



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 99 of 2011

SALIM YUSUF MOHAMED..... 1<sup>ST</sup>  
PLAINTIFF

RUKIA HASSAN YUSUF (As administrators of the estate of Yusuf Mohamed) .. 2<sup>ND</sup> PLAINTIFF

V E R S U S

NABHAN SWALEH SALIM ..... 1<sup>ST</sup>  
DEFENDANT

IBRAHIM MUSA ..... 2<sup>ND</sup>  
DEFENDANT

DISTRICT LAND REGISTRAR, MOMBASA ..... 3<sup>RD</sup>  
DEFENDANT

RULING

1. **Salim Yusuf Mohamed (Salim) and Rukia Hassan Yusuf (Rukia)** filed this cause on 19<sup>th</sup> April 2011. It is stated in the plaint that they bring the action as Administrators of the estate of **Yusuf Mohammed (Deceased)**. The suit is an attempt to impeach the 1<sup>st</sup> Defendants ownership over Mombasa/Block XI/66 (**the ‘suit property’**) which at one time was the property of the Deceased.

2. In an application dated 23<sup>rd</sup> May 2012 and filed on 20<sup>th</sup> June 2012, the 1<sup>st</sup> Defendant seeks the following orders-

(a) **The plaint is struck out for being an abuse of the court process; is barred by issue estoppels and want of standing and legal capacity on the part of the plaintiffs, who have commenced the proceedings as a collateral challenge to the first Defendant’s case in complete disregard of issue estoppels arising as a result of the ruling and order of Waki J (as he then was) in P & A Cause Number 434 of 1995; In the matter of Yusuf Mohamed (Deceased).**

(b) **The statement of claim as against the 1<sup>st</sup> Defendant is otherwise scandalous, frivolous, vexatious and intended to merely tarnish the name of the first Defendant and delay a fair and expedited disposal of the suit, thereby keeping him out of his property for no good reason at all;**

(c) **Judgment is entered for the 1<sup>st</sup> Defendant accordingly, the Plaintiffs’ suit as against the 1<sup>st</sup> Defendant is dismissed and the 1<sup>st</sup> Defendant is decreed owner of the property the subject of the**

**suit.**

3. That application is well understood against the backdrop of the decision of Waki, J (as he then was) dated 7<sup>th</sup> May 2000 in **Mombasa Probate & Administration Cause No 434 of 1995**, (hereinafter Cause 434 of 1995) **In the matter of The Estate of Yusuf Mohamed (Deceased)**. The decision was in answer to summons filed by one Hassan Yusuf for the revocation of the Grant issued to Salim and Rukia in respect to the estate of the Deceased herein.

4. In revoking the grant the Judge made some findings in respect to the suit property which forms the backbone to the 1<sup>st</sup> Defendants arguments. Details of these findings are fully discussed later in this decision.

5. The application before Court raises two substantial issues that relate to Judge Waki's decision-

(a) That the grant issued to Salim and Rukia was

revoked and they therefore lack capacity to sue on behalf of the estate of the Deceased

(b) This suit is caught up by issue estoppel as the decision of the Judge vindicates the disposal of the suit to third parties and so the action is an abuse of the court process as it is a collateral attack on a final decision made against the Plaintiffs by a Court of competent jurisdiction.

6. What did the Plaintiffs have to say to this? In an affidavit sworn on 17<sup>th</sup> September 2012, Salim admits that indeed the letters issued to Rukia and himself were revoked. And they did not appeal against that decision as they are seeking fresh letters vide **Kadhi's Court Case No. 24 of 2005** which is still pending to date. In submissions filed on behalf of the Plaintiffs I was beseeched to look at the broader interests of justice and to overlook the lack of letters.

7. On the issue of estoppel, the Court was asked to disregard the argument by the 1<sup>st</sup> Defendant. Salim alleges that he entered into negotiations to sell the suit property to Lawrence Isika (Isika) but the sale fell through. He expressed surprise that the property was now registered in the name of the 1<sup>st</sup> Defendant when the estate never executed the transfer to either Isika or the 1<sup>st</sup> Defendant. He alleges fraud and argues that the 1<sup>st</sup> Defendant cannot rely on the issue estoppel as it does not apply to him.

8. The 1<sup>st</sup> Defendants answer to this is that he purchased the property from Isika and was duly registered as owner on 16<sup>th</sup> February 2006. The transfer to him was executed by Isika as a registered property, Isika having obtained registration as proprietor by transmission. Isika obtained that registration on the strength of limited grant of Letters of Administration *ad colligenda* bona to the estate of the Deceased in **Mbsa Succession No. 308 of 2004** issued to him for purposes only of completing the sale and transfer of the property.

9. This is the view of the Court of the matter. It is conceded that the grant of letters issued to Salim and Rukia in respect to the Deceased estate were revoked by Justice Waki on 7<sup>th</sup> May 2000. Thereafter no fresh grant has been issued and the estate of the Deceased does not have personal representatives. It was therefore misleading for Salim and Rukia to claim that, as at 19<sup>th</sup> April 2011 when the plaint was filed, they were Administrators of the estate of the Deceased. This is what they aver in paragraph 1 of the plaint-

**"1. The Plaintiffs are individuals of sound mind residing in Mombasa in the Republic of Kenya and are Administrators of the estate of YUSUF MOHAMED – Deceased, by virtue of Letters of Administration issued vide High Court (Succession Cause No. 434 of 1995) sitting at Mombasa on 26<sup>th</sup> May 1998 and as subsequently confirmed vide a Certificate of Confirmation of a Grant issue on 7<sup>th</sup> August 1998. Their address for service for the purpose of this suit is care of: M/s Lumatete**

**Muchai & Company Advocates, Mombasa Trade Centre 9<sup>th</sup> Floor Nkrumah Road, P.O. Box 90565-80100 Mombasa.” (my emphasis)**

10. Salim repeated this untruth, on oath, in an affidavit sworn on 15<sup>th</sup> April 2011 made in support of an application for injunction. He boldly stated-

**“2. That the second Plaintiff (who is my biological mother) and I are the administrators of the estate of YUSUF MOHAMED by virtue of Letters of Administration issued by the High Court (Succession Cause No. 434 of 1995) sitting at Mombasa on 26<sup>th</sup> May 1998 and subsequently confirmed vide a Certificate of Confirmation of a Grant issued on 7<sup>th</sup> August 1998. Annexed hereto and marked “SYM1” and “SYM2” are copies of the said Letters of Administration and Confirmation of Grant respectively.”**

He failed to disclose that the grant had been revoked by a Court order. Could he have been unaware of the decision of the Court? This he has not addressed directly or at all.

11. It is my holding that Salim and Rukia not being the Administrators of the estate of the Deceased cannot sue on behalf of that estate and this suit is stillborn. It was the holding of the Court of Appeal in **Troustic Union International & Another –Vs- Jane Mbeyu & Another (Civil Appeal No. 145 of 1990**, unreported) and emphasized in **Coast Bus Service Limited –Vs- Samuel Mbuvi Lai (Civil Appeal No. 8 of 1996**, (unreported) that a party seeking to file a suit on behalf of the estate of a Deceased person must, of necessity, obtain Letters of Administration.

12. There are further problems. Rukia has infact disowned these proceedings. In an affidavit sworn herein on 24<sup>th</sup> May 2011 Rukia denies giving Salim any authority to institute this suit. This is what she says in paragraph 2 of that affidavit-

**“2. That I was not consulted by the first Plaintiff before the institution of this suit nor has my concurrence to institute these proceedings been obtained by the first plaintiff before filing this suit. I have no complaint whatsoever against the current registered owner of the leasehold interest in the suit property and I take great exception to the matters alleged in the statement of claim without my authority.”**

These are not challenges that the suit can surmount and is clearly for striking out.

13. But let me consider the question of issue estoppel. It was argued by Counsel for the 1<sup>st</sup> Defendant that the pronouncement of Judge Waki in **Cause No. 4434 of 1995** as to the validity of the sale to Isika was final and was a determination in rem in respect to that issue. Section 44 of The Evidence Act was cited. It provides-

**“(1) A final judgment, order or decree of a competent court which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is admissible when the existence of any such legal character, or the title of any such person to any such thing, is admissible.**

**(2) Such judgment, order or decree is conclusive proof–**

**(a) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;**

**(b) that any legal character to which it declares any such person to be entitled accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;**

**(c) that any legal character which it takes away from any such person ceased at the time from**

which such judgment, order or decree declared that it had ceased or should cease;

**(d) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.”**

14. Related to that argument is that the Plaintiffs challenge of that sale is trapped by issue estoppel in the sense illuminated in the decision of **Hunter –Vs- Chief Constable of West Midlands & Another [1981]3 ALLER 728**. The holding of that Court as properly summarized as follows-

**“The initiation of proceedings in a Court of justice for the purpose of mounting a collateral attack on a final decision adverse to the intending Plaintiff reached by a Court of competent jurisdiction in previous proceedings in which the Plaintiff had a full opportunity of contesting the matter was, as a matter of public policy, an abuse of the process of the Court. The fact that the collateral attack was by means of a civil action raising an identical issue decided against the Plaintiff in a competent Court of criminal jurisdiction was immaterial, since if the issue had been proved against the Plaintiff beyond all reasonable doubt in the criminal court it would be wholly inconsistent if it were not decided against him on the balance of probabilities in the civil action.”**

15. It is inevitable that I discuss the decision of Judge Waki in some detail. Before that Court was an application for revocation of Grant of Letters of Administration of the estate of the Deceased issued to **Salim** and **Rukia**. The Court determined that application upon receipt of viva voce evidence in which both Salim and Rukia testified. Relevant portions of what they told Court are captured in the decision. This is what the Court said of Salim’s evidence-

**“There was nothing to hide when they applied for Letters of Administration and the Petition was advertised in the normal way. Nothing now remains in the estate to fight over since the only asset was sold to a third party in 1997. They are living in the house as tenants and are at the mercy of the purchaser.”**

While of Rukia-

**“The only asset of the Deceased which is the plot should be sold and the proceeds distributed to the heirs. She knew about the third party who gave out money for the purchase of the house and conceded that it had been sold although they still reside there. It is the proceeds of sale which should be distributed to the heirs in accordance with Islamic Law.”**

16. The Court then proceeded to hold, after revoking the Grant, that-

**“There is evidence which I accept, that the only asset of the estate has been sold to third parties and there are even “fourth” parties involved as tenders of money on securing thereof. There is no indication that those parties were privy to the irregularities alleged in the processing of the Grant.”**

While the central issue for determination by the Judge was whether or not to revoke the Grant, the nature of orders he would eventually make depended on whether or not the suit property had been sold to third parties. It was for this reason that the Judge concluded by saying-

**“I think with respect that Sections 92 and 93 of the Succession Act were intended to protect innocent parties in such circumstances. In this case the interests of the innocent third parties shall remain unaffected ...”**

17. I am inclined to agree with Counsel for the 1<sup>st</sup> Defendant that the question as to the validity of the sale to Isika was determined in that decision. It was not a peripheral issue. Salim and Rukia who now challenge that sale testified on it. Both acknowledged and endorsed the sale and led the Court to determine that it was a protected transaction. The significance of decision, here, was the holding that the only asset of estate had been sold and could not be recalled for distribution. It was a fundamental

finding. None of the parties to the decision sought to review or appeal against it.

18. It matters not that Isika was not a party to the Succession proceedings. Salim and Rukia who now seek to challenge the sale to him were parties. They raised the issue of sale and testified on it to their advantage and whereupon the Court made a finding that protected Isika's sale. By now attacking that sale, Rukia and Salim are mounting a collateral attack on the decision of the Court. This abuse of Court process will not be approved by this Court.

19. The Court upholds the decision in Cause No. 484 of 1995 that the sale to Isika is valid and cannot be impeached by persons (or their privies) who were party to those proceedings. The 1<sup>st</sup> Defendant is a purchaser of value from Isika. If Rukia and Salim cannot shoot down Isika's sale then the interest of the 1<sup>st</sup> Defendant is beyond them. They cannot mount a direct assault on the 1<sup>st</sup> Defendant's interest.

20. This Court gives an affirmative answer to the prayer 1 of the 23<sup>rd</sup> May 2012. The plaint is struck out with costs to the Defendants. That disposes the entire suit. I am unable to grant prayer 3 as there is no counterclaim filed by the Defendants.

**Dated and delivered at Mombasa this 30<sup>th</sup> day of November, 2012.**

**F. TUIYOTT  
JUDGE**

**Dated and delivered in open court in the presence of:-**

**Wanjeri for Plaintiffs**

**Kimani for 1<sup>st</sup> Defendant**

**No appearance for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

**Court clerk - Moriasi**

**F. TUIYOTT  
JUDGE**