



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 71 OF 2016 (OS)

JAPHET NZILA MUANGI PLAINTIFF

VERSUS

HAMISI JUMA MALEE DEFENDANT

RULING

(Application to strike out suit on the ground that it was filed against a dead person; one cannot purport to file a proper suit against a dead person; such suit is a nullity ab initio; suit struck out)

1. The application before me is that dated 25 January 2022 filed by Mwanajuma Khamis, Salama Shomoni Hamisi Juma, and Ibrahim Khamis Juma who are the administrators of the estate of the defendant in this suit. The applicants seek orders that they be joined to this suit as interested parties, and consequent thereto, for the court to declare this suit as null and void for having been filed against a dead person and the same be struck out. The application is based on the grounds inter alia that the defendant herein died on 24 April 1993. It is thus contended that this suit, which was filed on 12 April 2016, is null and void and should be struck out. The supporting affidavit is sworn by Mwanajuma Khamis, who has annexed a certificate of death of the defendant.

2. The application is opposed by the plaintiff who swore a replying affidavit. He has deposed inter alia that the defendant was the registered proprietor of the Plot No. MN/1/27 and that vide an agreement for sale made in 1987 and 1988 he purchased the land and the defendant executed a transfer. He then took possession of the land. He avers that in view of this, he is a bona fide purchaser for value. He contends that the property has since passed and does not form part of the estate of the defendant.

3. I have considered the application alongside the submissions made by Mr. Mwangunya, learned counsel for the applicants, and Mr. Kariuki, learned counsel for the plaintiff. Mr. Kariuki's view was that the question for determination is not whether the defendant is dead but whether the property is one vesting in the estate of the defendant. I am afraid that the question is actually whether the defendant had died at the time that this suit was filed and if I find for a fact that he was deceased at the time, then I will have no choice but to strike out this suit as null and void for one cannot sue a dead man and claim that the suit is properly before court.

4. The issue was comprehensively addressed by Mbogholi Msagha J (as he then was) in the case of *Viktar Maina Ngunjiri & 4 Others vs Attorney General & 6 Others, High Court at Nairobi, Civil Suit No. 21 of 2016 (2018) eKLR* where he reviewed various authorities as follows :-

In the Indian case of C. Muttu vs. Bharath Match Works AIR 1964 Kant 293 the court observed,

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

In yet another Indian Case of Pratap Chand Mehta vs Chrisna Devi Meuta AIR 1988 Delhi 267 the court citing another decision observed as follows,

“if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead

person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

5. Having reviewed the above authorities, he found that the suit as against the 7th defendant, who was dead when the case was filed, was null and void *ab initio*.

6. The Court of Appeal has also had occasion to address the issue of a suit filed against a dead person in the case of *Geeta Bharat Shah & 4 Others vs Omar Said Mwatayari & Another, Court of Appeal at Mombasa, Civil Appeal No. 46 of 2008, (2009) eKLR*. In that case, a suit was filed against two persons one of whom was already dead when the case was filed. Judgment was entered against the deceased. An application to set aside the judgment was disallowed and the applicants appealed to the Court of Appeal. The Court of Appeal held that the judgment could not be sustained as it was entered against a person who was already dead. The court stated as follows :-

In the result, as Bharatkumar Nathalal Shah was already dead by the time the suit was filed, we hold the view that the suit was a nullity and Mr. Oddiaga, is with respect right in conceding the appeal in respect of him on that score. We see no merit in directing that he be allowed to file defence as he is not there to do so and the administrators to his estate cannot in law take over the matter as it was filed after he was already dead.

7. I am bound by the above decision of the Court of Appeal. I have no option but to find that the suit against the defendant (named as respondent in the suit) was a nullity *ab initio* and I hereby strike it out. I will not make any orders as to the costs of the suit but the applicants will have the costs of this application.

8. Orders accordingly.

DATED AND DELIVERED THIS 14TH DAY OF APRIL 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA