



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 191 OF 2014.

ALEXANDER M. ODONGO..... PLAINTIFF

=VERSUS=

CLEMENT MUKOYA

IMELDA WERE.....DEFENDANTS.

R U L I N G .

IMELDA WERE, who is the 2nd Defendant, through **M/S. J. V. JUMA & CO., Advocates** by the notice of motion dated 17th November, 2014 moved the court under Order 2 Rule 15 (a) of the Civil Procedure Rules to strike out the Plaintiff's suit for failure to disclose a cause of action. The application is based on the following three grounds;-

- “ (i) The Plaintiff has no capacity to sue in the circumstances.
- (ii) The 1st Defendant is dead.
- (iii) The whole suit is totally defective, and incompetent.”

The application was served on Alexander Mudibo Odongo, the Plaintiff herein, through the postal address he gave in paragraph 1 of the plaint dated 10th October, 2014 by registered post service. The Plaintiff did not attend court during the hearing. I have considered the grounds on the application and the submission by 2nd Defendant's counsel and find as follows:-

1. That applications under Order 2 rule 15 (1) (a) of the Civil Procedure Rules do not require evidence to accompany them. As such no supporting affidavit was filed.
2. That the pleadings in the plaint filed by the Plaintiff, and dated 10th October, 2014 suggests that the suit properties were registered in the names of one Odongo Ong'ombe who died in October, 1970.
3. That the suit parcels were registered on 27th June, 1973 which was over two years after the death of the said Odongo Ong'ombe.
4. That though the Plaintiff alleged that he was a son of the said Odongo Ongombe, he has not

averred in his pleadings that he had been appointed the administrator of the estate of the said Odongo Ong'ombe.

5. That the Plaintiff has not rebutted the 2nd Defendant averment that the 1st Defendant is deceased. It is trite law that no suit can be commenced and. or sustained against a dead person but only against such deceased person's estate or personal representative.

6. That for reasons that the Plaintiff do not have capacity to sue over the suit properties and that the 1st Defendant is reportedly deceased and no action has been taken to enjoin his personal representative in his place, the suit is struck out with costs to the 2nd Defendant.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON ...24THDAY OF FEBRUARY, 2015.

IN THE PRESENCE OF.....N/APLAINTIFF

.....N/A.....1ST DEFENDANT

.....N/A.....2ND DEFENDANT.

MR.J.V. JUMA ADVOCATE FOR 2ND DEFENDANT.

JUDGE.