



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

CIVIL CASE NO. 198 OF 2021

ABUBAKAR SHARIFF ALLI.....PLAINTIFF

- VERSUS -

LULI SHARIFF ALI ATHMAN.....1ST DEFENDANT

ALIYAH SHARIFF NOOR.....2ND DEFENDANT

LANDS REGISTRAR, MOMBASA.....3RD DEFENDANT

RULING

I. Introduction

1. This ruling is in respect to the Chamber summons dated 24th September 2021, the Notice of Preliminary Objection dated 29th November 2021 both filed by the Plaintiff/Applicant herein and the Notice of Motion dated 25th November 2021 filed by the 1st and 2nd Defendants.

II. The Chamber Summons application dated 27th September, 2021 by the Plaintiff/Applicant.

2. The Chamber Summons application has been brought under the provision of Sections 7 and 26 of the Limitation of Actions Act, Cap. 22 and Section 3 of the Environment & Land Court Act, No. 19 of 2011. The Applicant is seeking leave to file the intended suit out of time and to have the annexed Plaint deemed as duly filed. In a nutshell the Plaintiff case is that, he is the registered owner of Mombasa/Block/XX/288 and produced a Certificate of Title issued on 10th December 1986. Due to his nature of work, he left the title documents in the custody of the 2nd Defendant for safe keeping. That after the 2nd Defendant died on 21st February 2021, the Plaintiff discovered that she had fraudulently transferred the suit to herself on 7th December 1998, then transferred it to the 1st Defendant on 1st October 2002 and transferred back to herself on 12th April 2005. The Plaintiff claims the said transfers were illegal for being effected without his consent and were based on fraudulent documents, to his detriment.

III. The Notice of Motion Application dated 25th November, 2021 by the 1st and 2nd Defendants

3. The said Notice of Motion application is brought under the provisions of Sections 1A, 1B (a) and 3A of the Civil Procedure Act, Cap. 21, Order 24 (4) and Order 51 Rule 1 of the Civil Procedure Rules, of 2010. The said application was based on the grounds, facts and averments of the twenty six (26 Paragraphed Supporting affidavit of ABUBAKAR SHARIFF ALI, the Plaintiff hereof sworn and dated on 24th September, 2021 and seven (7) annexures marked as "ASA – 1 to 7" annexed thereto. He held that the 1st Defendant was the sister to the Plaintiff and the 2nd Defendant was the late mother to the Plaintiff. He stated that in the year 1986, the Plaintiff purchased all that property known as Title No. Mombasa/Block/XX288 from one Justin Fernades and soon after caused it to be registered in his name as the rate payer at the County Government of Mombasa which was then the Municipal County Council of Mombasa.

4. He stated that being a long distance truck driver, he handed the original Certificate of title deed documents to the his mother, the 2nd Defendant for its safe keeping due to the trust and confidence he had in her. As fate would have it, on 21st February, 2021, the 2nd Defendant passed away. Soon after the burial, the Plaintiff searched for the title in vain. He decided to conduct an official search at the land Registry and was shocked to find out that the title had been registered in the names of the 2nd Defendant on 7th December, 1998. On 1st October, 2002 and who later on transferred it to the 3rd Defendant but on 12th April, 2005 who re - transferred it to the 2nd Defendant. He averred that all these transfers of his rightful land were illegal, fraudulent, null and void, and irregular as they were done neither with his consent nor knowledge. He held that clearly here was a conspiracy between the 1st and 2nd Defendant to deprive, dispossess and disown him of his legally acquired and absolute property.

5. Through a letter dated 9th July, 2021 he wrote to the Department of Criminal Investigations but there has been no responses to date. It is for this reason that he decided to institute this suit before this Court. He urged Court to allow the application as prayed.

IV. The Notice of Preliminary Objection dated 29th November, 2021 by the Plaintiff.

6. The Notice of Preliminary Objection was raised by the Plaintiff against the application dated 29th November 2021 and prayed the same be struck out with costs. The Plaintiff based the objection on the grounds that the Learned Counsel for 1st and 2nd Defendants lacked the locus standi to represent them, who allegedly swore an eleven (11) paragraphed Supporting Affidavit on contentious matters making himself a potential witness. That the application could not claim that the 1st and 2nd Defendants were deceased and turn around and have an advocate on record to represent them. The Advocate could not be representing nor be taking instruction from dead or non-existent persons. The Advocate could only be receiving and representing the beneficiaries of the duly appointed Legal Administrators or beneficiaries of the estate of the deceased. The application was deemed incurably defective and ought to be dismissed for violating Rule 9 of the Advocate's Practice Rules.

The Notice of Motion Application dated 25th November, 2021 by the 1st and 2nd Defendants

7. On 26th November, 2021 the 1st and 2nd Defendants filed this application. They sought to have the suit struck out against the 1st and 2nd Defendants, who died before the suit was commenced. Mr. Abdi Khalid Yunis, as an Advocate of the high Court stated that he was in seise of this matter and hence sworn this 11 Paragraphed Supporting affidavit in opposition of the suit and the application filed by the Plaintiff herein. He held that the Plaintiff filed this suit against the 1st and 2nd Defendants on 18th September, 2021. He maintained that at the time the suit was filed the 1st and 2nd Defendants were both deceased and as such the suit was incompetent, a nullity, an abuse of court and law and could not be sustained in law. There was annexed a Certificate of Death of Luli Shariff Ali issued on 13th November 2020 indicating she passed away on 30th October 2020, while Aliya Shariff Noor died on 21st February 2021 as indicated in her Permit for Burial that was issued on the same day.

V. Submissions

8. On 30th November, 2021 while all the parties were in Court, they were directed to have the two applications and the Preliminary Objection be canvassed by way of written submissions. Pursuant to that, only the Counsel for the 1st and 2nd Defendants/Respondents filed written submissions.

The 1st and 2nd Defendants Written Submissions

9. On 21st January, 2021, the Learned Counsel for the 1st and 2nd Defendants, the Law firm of Messrs. Yunis Ali & Company Advocates filed their written submissions dated 19th January, 2022. Mr. Yunis Advocate submitted that the suit herein was instituted after the death of the 1st and 2nd Defendants and as such was an abuse of the court process. That the entire suit was incompetent, an abuse of the court process and law a nullity and ought to be struck out. To buttress its case on this point, the Counsel relied on the case of **"Viktar Maina Ngunjiri & 4 Others – Versus – Attorney General & 6 Others which cited the Indian case of C. Muttu – Versus – Bharath Match AIR 1964 Kaut 293"** and the Court of Appeal's decision in the case of **"Geeta Bharat Shah & Others – Versus - Omar Said Mwanatayari and another (2009) eKLR**, where it was held that where a Respondent had admitted to suing a dead person, the court was duly bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead at the time the suit was filed. The Learned Counsel argued that the suit was incurably defective on the ground that it was filed against a nonexistent persons.

10. In response to the Plaintiff/Applicant's Preliminary Objection, counsel submitted that it failed to meet the threshold set in the case of:- **"Mukisa Biscuits Manufacturing Co. Ltd – Versus - West End Distributors Limited (1969) EA. 696**. That a preliminary objection has to stem from pleadings and raise a pure point of law. The preliminary objection was argued to be consisting of facts and not based on any law, therefore inviting court to interrogate the facts before making a determination. The Learned Counsel further argued that he has locus standi to represent the Defendants in order to discharge his duties as an officer of this court, of disclosing to court that both the Defendants are dead and could not be sued. The Honorable Court was urged to allow the application dated 25th November 2021 and dismiss the Plaintiff's suit.

VI. Analysis and determination

11. I have read carefully the pleadings herein and considered the written submissions made by counsel. I have consolidated all the issues in the Chamber Summons dated 24th September 2021, Notice of Motion dated 25th November 2021 and the Preliminary Objection dated 29th November 2021. The main issue that emerges for determination is whether the suit brought against the 1st and 2nd Defendants can be sustained.

12. This suit is yet to be officially instituted, hence the Plaintiff seeking leave to file the Plaint dated 18th September 2021 out of time via the Chamber Summons dated 24th September 2021. Instead of responding to the application with grounds of opposition or a Replying Affidavit, counsel for the 1st and 2nd Defendants filed a Notice of Motion dated 25th November 2021 seeking court to strike out the suit. I will consider this application as a response to the Chamber summons as opposed to considering it independently. The law firm of Messrs. Yunis Ali & Co Advocates filed a Notice of Appointment under protest on 26th November 2021. Their argument in the application was that the Plaintiff's suit was a nullity for suing deceased persons instead of the duly appointed Legal administrators to their estates.

13. The Plaintiff responded to the 1st and 2nd Defendants' application by filing a Preliminary Objection on 29th November 2021. The

Objection is premised on the grounds on the face of it, which are a set of facts that needed to be ascertained before determination. By now parties need to understand what constitute a worthwhile Preliminary Objection, the case of **Mukisa Biscuits Manufacturing Co. Limited – Versus - West End Distributors Limited (1969) EA. 696** is very clear. LAW J.A on page 700 stated that:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implications out of pleadings, and which if argued as a preliminary point may dispose of the suit.” SIR CHARLES NEWBOLD P, on page 701 observed that “The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

14. The Preliminary objection as raised by the Plaintiff is not capable of disposing the matter preliminarily without the court having to consider and ascertain the facts from elsewhere. The point raised on whether the 1st and 2nd Defendants are deceased and therefore could not have instructed the firm of Yunis Ali & Co Advocates, is one that needs court to go beyond the premise of pleadings to ascertain. This is not a pure point of law stemming from the pleadings only, the Preliminary Objection raised by the Plaintiff fails in its entirety.

15. Back to the main issue, the Plaintiff has admitted in his Chamber Summons that the 2nd Defendant, who is his mother is deceased. In his supporting affidavit he claims to have left her with his certificate of title to Mombasa/Block/XX/288, the suit property for safe keeping. That after her death on 21st February 2021 he learnt that the suit land had fraudulently exchanged hands between the 1st and 2nd Defendants without his knowledge. In support of his case, he annexed a Permit for Burial dated 21st February 2021, indicating that the 2nd Defendant died on 21st February 2021. The 1st and 2nd Defendants on the other hand, has annexed in the Supporting affidavit the Certificate of death of the 1st Defendant issued on 13th November 2020. The said certificate of death indicated that the 1st Defendant died on 30th October 2020.

16. From the evidence on record the 1st and 2nd Defendants died before the application by the Plaintiff to file suit out of time was filed in court. The Certificate of death for the 1st Defendant indicates she died on 30th October 2020 while the burial permit for the 2nd Defendant indicate she died on 21st February 2021. The **Court of Appeal in Geeta Bharat & 4 others – Versus - Omar Said Mwatayari & another (2009)eKLR** held that:- *“.....In refusing to allow the application as in favour of the deceased against whom a suit was filed after the demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased’s estate to urge the Court to do so for once the Respondent also admitted he sued a dead person, the court was duty bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed. In any event, because the person cited in the Plaint as the first Defendant was already dead by the time the suit was filed meant the Plaintiff (now the 1st Respondent) did not tell the truth when he said in his verifying affidavit that he had read the Plaint and verified the facts therein for how could he say that against undisputed fact later discovered that by the time he was saying so, the 1st Defendant was long dead.”*

17. Undoubtedly, Luli Sharif Ali Athman and Aliyah Shariff Noor were already dead by the time this application was being filed. Therefore, I find that the application is a nullity for suing the deceased in their own capacity as opposed in their personal representative capacity. In **Isaya Masira Momanyi - Versus - Daniel Omwoyo & another [2017] eKLR** it was held that:-

“It is trite law that the estate of deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who has been issued grant of letters of administration has capacity to represent the estate of a deceased person. The powers of the personal representative are set out under Section 82 of the Law of Succession Act.”

18. Where the Plaintiff wants to institute civil proceedings against a deceased defendant, and no letters of administration have been taken out by the legal representatives of the defendant, the Plaintiff ought to cite the person entitled to take out the letters of administration. **Rule 22 (1) of the Probate and Administration Rules** stated that:-

“A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.

19. The Plaintiff therefore ought to have cited the persons entitled to administer the estate of the 1st and 2nd Defendant to court to either accept or refuse a grant of letters of administration. In the case of In **Re the Estate of Josiah Muli Wambua - Deceased [2014] eKLR** it was held that:-

“In intestacy, a person entitled to administration may be cited by the court to accept or refuse a grant of letters of administration intestate. The person respond should reset to the citation by either renouncing his entitlement to apply for the grant or by applying for the grant. If he fails to appear upon being cited or to apply for grant, the citor may proceed to Petition for the grant.

In intestacy, citations issue only in cases where no petition has been lodged in court. Citations are intended to trigger the process of applying for letters of administration intestate in circumstances where the persons entitled to apply are not willing or are slow in moving the court in that behalf. The citor should not be a person who has himself already applied for the grant, for the citor should only apply for grant after the citee fails to so apply.”

VII. Conclusion and Disposition

20. Based on the above stated elaborate analysis, it is rather clear that there no letters of administration have been taken out on behalf of the 1st and 2nd Defendants and neither has the Plaintiff cited the persons entitled to administer the estate of the 1st and 2nd Defendants.

21. For the reasons given above, the Plaintiff cannot sue the 1st and 2nd Defendants in their own capacity, they are dead long before this application was filed in court. The application dated 24th September 2021 cannot be sustained. Thus, in the given circumstances, I proceed to strike out the application in its entirety with no order as to costs.

IT IS SO ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF MARCH 2022.

HON. JUSTICE L. L. NAIKUNI

JUDGE

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumnah Hassan, the Court Assistant.

Mr. Kiptoo Advocate for the Plaintiffs.

Mr. Yunis Advocate for the 1st and 2nd Defendants.