



IN THE MATTER OF: THE REGISTERED LAND ACT (CHAPTER 300) LAWS OF KENYA

AND

A PARCEL OF LAND KNOWN AS LAND REFERENCE NO. MOMBASA/BLCOK 1083

AND

IN THE MATTER OF: LIMITATION OF ACTIONS ACT (CHAPTER 22) LAWS OF KENYA

AND

**IN THE MATTER OF: THE CIVIL PROCEDURE ACT (CHAPTER 21) LAWS OF KENYA
AND THE RULES ENACTED THEREUNDER**

BETWEEN

**MOHAMED ABUSHIRI MKULLU.....
.....PLAINTIFF/APPLICANT**

VERSUS

SULEIMAN ABDALLA HASSAN

THE ESTATE OF SAID SWELLAM GETHAN

SAANUN.....DEFENDANT/RESPONDENT

RULING

By a Chamber Summons Application dated 12th April 2010 brought under Order VI Rules 13 (b) (c) and (d) of the Civil Procedure rules the second Defendant is praying for the following orders:

- 1. That the Plaintiff suit against the 2nd Defendant be struck out with costs.**
- 2. The costs of the application be provided for.**

There is a supporting affidavit by one Nuru Saanun who states that she is the widow of Swellam Gethan Saanun dated 12th April 2010.

The ground upon which the application is sought is that: the Second Defendant is not a legal entity and cannot be sued in the absence of a legal representative, accordingly the suit is nullity. In her affidavit, Nuru Saanun states that she has been advised by her advocates that the suit is misconceived as the second defendant is not a legal entity and cannot be sued unless personal representatives are appointed to represent the estate.

In reply to the application, there is an affidavit dated 26th April 2010 by Ahmed Mohamed Abushiri Ahmed. although titled Supporting Affidavit, I believe should be a Replying Affidavit as shown in its contents.

In reply to the issue of the capacity to sue, the deponent in his affidavits states that he is informed by his advocate that it is not possible for the advocates for the 2nd Defendant to appear in this matter upon “instructions” from the 2nd defendant while at the same breath denying the 2nd Defendant is a legal entity capable of suing and being sued.

Although there are various other issues raised in the papers filed in the matter, it is my considered opinion the major issue for determination by the Court is whether the 2nd Defendant is capable of being sued?

The parties agreed to file written submissions by consent on the 31st May 2010 and the parties filed their respective submissions.

I have perused the written submissions; affidavits filed in the matter and considered their contents.

In his submission, the Counsel for the Applicant/2nd Defendant argues that the 2nd Defendant is not a legal entity and cannot be sued unless personal representatives are appointed to represent the estate. He further states that under Order XXIII Rule 4 if the Defendant is alive when the suit is filed, the suit will abate if the legal representative of the Defendant is not made a party to the suit within a year. He further submitted that a suit cannot be filed against a dead person by suing his estate without naming the personal representatives. He concludes that the suit against the 2nd Defendant is a nullity and should be struck out. In support of his argument, the learned Counsel for the 2nd Defendant relied on several authorities.

The Counsel for the Plaintiff has also filed submissions in opposition to the application. He castigated the advocate for the 2nd Defendant and the entire application. He submitted that the advocate for the 2nd Defendants lacks the locus standi to appear before the Court. Counsel states that the Originating summons names the 2nd Defendant as “the estate of **SAID SWELLAM GETHAN SAANUN**”.

He states that in response to the service of the claim on the deceased widow “an appearance under protest” was filed on the 6th June 2007 by the 2nd Defendant’s Advocates. He says the nature of protest was not disclosed. He further submits that inherent in the filing of appearance for a party sued is an affirmation that such a party does in fact exist as a legal entity with full capacity to sue and be sued.

Counsel further attacked the proposition that the 2nd Defendant is not a legal entity by asking on whose instructions did the 2nd defendant’s advocates appear in court in the first place.

He further states that the Plaintiff was aware at the time of filing this suit that the 2nd Defendant was already dead only that the Plaintiff did not know whether any Will had been left or Grant of Letters of administration issued.

Counsel for the Plaintiff further states that “we humbly submit that this Honourable Court do order both the Probate and Kadhi’s Registry to look for the relevant court file so as to get to the root of this problem”

I have considered the submissions by counsels and the authorities cited.

It is my considered opinion that it is the duty of any party instituting a suit to find out which party they are filing a claim against. In the instant suit the Plaintiff contends that he was aware at the time of filing suit that the 2nd Defendant was already dead only that the Plaintiff did not know whether any will had been left or Grant of Letters of administration issued.

Details of the alleged matter in the Kadhi’s court and/or elsewhere are not before the court. I cannot

make orders casually sought by the Counsel for the Plaintiff to the Probate & Kadhi's Court Registries.

It is not the duty of the Court to help a litigant to establish whether grants of letters of administration were issued on behalf of the estate of a deceased person. This is the duty of the litigants and/or their advocates.

In the instant case the 2nd Defendant is described as the Estate Said Swellam Gethan Saanu. This does not help anything unless the name of the personal representative is indicated in the suit or if there is a grant which cites the Executor or Administrator as the case might be.

It is clear that the widow was served with the application for adverse possession and she sought representation from her advocate to protect her interest. This does not make her the personal representative of the estate of the deceased.

She was entitled for takeout the application to avoid confusion.

In the case of **LATIFA YAKB & 4 OTHERS –VS- AHANSHUDIN M. KASSAM HCCC No. 226 of 2000**, Justice Maraga quoted with approval the decision of Law J in **Pathak Vs. Mrekwe** where the court stated that a suit instituted against a dead person is a nullity.

I am in full agreement with the decision in the above authority.

The order sought in the application dated 12th day April 2010 are granted. I make orders that the Plaintiff's suit against the 2nd Defendant is struck out with no order as to costs.

DATED AND SIGNED AT NAIROBI ON THIS 17TH DAY OF JULY 2012.

M.K IBRAHIM
JUDGE

DATED AND DELIVERED AT MOMBASA ON THIS 22ND DAY OF AUGUST 2012.

J.W. MWERA
.....
JUDGE

In the presence of: