



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
ENVIRONMENT & LAND CASE NO.54 OF 2014
BENSON MANGATE BARASA.....PLAINTIFF
VERSUS
AMOS WABWIRE.....DEFENDANT
RULING

The record herein shows that on 9th March 2016 MUKUNYA J dismissed the plaintiff's suit with costs to the defendant.

I have perused the record and I do not see any order reinstating the dismissed suit.

Subsequent to that, there have been several applications in this matter. These are:

- 1. Application dated 8th November 2016 which sought, among others prayer, the setting aside of the dismissal order dated 9th March 2016. That application was withdrawn on 13th December 2017 with no order as to costs.**
- 2. Application dated 10th January 2018 seeking to substitute the deceased plaintiff with one JOSEPH BARASA. That application was not opposed and was allowed on 30th July 2018.**

I now have before me the application by the said JOSEPH BARASA seeking various prayers:

- 1. The Notice to show cause issues by the defendant and dated 12th August 2016 be set aside.***
- 2. Stay of execution.***
- 3. The ruling by MUKUNYA J dated 9th March 2016 be reviewed or set aside.***
- 4. The consent entered before the Deputy Registrar on 10th March 2016 taxing the bill of costs at Ksh.140,000 be set aside and the plaintiff be granted leave to challenge it.***
- 5. This suit be reinstated to full hearing.***
- 6. Leave be granted to the plaintiff to change advocates to KHAMINWA & KHAMINWA ADVOCATES from WAFULA WACHANA ADVOCATES.***

The application is opposed and PAUL KASSIM SIFUNA filed a replying affidavit describing it as frivolous, vexatious, scandalous and an abuse of the process of the Court, that a consent on the bill of costs had been recorded herein between the deceased plaintiff and defendant at Ksh.140,000 and a stay of execution granted for 45 days and that in any event this suit is res judicata.

The application has been canvassed by way of written submissions filed both by the firm of KHAMINWA & KHAMINWA ADVOCATES for the plaintiff and KASSIM SIFUNA ADVOCATES for the defendant.

I have considered the application and the submission by Counsel. I have also perused the record herein.

As I have already indicated at the commencement of this ruling, on 9th March 2016, MUKUNYA J delivered a ruling striking out with costs the plaintiff's suit. That order has never been vacated reviewed or appealed to-date. It follows therefore that there is no suit pending in this

case upon which an application can be founded. Indeed when an application by the plaintiff dated 10th January 2018 was placed before the late **JUSTICE MUKUNYA** on 11th January 2018 and although he advised the parties to take a date in the Registry, he also make the following orders in paragraph three(3):

“1.

2.

3. There is no suit pending.”

When the parties appeared before me on 27th June 2018 and again on 30th July 2018, they did not disclose that this suit had infact been struck out some two (2) years earlier. The plaintiff therefore fraudulently obtained orders on 30th July 2018 on a non-existent suit.

Surprisingly, Counsel for the defendant did not raise that issue and neither did Counsel for the plaintiff. As Officers of the Court, Counsel have a duty to assist the Court in dispensing justice fairly.

It is clear therefore that this suit having been struck out on 9th March 2016, there was no suit in which **JOSEPH BARASA** could be substituted as he purported to do when he filed the application dated 10th January 2018 and obtained orders to that effect on 30th July 2018. Those orders having been obtained without disclosing that this suit had been struck out are hereby vacated. And those orders having been vacated, there is no basis upon which the Notice of Motion dated 13th May 2016 can be considered because not only is there no suit but there is also no plaintiff to move the Court.

The up-shot of the above is that the Notice of Motion dated 13th May 2018 is struck out with no order as to costs.

BOAZ N. OLAO

JUDGE

22ND NOVEMBER 2018

Ruling delivered, dated and signed in open Court this 22nd day of November 2018 at Bungoma.

Mr. Onkangi for Mr. Khaminwa for Applicant – present

Mr. Wekesa for Mr. Kassim Sifuma for Respondent – present

BOAZ N. OLAO

JUDGE

22ND NOVEMBER 2018