



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 285 OF 2014

LIBYA OIL KENYA LIMITED.....PLAINTIFF

- V E R S U S -

IRENE JULIET OTINGA.....1ST DEFENDANT

ALEX SHIVATSI.....2ND DEFENDANT

JAMES MICHAEL.....3RD DEFENDANT

HOROBA LIYAI..... 4TH DEFENDANT

CORNEL SHISANYA.....5TH DEFENDANT

RULING

1. The 2nd and 3rd defendants raised a preliminary objection stating that this suit is bad in law and an abuse of the court process for offending the provisions of section 82 and 83 of Chapter 160 of the Laws of Kenya. They state further that this suit revolves around the estate of the deceased therefore can be resolved within the case file *Mombasa H.C. Succession Cause No. 187 of 2008*. Ms. Rajab Counsel for the 2nd and 3rd defendants submit that the administrators have a duty to distribute the properties under Section 82 and 83 of Cap. 160. The applicant can raise their issue in the succession file or ought to have filed their claim by originating summons under Order 37. Secondly, that there is no privity of contract between the plaintiff and the estate of the deceased. She urged the court to dismiss this application and the suit with costs.

2. The 5th defendant opposed the preliminary objection and stated that he wanted this suit to go to full trial as there are so many matters hidden in the succession file. He says he has not seen any grant issued to the 2nd and 3rd defendants.

3. The plaintiff/applicant has opposed the preliminary objection. Her Counsel submitted that the 1st, 2nd and 3rd defendants were appointed interim administrators purposely to renew the lease. Further that the succession file is riddled with applications that this plaintiff cannot jump into that ship and the succession court cannot issue an order of injunction. He referred this court to the case of the *Estate of Kilungu (2002)2KLR 136*. It is the respondent's case that the cause of action is about lease of land not dispute on who should administer the estate. Lastly it is submitted the respondent does not fall under the class of persons described under Order 37 of the Civil Procedure Rules.

4. On the issue of privity of contract, the plaintiff submitted that there are certificates of notices of

change of name annexed to their affidavit in support of the motion. It is their case that there has been only a change of names but the entity has not changed. In response the 2nd and 3rd defendants submit that what determines a suit is a plaint and not an application, and a prayer for specific performance is an obligation not requiring injunctive orders.

5. Section 82 and 83 of Cap. 160 provide a list of the powers and duties of administrators both before and after confirmation of grant. Section 79 vests the property of a deceased in his personal representative subject to any limitation imposed by the grant. The position as it is at the time of filing this suit is that the grant has not been confirmed and so the assets/liabilities have not been distributed. Consequently the responsibility of the current administrations in section 82 (a) have not been taken away and they have a duty to deal with this suit arising out of the death for his estate. The suits referred to in my view are independent of the succession cause.

6. The matter pending at hand is an interlocutory application seeking temporary orders of injunction pending determination of suit. The submissions by the 2nd and 3rd defendants that the cause of action is determined by plaint is true but the law also provides temporary measures to preserve the status quo to enable a party get an opportunity to prove the case brought out. The notice of motion pending cannot be simply ignored merely because the prayers in the plaint are independent of the contents of the motion. On the issue of whether there is privity of contract between the plaintiff and the estate of the deceased, the explanation was offered by counsel for plaintiff that at page 59-61 in the bundle of their documents, there are certificates annexed detailing the changes in name but the entity remained the same. This is also a matter requiring evidence to prove and cannot be determined summarily by raising it as a preliminary objection.

7. The 2nd and 3rd defendants submitted that the plaintiff ought to have come to court by way of an originating summons under Order 37 and or filed the claim within the succession file. Order 37 lists the persons entitled to take out an originating summons. The plaintiff's claim herein is whether the defendants should be compelled to renew the lease. The closest to the plaintiff's claim to Order 37 is under rule 1 (f). "***The approval of a sale, purchase, compromise or other transactions.***" In my view, this case goes beyond this provision because the question is whether the administrators (defendants) have capacity to carry out the specific performance which they are already contesting. The originating summons is intended to be taken in simple and uncontested matters. Further in the succession file, the court cannot deal with issues of contract which is the subject in this case. I am satisfied the plaintiff's case is properly before this court and support my finding by the holding no.(i) in the case of **KULSUMBAI GULAMHUSSEIN RAMJI & ANOTHER -VS- ABDUL HUSSEIN MOHAMED [1975] EA 69** where the court said that "***the questions raised here were neither simple nor clear cut nor could they be determined even if the summons were adjourned into court with that expedition which the procedure by originating summons was designed to achieve***". See also holding 1 and 2 in **KENYA COMMERCIALBANK VS OGEBE [1982] 296**.

9. In conclusion, I find that the preliminary objection was raised prematurely as the estate is yet to be distributed and thereby strike it out with costs to the plaintiff.

Dated and delivered in open court at Mombasa this 26th day of February, 2015.

A. OMOLLO

JUDGE

26.2.2015