



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 80 OF 2011.

MUSA OUNDO MUSALAMA PLAINTIFF

VERSUS

JORAM ADALA OKUBI DEFENDANT.

RULING.

The application dated 24th July, 2012 (possibly the date should have read 24th July, 2013) was filed by the Defendant through M/S Bogonko, Otanga & co. advocates for the following orders;

1. That the exparte judgment entered on 23rd February, 2013 and all consequential orders be set aside and the Defendant granted leave to file defence out of time.
2. That the costs of this application be provided for.

The application is based on three grounds which are on the face of the application and are summarized hereinbelow;

1. That the Defendant was not served.
2. That the Plaintiff is deceased and a stranger is masquerading as the Plaintiff.
3. That the defendant has a good defence.

The application is supported by the Defendant's affidavit sworn on 24th July, 2013 in which he among others, depones as follows;

1. That he entered appearance after being served with the suit papers.
2. That thereafter the Plaintiff died on 25th December, 2011 as confirmed in the death certificate issued on 29th February, 2012 and marked JA- 1.
3. That he has never been served with any other suit papers after the death of the Plaintiff, and any affidavit of service indicating the contrary is false.
4. That the suit papers were signed by Samuel Mulera Lukiri, who also testified during the formal proof masquerading as the Plaintiff.
5. That he came to know that this case had been heard and orders issued on 5th July, 2013 when he was served with a replying affidavit to his application in Busia C.M Land case No. 32 of 2002.
6. That he is the registered owner of Lucholulo/Bukhayo/1597 whose title has been revoked without giving him an opportunity to be heard contrary to the principles of natural justice.
7. That he has a good defence.

Samuel Mulera Lukiri filed a replying affidavit to the application, sworn on 23rd September, 2013 in which he among others depones as follows;-

1. That the issues raised in this application are similar to those raised in another application in Busia CM. Land case No. 32 of 2002.
2. That there should be no more than one case between the same parties over the same subject matter at the same time.

When the application came up for hearing on 25th September, 2013, Mr. Bogonko Advocate appeared for the Defendant while Mr. Samuel Mulera Lukiri answered for the Plaintiff, but later disclosed that he was a son to the Plaintiff. Counsel for the Defendant submitted that the papers filed by the said Samuel Mulera Lukiri, impersonating the Plaintiff and the replying affidavit by the said Samuel, should be expunged from the record of the court. Samuel Mulera Lukiri who gave his national Identity card number as 4426095 said he is the first son of the Plaintiff who died on 25th December, 2011. He confessed that he appeared before this court on 17th December, 2012 and testified introducing himself as Musa Oundo Musalama. He said that on 3rd November, 2009, his father had given him a power of attorney allowing him to execute any document in court in respect to Busia CM. Land case No. 32 of 2002 as his father was unwell. He added that after his father died, the family members authorized him to file for succession of his father's estate. He thereafter wrote to the courts where his father had cases pending, asking that he be allowed to proceed with the cases. He is yet to receive any response. He said this case had been filed by his father and as there was another application in the lower court pending ruling on 30th September, 2013 the defendant should have waited for the ruling to be delivered. He said that he testified on behalf of his father on the strength that the family members had authorized him to make a follow up on the issues of his father's estate.

The court has carefully considered the grounds on the application, the contents of the defendant's affidavit in support and the replying affidavit by Samuel Mulera Lukiri and find as follows;

1. That the suit papers initiating this suit filed on 14th November, 2011 indicated they were signed by the Plaintiff by writing his names. The papers filed after 25th "December, 2011 which is the date the Plaintiff died, carries the same signature. Having carefully looked at the signatures on the documents filed before and after the death of the said Plaintiff the court finds the signatures were not inserted by the named plaintiff. They were most probably signed by Samuel Mulera Lukiri.
2. That there is nothing in the papers initiating this suit to indicate that Samuel Mulera Lukiri had the authority of the named Plaintiff to file and prosecute this suit on his behalf.
3. That the named Plaintiff, having died on 25th December, 2011 could not have presented himself in court on 17th December, 2012 to testify as PW 1 as the record shows.
4. That the said Samuel Mulera Lukiri did not move the court as provided for under the law to allow him file this suit in a representative capacity when his father was alive, and to continue prosecuting this case after the death of his father.
5. That the said Samuel Mulera Lukiri was, and still is, a stranger to this case and the proceedings thereof.
6. That the appearance of the said Samuel Mulera Lukiri on 17th December, 2012 when he testified giving his names as Musa Oundo Musalama, without making full disclosure of the death of the said Musa Oundo Musalama and without legally being enjoined in the suit made the proceedings of that day not only irregular but void ab initio.
7. That the judgment prepared thereafter on the evidence adduced by the said Samuel Mulera Lukiri and delivered in court on 21st February, 2013 was irregularly obtained and should be set aside.
8. That having found that the court papers initiating this suit were not signed by the named Plaintiff, and that Samuel Mulera Lukiri has not complied with the legal provisions to allow him initiate and prosecute this suit in the names of Musa Oundo Musalama who is deceased, the court finds this suit is an abuse of the courts process and should be struck out. There is therefore no suit that the defendant should be called upon to file a defence against.

That having found as above, the court issues the following orders;-

- a. That the proceedings of 17th December, 2012, 28th January, 2013 and the judgment delivered on

21st February, 2013 are hereby set aside.

- b. That the suit is hereby struck out for the suit papers, including the plaint, were not signed by the named Plaintiff or by a person authorized by the said Plaintiff in accordance with the law..
- c. That Samuel Mulera Lukiri who filed this suit and proceeded to testify under the names of his father long after he had died will meet the cost of this suit incurred by the defendant.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 23rd DAY OF October, 2013.

IN THE PRESENCE OF;

JUDGE.