



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.175 OF 2014

1. AGNES WAGANGA E. JABU

**2. DEBORA BABY BUKI (*SUING ON BEHALF OF THE ESTATE OF
THE LATE CHARLES BUKI MOSES....*PLAINTIFFS/RESPONDENTS**

=VERSUS=

1. PETER KIVOLONZI

2. FATUMA BUKI MOSES

3. JANE NGALE FUKWE

4. THE LAND REGISTRAR, KILIFI.....DEFENDANTS/APPLICANTS

R U L I N G

1. Before me is the Application dated 22nd June, 2015 by the 1st, 2nd and 3rd Defendants seeking for the following orders:

(a) That this honourable court do stay, set aside and/or vary the judgment of this honourable court delivered on the 5th of June 2015 by the honourable Justice O. A. Angote and a decree arising from the said Judgment.

(b) That this honourable court be pleased to order that status quo ante the delivery of this honourable court's judgment dated the 5th day of June 2015 and issuance of a decree arising from the said Judgment be maintained pending the interpartes hearing of this application in the first instance and thereafter pending the hearing and determination of this suit.

(c) That leave be granted to the 1st, 2nd and 3rd Defendants/Applicants herein to file their defence out of time and the draft defence filed herewith be deemed to be properly filed upon payment of the required court fees.

(d) That the cost of this suit be provided for.

2. In her Affidavit, the 2nd Defendant deponed that she is the daughter of the late Charles Buki Moses who passed on on 8th June, 2000; that the 1st Plaintiff was not one of the two wives of the late Charles Buki Moses; that by the time her father died, the title deed for Kilifi/Kijipwa/202 had not been issued and that the said title was issued post humously on 27th March 2008.

3. It is the 2nd Defendant's deposition that her, together with Jane Ngale Fukwe, the 3rd Defendant, applied for letters of administration in Mombasa Succession Cause No. 404 of 2010; that they did not include the Plaintiff in the list of the beneficiaries because the 1st Plaintiff was not a wife to their late father neither was the 2nd Plaintiff a daughter to their father and that the Plaintiffs did not object to the issuance of the said letters of administration.

4. It is the deposition of the Defendants that they only learnt about the entry of Judgment in this matter on 16th June 2015 after seeing a notice of entry of Judgment in the Standard Newspaper and that after perusing the file, they were shocked to learn that there was a different set of letters of administration issued to the Plaintiff in respect of their father's estate.

5. It is the Defendants' deposition that they never read the advertisement in the Standard Newspaper of 24th October 2014.

The Plaintiffs'/Respondents' case:

6. In her Replying Affidavit, the 1st Plaintiff deponed that she is the third wife of the late Charles Buki with whom she started cohabiting with after the 1st and 2nd Defendant's mother left him in 1969; that she knew the 1st and 2nd Defendants although they were not living with their father; that she was not aware that the 1st and 2nd Defendants had petitioned to be the administrators of the Estate of Mr. Buki and that she learnt of the position from Salim Hussein in 2014 after the sale of the suit property.

7. According to the 1st Plaintiff, the sale of the suit property to the 3rd Defendant was fraudulent and no amount of litigation can change that position.

8. It is the 1st Plaintiff's deposition that the Defence does not raise triable issues as far as the issue of the fraudulent sale of the suit property to the 3rd Defendant is concerned.

9. I have considered the brief written submissions filed by the Applicants' and the Respondents' advocates.

Analysis and findings:

10. This matter was commenced by way of a Plaint which was filed on 25th September 2014. On 15th October 2014, this court allowed service of the Plaint and the summons upon the Defendants by way of advertisement. The service of the summons was then effected by way of advertisement in the Standard Newspaper of 24th October 2014.

11. The matter proceeded for formal proof when the Defendants failed to enter appearance.

12. The Defendants have deponed that they never read the advertisement that was published in the newspaper.

13. Whether the Defendants read or did not read the said advertisement, in law, service of summons on the Defendants was effected on 24th October 2014 and the Defendants were under an obligation to enter appearance within 21 days as ordered by the court. The Judgment that was subsequently entered is therefore regular.

14. It is trite law that where there is a regular Judgment, the court can only set it aside if the draft defence raises triable issues (**see Patel Vs East Africa Cargo Handling Services, Ltd (1974) EA 75 and Mbogo Vs Shah (1968) EA 93.**

15. It is the 2nd and 3rd Defendants' case that they are the legitimate legal administrators of the Estate of the late Mr. Buki. The Defendants have annexed on their Affidavit the letters of administration that were issued to them on 28th July 2011 in Mombasa Succession cause NO. 404 of 2010.

16. The said letters of administration shows that the 2nd and 3rd Defendants were appointed by the court as the administrators of the Estate of Charles Buki Moses.

17. The Plaintiffs, on the other hand, averred in the Plaint that they are the sole administrators of the Estate of the late Mr. Buki. Indeed, the Plaintiffs informed the court that the letters of administration that were issued in their favour were confirmed on 1st April 2014. It is on that basis that the Plaintiffs challenged the sale of the suit property by the 2nd and 3rd Defendants.

18. Although the Plaintiffs have admitted that the 2nd and 3rd Defendants are the daughters of the late Buki, they never included them as beneficiaries of the Estate of Mr. Buki when they applied for the letters of administration.

19. It is not in dispute that by the time the Plaintiffs applied for letters of administration in Mombasa Succession Cause 378 of 2013, the court had already appointed the 2nd and 3rd Defendants as the administrators of the Estate of Mr. Buki.

20. Consequently, until the Plaintiffs revoke the letters of administration that was issued to the 2nd and 3rd Defendants, the issue of their *locus standi* in prosecuting this suit as administrator of the said Estate is debatable. That, in my view, is a triable issue that has been raised in the draft Defence.

21. The other triable issue that can only be dealt with at the hearing is whether indeed the 2nd and 3rd Defendants legally sold the suit property to the 1st Defendant. It is only the Defendants that can respond to that issue satisfactorily during trial. This court cannot determine that issue considering that the standard of proof for fraud on the part of the Plaintiffs is higher than is ordinarily in other civil matters, that is, higher than on a balance of probabilities. (**See Urmilla W/o Mahandra Sha Vs Barcklays Bank International Ltd & Another (1979) KLR 76 and Koinange & 13 others Vs Koinange (1986) KLR 23.**

22. Having raised triable issues in the draft Defence, I shall allow the Defendants to unconditionally defend the suit.

23. For those reasons, I allow the Application dated 22nd June 2015, in the following terms:

- (a) **The Judgment of this court delivered on 5th June 2015 be and is hereby set aside.**
- (b) **Leave be and is hereby granted to the Defendants to file their Defences within 14 days from the date of this ruling upon payment of the requisite fees.**
- (c) **Each party to bear his or her own costs.**

Dated and delivered in Malindi this 30th day of **October** 2015.

O. A. Angote

Judge