



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**CIVIL SUIT NO. 45 OF 2010.**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA.**

**IN THE MATTER OF PARCEL NO. N. TESO/KOCHOLYA/780.**

**BETWEEN.**

**CHARLES IPEKET SAUSAU .....APPLICANT/RESPONDENT.**

**VERSUS**

**IPAPU PHILIP JACKAH .....RESPONDENT/APPLICANT.**

**R U L I N G.**

The Respondent's counsel, M/S Imwene P. A & company advocates, gave notice to raise a preliminary objection to the application dated 6<sup>th</sup> November, 2012. The notice dated 22<sup>nd</sup> July, 2013 sets out the following four points of law;

1. That the applicant has no capacity to institute or prosecute any pleadings with respect to the land that is charged by the Standard bank, a limited liability company, having been charged on 19<sup>th</sup> July, 1982. That the applicant lacks authority from the bank to pray for the orders from this court.
2. That the applicant is a stranger to this proceedings as he has not obtained grant to substitute his late father. He was also not obtained letters of administration Ad Litem to give him authority to defend the estate of his deceased father, Shem Jakaa who is the original respondent in the proceedings.
3. That the applicant has not complied with the due process of the law as he did not seek the leave from the court to be enjoined as a party to substitute his deceased father in accordance with Order 24 Rule 3 (1) of the Civil Procedure Rules 210.
4. That the applicants name should be struck out from these proceedings and his application be dismissed with costs.

During the hearing, M/S. Imwene raised her preliminary objection and specifically challenged the legal standing of Ipapu Philip Jackah, the respondent in the preliminary objection and Applicant in the application by notice of motion dated 6<sup>th</sup> November, 2012. Counsel submitted that the said applicant has contravened the provisions of Section 51, 53 (b), and 54 of the Law of Succession Act, as he has not annexed any copy of any document to show that he has been appointed the legal representative of the deceased or that he has obtained leave of the court to be substituted for the deceased.(original Respondent)

In his response, the applicant who appears for himself opposed the preliminary objection and indicated that he does have capacity to file and prosecute the said application. He referred the court to the order of 4<sup>th</sup> October, 2010 in which prayers 1, 2, and 3 of the application of the same date was granted. Prayer 2 of the said application was requesting the court to allow the substitution of "Shem Ijaaka's names" by "Isasu Philip Jalkah". The court takes the names Shem Ijaaka to refer to the original respondent in this

proceedings, Shem Jakaa and the names Isasu Philip Jalkah to refer to Ipapu Philip Jackah, the applicant in the application dated 6<sup>th</sup> November, 2012. It appears that M/S Imwene counsel for the original applicant, was not aware about the application dated 4<sup>th</sup> October, 2010 and the orders issued on the same day, which effectively allowed the said applicant to be enjoined in the proceedings in place of the initial respondent. There is however nothing on record to confirm whether the application and order of 4<sup>th</sup> October, 2010 were served on the original Applicant's counsel.

As shown above, the applicant named in the application dated 6<sup>th</sup> November, 2012 has capacity to file the said application in view of the orders of 4<sup>th</sup> October, 2010 which have not been reviewed and or set aside. The Respondent Counsel's preliminary objection on all the four issues contained in her notice is without merit and the same is rejected but costs will be in the cause as there are doubts as to whether the order of 4<sup>th</sup> October, 2010 was served on the counsel.

**S. M. KIBUNJA,**

**JUDGE.**

Delivered on 24<sup>TH</sup> day of SEPTEMBER, 2013.