleased to review and set aside the order of dismissal of the suit against the 2nd Defendant and all other consequential orders. Further, that the court be pleased to extend and/or enlarge the time within which the 2nd Defendant can be substituted with his legal representative.

The application is premised on grounds outlined in the application and supported by an affidavit sworn on 26/4/2013 by Abdisatar Haji, the Director of the 3rd Plaintiff, wherein he deposes that the 1st and 2nd Plaintiffs are administrators of the estate of Haji Mohamed whilst the 3rd Plaintiff is a company whose shares are substantially held and owned by the family of the late Haji Mohamed, which was the initial registered owner of the suit property. Further that the said family has been in possession of the suit property since it was allotted the same by the Government in early 1970s.

The deponent states that the 3rd – 5th Defendants were joined to the suit following the Plaintiff's application dated 21/10/2010, and that a subsequent application dated 16/7/2012 seeking restraining orders against all Defendants pending the disposal of the suit is yet to be adjudicated upon. It is his deposition that the Plaintiffs had not been receiving updates on the matter from their previous advocates and upon perusing the court file, they learnt that the 1st and 2nd Defendants had made an application to have the suit against them dismissed, which application was responded to by their previous advocates without informing them of its existence. He deponed further that when the matter came up for hearing, their previous advocates erroneously, without any justification whatsoever and without informing them and/or obtaining their instructions conceded that the suit against the 2nd Defendant had abated, instead of making an application for substitution with the legal representative.

The deponent referred to his sworn affidavit on 21/10/2010 and that sworn by the 1st Plaintiff on 6/10/2010 which were annexed, and stated that the said affidavits contained a chronology of events including the 1st and 2nd Defendants' alleged fraudulent actions, which shows that they are an integral part of the proceedings. The deponent urged the court to allow the application to prevent a miscarriage of justice since the Plaintiffs have maintained since inception of the suit that the case is primarily based on the fraudulent acts of the 1st and 2nd Defendants. Further, that the law allowed for an enlargement of time to substitute a deceased Defendant where such enlargement of time would lead to the fair, just and final determination of the matter between the parties. The deponent reiterated that it is in the interest of justice that the 2nd Defendant's legal representative be joined to the matter to facilitate the hearing and determination of the suit on merits. Further, that the suit is convoluted and can only be fully ventilated at the hearing with the participation of all the affected parties.

The Response

The 2nd Defendant filed Grounds of Opposition dated 26/7/2013 wherein he averred that the Plaintiff's application is undated, and does not state the date of the order which they seek to review and thus is incompetent. The 2nd Defendant averred that none of the conditions for granting a review of an order as provided for under Order 45 of the Civil Procedure Rules has been established by the Plaintiffs. Further that no application to extend time under Order 24 of the Civil Procedure Rules has been made and therefore an order of review if granted would only set aside the order removing the 2nd Defendant from the suit. It is averred for the 2nd Defendant's estate that it only owns one share as a Director of the 1st Defendant which cannot in any way influence the outcome of the suit.

Joyce Koech, Litigation Counsel at the office of the Attorney General filed Grounds of Opposition on behalf of the 3rd and 4th Defendants dated 6/6/2013. The counsel stated that they shall oppose the motion on grounds that the application is fatally defective and bad in law as the Plaintiffs have not exhibited any ownership to the subject land to deserve the reliefs sought. Secondly, that the Plaintiffs have not exhibited any authority to institute a suit on behalf of the 3rd Plaintiff, and neither have they annexed documentation that showing the directorship of the 3rd Plaintiff. Lastly, that the Plaintiffs are guilty of laches considering the inordinate delay in instituting the suit and in substituting the suit against the 2nd Defendant.

The Submissions

The application was canvassed by way of written submissions. Orlando Udoto & Okello Advocates for the Plaintiff filed submissions dated 8/10/2013 wherein counsel reiterated the contents of the Plaintiff's application and submitted that the errors, omissions and/or mistakes of the Plaintiffs' previous advocates should not be visited upon the Plaintiffs. It was also submitted that the suit had never proceeded to full hearing owing to a series of interlocutory applications and not arising from the fault of the Plaintiffs. Counsel submitted that the court has the inherent powers and jurisdiction to grant the orders sought.

K. H. Osmond Advocate for the 2nd Defendant filed submissions dated 15/10/2013, wherein counsel

submitted that the Court was in November 2012 notified of the 2nd Defendant's demise which occurred in January 2012, and that notwithstanding this advice the Plaintiffs did nothing to enjoin the 2nd Defendant's estate within the 12 months period that is provided, hence the application to dismiss the suit against the 1st and 2nd Defendant. Counsel submitted that litigation must come to an end, and that the suit had never been heard on its merits entirely due to the Plaintiffs disinterest in prosecuting the suit since 2000 seen from their practice of constantly changing Advocates. Counsel submitted that the suit property was lawfully transferred to the 1st Defendant in 1991 and subsequently transferred to the 3rd Defendant for settlement of the landless. Further, that the 2nd Defendant only had one share whereas a company known as Ol-Leila Holdings Limited has 93,996 shares out of the 100,000 shares of the 1st Defendant, and there had been no attempt by the Plaintiffs to join this company to the suit.

The Determination

I have carefully read and considered the pleadings and arguments made by the parties herein. The issues for determination are firstly, whether the orders made by this Court on 18/3/2014 are amenable to review and/or setting aside, and secondly whether this Court can extend the time for the substitution of the 2nd Defendant.

This court on 18th March 2013 granted an order that the suit against the 2nd Defendant has abated and is dismissed following an application dated 8/12/2013 filed by the 1st and 2nd Defendants. It is this order that the Plaintiffs seek to be set aside. It is the Plaintiff's claim that they were not properly briefed by their previous counsel on record. Further, that without their instructions, their previous counsel conceded to the application that the suit against the 2nd Defendant be dismissed for having abated.

This Court derives authority to review its order or decree from section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Order 45 of the Civil Procedure Rules. Rules (1) thereof reads:

- (1) Any person considering himself aggrieved—**
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

The Plaintiffs' claim is that the 1st and 2nd Defendants are integral to the proper adjudication of this matter, and submit that it is paramount that the 2nd Defendant's estate participates at the hearing so as to provide information to assist the court to arrive at a fair and just decision. On behalf of the 2nd Defendant, it is submitted that he only owns one share which cannot in any way influence the outcome of the suit. However, on perusal of the Further Amended Plaintiff, the Court notes that there are allegations of fraud particulars outlined therein made directly against both the 1st and 2nd Defendants.

It is an established principle that an allegation of fraud is a serious indictment against a party to whom it is made and the standard of proving such allegations is higher than on a balance of probability. Considering the gravity of the allegations, it is my view that the 2nd Defendant's estate ought to be a party to the proceedings irrespective of its shareholding so as to enable the court to make a proper finding. The court record also reveals that the subject matter of the suit is 9070 hectares of land known as LR No. 12924 situated in Voi which the Plaintiffs claim that their deceased father was the majority shareholder of, and which was the subject of alienation by 1st and 2nd Defendants in exchange of Kshs. 40 Million.

The Plaintiffs' instant application was also filed slightly over one month after the relevant order was made, and was thus brought without delay. I therefore find that the Plaintiffs have established sufficient reason to warrant the court to review its order in terms of setting it aside.

On the second issue of enlargement of time to substitute the 2nd Defendant,

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:

“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.”

Further, Order 24, Rule 7 states that:

“(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”

From the foregoing provisions it is clear that the Court is given the discretion revive a suit that has abated if sufficient cause is shown. It is submitted for the Plaintiffs that the previous counsel on record failed to make the appropriate application for substitution and proceeded to concede to an application for dismissal of the suit against the 2nd Defendant without instructions. The counsel for the 2nd Defendant contends that the Plaintiffs were aware of the 2nd Defendant's demise as far back as January 2012 or upon the Court being notified of the same in November 2012 but that they failed to make the appropriate application within the 12 month period.

The under-lying principles that a Court should consider in exercise of discretion to extend time were laid down by the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others**, **Supreme Court Application No. 16 of 2014** as follows:

- Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
- A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
- Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

- Whether there will be any prejudice suffered by the respondents if the extension is granted;
- Whether the application has been brought without undue delay; and
- Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

The Plaintiffs claim that the delay has been occasioned by the lack of communication and appropriate advice by their previous counsel. Further, the circumstances of the case are that it is admitted by both parties that the suit is yet to be prosecuted 14 years down the line. The Plaintiffs aver that it is because of a myriad of interlocutory applications whereas the 2nd Defendant faults the Plaintiffs citing disinterest on their part.

From the foregoing, it is my considered view that the Plaintiffs' application for enlargement of time is justified as it is in the interest of justice that the matter proceeds to trial with the inclusion of a representative of the 2nd Defendant's estate. The Court's conviction is also guided by the widely accepted principle of law that a litigant should not suffer because of his advocate's oversight See **Lee G. Muthoga v Habib Zurich Finance (K) Ltd & Another, Civil Appl. No. NAI. 236 of 2009.**

The Plaintiffs' Notice of Motion dated 26th April 2013 is accordingly allowed for the foregoing reasons, and it is hereby ordered as follows:

1. The orders given by this Court on 18th March 2013 dismissing the suit against the 2nd Defendant be and are hereby set aside.
2. The time within which the 2nd Defendant can be substituted with his legal representative be and is hereby extended for a period of one year from the date of this ruling.
3. The Plaintiffs shall bear the costs of their Notice of Motion dated 26th April 2013 .

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____11th__ day of ____December____, 2014.

P. NYAMWEYA

JUDGE