



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 242 OF 2020 (O.S.)

IN THE MATTER OF: THE ESTATE OF SALEEM BADER ABDUL BAQUI –AL-ARMY (aka SALIM BAKIR SAID AL-AMRY)

AND

IN THE MATTER OF: PLOT NO. 661/II/MN

AND

IN THE MATTER OF: AN APPLICATION BY WAY OF ORIGINATING SUMMONS BY ABDILAH SALIM BADRI (as heir/cestin que trust)

AND

IN THE MATTER OF: ORDER 37 OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

ABDILAH SALIM BADRI.....PLAINTIFF

VERSUS

HEMED MOHMAED MBARAK.....DEFENDANT

RULING

## **I. PRELIMINARY**

1. Before this Honorable Court for determination is the Notice of Motion application dated 13<sup>th</sup> August, 2021 filed by the Defendants on 17<sup>th</sup> August, 2021.

The afore stated application is brought under the Provisions of Sections 1A, 1B, and 3A of the Civil Procedure Act Cap 21 Order 51 Rule 1 of the Civil Procedure Rules, 2010.

## **II. The Defendant/Applicant's Case.**

2. The Defendant/Applicant through the aforementioned application seeks for the following order:-

**(a) That Applicant suit against the Respondent be struck out for lack of Locus Standi of the Applicant to institute a suit.**

**(b) Costs.**

The said application is founded on the grounds, testimonies and averments of the 10 Paragraphed Supporting Affidavit of one HEMED MOHAMED MBARAK the Defendant herein sworn and dated on 13<sup>th</sup> August, 2021.

3. He deposed being aware of the filed Originating Summons (O.S.) dated 23<sup>rd</sup> December, 2020 commencing the suit over the suit land

known as Land Reference No. 66/II/MN (hereinafter referred to as "The Suit Land") belonging to the late SALEEM BADER ABDUL BAQUI AL AMRY (aka SALIM BADIR SAID AL-AMRY) hereinafter referred to as "The Suit Land") without first of all obtaining Letter of representation under the Laws of Succession Act Cap 160.

4. He deposed that he had the knowledge and also advised by his Advocates on record that that an estate of a deceased person could only be administered and/or proceedings instituted through the Applicant having obtained Grant Letters of Administration of the Estate of the deceased. However, in this case he averred that the Plaintiff/respondent had not obtained such a Grant letters of Administration. He held that as the registered owner to the Suit Land, the applicant lacked the Grant of Letters of Administration and hence the *Locus Stand* in the suit or to institute the suit.

5. Furthermore, he contended that he was aware that the applicant was not a beneficiary of the estate of the deceased and hence had no proprietary or trust interest in the suit property and for this reason the Honorable Court has no jurisdiction to hear and determine the case. Therefore, it should down its tools whatsoever. The Defendant prayed that the application and the prayers sought be granted with costs.

### **III. The Plaintiffs/Respondents Case**

6. On 20<sup>th</sup> September, 2021 the Plaintiff/Respondent filed a 16 Paragraphed Replying Affidavit sworn and dated 17<sup>th</sup> September, 2021 by ABDILLAHI SALIM BADRI, the Plaintiff herein and an annexure marked "A" by.

7. He deposed that being the Plaintiff/Respondent herein, he was well versed with the matter of facts relating the filed Originating Summons and therefore competent and duly authorized to swear the Replying Affidavit. According to him the Notice of Motion application by the Defendant/Applicant dated 13<sup>th</sup> August, 2021 lacked bona fide basis as it was frivolous, an abuse of the due process of court and law. He held having instituted this suit by way of originating summons in order to preserve the estate of the deceased from being intermeddled. Further that he did so being the heir to the deceased herein as *Cestui que trust* of the trust created by the will left by the Deceased.

8. He argued that the parcel of land known as land reference number No. 661/II/MN was distributed according to the will of the deceased whereby his two sons were given 5 acres, his widow – 0.454 acres and himself 2.18 acres to hold in trust and a portion measuring 0.546 acres to the deceased's co-owner – known as Sudi. According to the Deponent, these distribution was contained in the Decree obtained from the Kadhi's Court which was already part of this proceedings.

9. He argued that besides being an heir of the estate, he had a legal and enforceable interest and rights in the subject property and had a duty to protect what was consecrated a Wakf to Asal Noor Madrasa and Mosque as the Sole Trustee. He therefore prayed that the prayers sought in application by the Defendant to be dismissed with costs.

### **Further affidavit by the Defendant/Applicant**

10. On 20<sup>th</sup> September, 2021 the Defendant/Applicant sought leave and was granted 7 days leave to file a further affidavit in response to the Replying Affidavit sworn on 18<sup>th</sup> September, 2021 by the Plaintiff/Respondent. On 30<sup>th</sup> September, 2021 the Defendant/Applicant filed the further Affidavit sworn by Hemed Mohamed Mbarak and dated 29<sup>th</sup> September, 2021. The deponent refuted that the Plaintiff/Respondent – Abdilahi Salim Badri was a beneficiary of the estate of the deceased. He held that the previous owners including Halima Anderson Gylden from who he purchased the suit property used to pay ground rent to the deceased and subsequently became his heirs. He stressed that the Plaintiff/Respondent had never had any interest whether as a beneficial owner or as a beneficiary.

11. He deposed and wondered as the actual beneficiaries of the deceased who were the actual owners of the suit land where the suit property was constructed never raised any objection to his construction of the structures on the suit land. Indeed he held that if anything they had given him consent to construct a permanent structure thereon. He denied that the property belonged to Asal Noor Madrasa and Mosque as there was no proof whatsoever to that effect. He further averred that the Plaintiff/Respondent had instituted this suit on his own personal behalf and in the absence of the actual owner. Therefore, he reiterated that the Plaintiff/Respondent had no *Locus Standi* to institute the suit on behalf of the estate of the deceased making suit all defective.

12. He refuted the allegation that the sub-division had already been undertaken and approved by the County Government of Mombasa as false and held that the said survey report annexed as being defective as it failed to clearly indicate the suit property nor any encroachment on the said property.

### **IV. The Submissions**

13. On 4<sup>th</sup> October, 2021 in the presence of all the parties, this court directed that the said Notice of Motion application dated 13<sup>th</sup> August, 2021 by the Defendant/Applicant be canvassed by way of written submissions accordingly. Pursuant to that on 8<sup>th</sup> November, 2021 all the parties having fully complied with the aforesaid directions granted by this Honorable Court, a ruling dated was reserved for 17<sup>th</sup> January, 2022 hereof.

#### **A. The Defendant/Applicant's Written Submissions**

14. On 19<sup>th</sup> October, 2021, the Law Firm of Messrs. Yunis Ali. & Co. Advocates for the Defendant/Applicant filed their written submissions dated 15<sup>th</sup> October, 2021. They submitted that the Plaintiff/Respondent lacked the legal capacity – "*Locus Standi*" to have instituted the originating summons before this Honorable Court against the Defendant/Applicant. The Learned Counsel held that the, Plaintiff/Respondent had never had any interest in the suit prior to the Applicant purchasing it until the commencement of this suit. On this point they relied on the decision of "*the Law Society of Kenya – Versus - Commission of Lands and Others HCCC No. 464/2000* Where Court held that *Locus*

*Standi*” signifies the right to be heard. A person ought to have sufficiency of interest to sustain standing to sue in a court of Law.

15. They further submitted that the fact that the Plaintiff/Respondent had failed to obtain Grant/Letters of Administration therefore he was not entitled to be a Legal Administrator to the estate of the deceased and if he did an action the same was incompetent as at the date of inception whether he had a case worth being listened to or not. To buttress on this, they relied on the court of Appeal case of **Otieno – Versus - Ougo & Another (1986-1989) EALR 468**.

They submitted that taking that there was no evidence of any Grant Letters of Administration having been obtained by the Plaintiff/Respondent they prayed that the entire originating summons dated 23<sup>rd</sup> December, 2020 be dismissed for lack of capacity or *Locus Standi* to institute the instant suit.

#### **B. The Plaintiff/Respondent’s Written Submissions.**

15. On the 22<sup>nd</sup> October, 2021, the Law firm of Mesrs Odongo B. O & Company Advocates for the Plaintiff/Respondent filed their written Submissions dated 22<sup>nd</sup> October, 2021. The Learned Counsels submitted that the application by the Defendant/Applicant only raised one single issue – whether the Letter of Administration was a pre – condition and requirement in instituting an Originating Summons in court. According to them the answer was in the negative. In saying so, they relied and emphasized on the provisions of Order 37(1) of the Civil Procedure Rules, 2010 and posed the question - Whether the ***Cestui que trust (the beneficiary of a trust)*** was one of the persons who were listed who would take out an originating summons and therefore the letters of Administration was not a requirement they argued. They held that the issues for determination in the instant case were as founded under the provision of Order 37 (a) and (g) of the Civil Procedure Rules, 2010 being **(a) Any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or Cestui que trust and (b) The determination of any question arising directly out of the administration of the estate of trust”**

The Learned Counsel further held that it was not in dispute that the Plaintiff/Respondent was a heir to the deceased herein and a beneficiary of the Trust created by the duly executed Probate Will left by the deceased. Thus, they argued that it was important and in the interest of justice that he should be heard particularly where he felt someone was trying and/or was intermeddling with the property of the estate. The upshot of all this they urged court to dismiss the application by the Defendant with costs.

#### **IV. ANALYSIS AND DETERMINATION.**

16. I have keenly assessed all the pleadings including the Notice of Motion application dated 13<sup>th</sup> August, 2021, by the Defendant/Applicant, the Replying Affidavit, the articulate and well prepared written submissions on the subject matter by the parties, the cited authorities and the relevant provisions of the law hereof.

In order to arrive at an informed and just decision I have frame three (3) salient issues as follows:-

- a. Whether the Grant Letters of Administration as envisaged and provided for under the provisions of the Laws of Succession Cap 160 of the Laws of Kenya is a requirement to institute a Civil Suit.**
- b. Whether the provisions of Order 37 Rule 1 of the Civil Procedure Rules any of the named persons especially Cestui que Trust (the beneficiary of a Trust) may take out an Originating Summon?**
- c. Who will bear the costs of this application?**

#### **Issue No. (a) Whether the Grant Letters of Administration as envisaged and provided for under the provisions of the Laws of Succession Cap 160 of the Laws of Kenya is a requirement to institute a Civil Suit.**

17. Before embarking onto a detailed analysis of the matter and drawing up the final ruling, the Honorable Court feels it imperative, to first and foremost expound on the facts of the case briefly. Prior to his demise, the deceased - the Late Saleem Bader Abdul Baqui Al Amry (aka Salim Badir Said Al-Amry) was the legal and absolute proprietor to all that suit property.

18. On 23<sup>rd</sup> December, 2020, the Plaintiff/Respondent instituted the Originating Summons. He claimed to be the heir/Cestui que trust in respect of the trust created by the will of the deceased duly executed on 11<sup>th</sup> March 1979 over his estate. It comprised among other properties all that parcel of land known as Plot No. 661/II/MN. The Plaintiff/Respondent claimed that the Defendant/Applicant had trespassed upon the said suit property and wanted Court to determine the following questions:-

- a. Whether the actions of Mr. Hemed Mohamed Mbarak, the Defendant/Applicant herein in moving onto Plot No. 661/II/MN and commencing the construction of a permanent house thereof was unlawful, illegal and amounted to intermeddling/interference with the estate of the estate of the deceased persons?
- b. Whether the interest of Mr. Hemed Mohamed Mbarak the Defendant/Applicant herein, over Plot No. 661/II/MN ceased immediately he demolished the Swahili house without land he bought thereon.
- c. Whether permanent injunction should be issued by this Honorable Court stopping and/or restraining the Defendant by himself his servants, agents contractor may be of any beneficiary (ies) of the estate, ceased.
- d. That by putting up a permanent structure on the suit property, the Defendant/Applicant was only cleverly attempting to acquire the land which he had no interest in, and it was unlawful and illegal.

e. That the said construction was being done in such a hurried manner so as to defeat any proceedings which would be brought.

19. The duly executed Probate Will by the deceased was annexed as part of the proceedings. It was stated that the will created a Trust and Mr. Abdullahi Bui Omar Saleem Bui Badu and Mr. Abdul Karim Bui Abdallah Bui Kartem were appointed the Executors and the said Probate Will were admitted to probate and the Grand Letters of Administration was issued – copies which were annexed.

Unfortunately, and as fate would have it, it was held that the two duly appointed legal administrators were also now deceased. Their certificates of death were annexed hereto. The Plaintiff/Respondent averred that he was one of the sons of the deceased herein and that during his life time, the deceased owned among other properties the suit land jointly with one Mjakazi Binti Masud (aka Sudi) – who owned 1/16 shares thereof. It was stated that the suit property was distributed in accordance with the Islamic Law in Kadhi's Court Succession Cause No. 243 of 1997 (OS) and a copy of the Decree annexed showed the distribution was undertaken as follows:-

i. 0.456 acres to Sudi;

ii. 5 acres (10.5%) to Ahmed Salim Bader and his two sons –Abdulmuin Ahmed Salim and Abdullahi Ahmed Salim.

iii. 0.45 acres (1%) given to Lashed Mohamed Mobarak.

iv. 2.18 acres given to Abdullahi Salim Badri (The Plaintiff herein) to hold in trust for Asal Noor Madrasa, Mosque and Safaricom Towers.

20. It is stated that prior to his death the deceased had allowed some people to build temporary Swahili houses, being houses without land on the suit land. One of them, being Said Abdalla Said (now deceased) the father of Halima Anderson Gylden is alleged to have been the one who sold the Swahili house without land to the Defendant/Applicant herein. It is stated that, the Defendant/Applicant demolished the said house without land and on or about 14<sup>th</sup> December, 2020 he started constructing a permanent house. According to the Plaintiff, the interest of the Defendant/Applicant was only the Swahili house without land which he bought and not the suit land and the moment he demolished the house the said interest ceased. Ideally, he became a trespasser to the suit land.

21. On the other hand, the Defendant/Applicant has maintained, without proof that his construction had the blessings of Asya Omar Badri (the Widow of the Plaintiff/Respondent's deceased brother, Ahmed) and her son Abdulmusin. It is the Plaintiff/Respondent's case that the Defendant/Applicant should wait until distribution was finalized then he could build on the portion which would be taken by the family of Asiya Omar Badri and her son.

Further, the Defendant/Applicant held that sometimes in the year 2019, he purchased a house without land from Halima Anderson Glyden for a sum of Kenya Shillings Four Million (Kshs. 4,000,000/=). He annexed a copy of the sale agreement dated 11<sup>th</sup> February 2019 and the house without land was erected on a portion of the suit land. That Halima Anderson Gylden the former owner of the house without land paid monthly ground rent for the said portion of land to Ahmed Salim Bader and later on upon his demise to the his estate. The Defendant/Applicant averred that when he was purchasing the house without land he obtained consent from the beneficiaries of the Estate of the deceased who were the lawful owners of the portion of land in which the house without land was erected and the beneficiaries consent to the sale of the house without land and who consented to the construction of the one storey permanent building upon payment of Kenya Shillings Two Hundred and Fifteen Thousand (Kshs. 215,000/=).

22. Now, having stated the facts of this case, I now wish to turn my attention to the deep analysis of the case. I will proceed to address the legal issues under this sub-heading. It is trite law that for one to institute a legal action and proceedings in the estate of a deceased person, an application should be clothed with proper legal capacity (*Locus Standi*) to do so. In order to attain the said *Locus Standi*, the applicant has to apply for either a limited grant or the Special *Ad Litem Ad Colligenda bona* under the provisions of Sections 54 and 55 of Laws of Succession Cap. 160 or full grant letters of Administration under the provisions of the Laws of Succession or under the Islamic Personal Laws all of the Laws of Kenya. Contrary to that the proceeding would be susceptible to revocation under the provisions of Section 74 (1) (a) (b) and (c) of the Cap 160 Laws of Kenya. In the instant case, it is the Islamic laws that is applicable to the parties.

23. There are myriad of authorities to support this legal substratum which include but not limited to “**Otieno – Versus - Ougo & Another (1986-1989) earl 468; and in Rajesh Pranjiran Chudasama –versus- Sailesh Pranjivan Chudasama (2014) eKLR.**”

Where the Court addressed itself on the issue of *Locus Standi* in succession matters as follows:-

**“... But in our view the position in law as regards locus standi in succession matter is well settled. A litigant is clothed with locus standi upon obtaining a limited grant or a full grant of Letters of Administration in cases of Intestate Succession.”**

In the case of Otieno –versus Ougo (Supra) this court differently instituted rendered itself thus:-

**“...an Administration is not entitled to bring any action as administration before he has taken out Letters of Administration. If he does, the action is in competent as the date of inception ..... To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus means he cannot be heard, even on whether or not he has a case worth listening to .....”**

24. In an ideal case, it would be arguable and the Defendant/Applicant's would be right here, that the Plaintiff/Respondent would have been incompetent for want of *Locus standi* to commence these proceedings by way of originating summons on behalf of the estate of the deceased. Thus, there would have need to discuss it *ex debito juficial Locus Standi*. This is basically the right to appear or be heard in court of other

proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that the party cannot be heard, despite whether or not he has a case worth listening. However, from the facts well adduced herein the situation is completely to the contrary. In this case, it appears the matter of the Grant Letters of Administration and the distribution of the estate of the deceased based on the duly executed Probate Will was already accomplished and with filed Decree in the Khadi's Court Mombasa in Succession cause Number 243 of 1997 (OS). It is not in doubt that the Plaintiff/Respondent is the beneficiary heir in Trust of some the beneficiaries of the estate on the strength of the Will by the deceased. Accordingly, the Plaintiff/Respondent has the *Locus Standi* or capacity to institute the Originating Summons on behalf of the deceased and to preserve the estate. The submission by the Defendant/Applicant on its legal capacity on the suit land has to be dealt with on merit and that is only possible during a full trial. Without pre-empting the issues before this court for determination in the main suit, the Defendant/Applicant's right on the suit land has to be unsolved. Therefore, its application is found to be wanting and thus mischievous to say the least.

**ISSUE No. (b) Whether the provisions of Order 37 Rule 1 of the Civil Procedure Rules, 2010 any of the named persons especially Cestui que Trust (the beneficiary of a Trust) may take out an Originating Summon?**

25. The Provisions of Order 37 Rule 1 hold that:-

**“The execution or administration of a deceased person or any of them and the trustees under any deed or instrument or any of them and any person claiming to be interested in the sought as creditor or as Cestui que trust” under the terms of any died of instrument or as claiming by assignment or otherwise such creditor or other person as aforesaid, may take out as of course an originating summons before a Judge sitting in Chambers for such relief as of the nature or kind following as may by the summons be specified and as the circumstances of the case may require that is to say the determination without the administration of the estate or trust any of the following questions :-**

**a. Any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee heir or Cestue que trust”**

**(g) The determination of any question arising directly out of the administration of the estate of trust.**

Therefore from the clear reading of Order 37 Rule 1 of the Civil Procedure any of the persons named herein have the right to take out an originating summons as of the law and in that it makes an except to the requirement of a Letter of Administration.

26. This honorable court has noted that there has been two (2) questions that have been specifically placed before court for determination being Order 37(1) (a) and (g). It is not in dispute that the Plaintiff/Respondent is the heir and/or beneficiary to the estate of the deceased and a beneficiary to the Trust created by the will left by the deceased. The Plaintiff/Respondent has the right to preserve and protect the estate of the estate from being intermeddled.

For this reason, this Court holds the view that there is need and to the interest of justice, equity and conscience that the originating summons is heard and determined on its own merit particularly in order to preserve the estate from intermeddling which include the suspicious acts of trespass on it.

To arrive at this conclusion I have further relied on the decision of *Miscellaneous Civil Appl. No. 37 of 2013 (OS) in the matter of Chandrakant Devchand Megligi Shah (Deceased), Priyat Shah & Monra Shah Mukesh Manchand Shah*.

## **V. DETERMINATION.**

Ultimately, having considered the foregoing two (2) sub-Headings hereof, I am compelled on the preponderance of probability to direct as follows:-

**a. THAT the Notice of Motion application dated 13<sup>th</sup> August, 2021 by the Defendant be and is hereby dismissed with costs to the Plaintiff/Respondent**

**b. THAT the following directions on the Originating Summons dated 23<sup>rd</sup> December, 2020 be and is hereby made pursuant to the provisions under Order 37 Rules 16, 18 and 19 of the Civil Procedure Rules, 2010 as follows:-**

**i. The Originating Summons dated 23.12.2020 is converted to a Plaint, the Supporting Affidavit as witness statement and the filed Replying Affidavit is considered to be a Defence.**

**ii. The Defendant has the liberty to file a Counter Claim and the Plaintiff to file Reply to the filed Defence and Counter Claim within he next 21 days from this date hereof.**

**iii. The matter to be heard by way of adducing “Viva Voce” evidence.**

**iv. The Provisions of Order 11 of the C.P.C. on Case Management is adhered with.**

**v. The Plaintiff is granted 14 days leave to file a Reply to the Defence and/or counter claim.**

**vi. That this matter to be fixed for hearing within the next ninety (90) days from this date hereof without failure.**

**c. THAT matter be mentioned on 17.2.2020 for compliance and taking a hearing date**

**ISSUE No. (c) Who will bear the costs of this application?**

From the provisions of Order 27 (1) of the Civil Procedure Act cap. 21 Costs follow the event. The event in this case is the result of where the notice of motion application dated 13<sup>th</sup> August, 2021 has been dismissed. Hence the costs will be borne by the Defendant/Applicant to the Plaintiff/Respondent herein.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 17<sup>TH</sup> DAY OF JANUARY, 2022**

**HON. JUSTICE L.L. NAIKUNI**

**JUDGE**

**(ELC- MOMBASA)**

**In the presence of:-**

M/s. Yumna Hassan – the Court Assistant

.....Advocate for the Plaintiff/Respondent

..... Advocate for the Defendant/Applicant