



REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 150 of 2011

HOROBA LIYAI PLAINTIFF

VERSUS

- 1. IRENE JULIET OTINGA**
- 2. JAMES MICHAEL LUTALI**
- 3. LYDIA SYLVIA LUYALI**
- 4. PURITY MUSEREMU LUYALI**

5. LUYALI OROBA MASITSA DEFENDANTS

6. ALEX SHIVACHI LUYALI

7. GODWILL TSAVAYI LUYALI

8. LEVIS LUYALI

9. BEATRICE LUVONO KALINGA

RULING

The application by way of Notice of Motion dated 6.2.12 seeks orders that the suit herein be struck out in its entirety with costs to the respondent.

The application is supported by the affidavit by the 5th defendant, **ALEX SHIVACHI LUYALI** sworn on 6.2.12.

The thrust of the said application is that the suit is incurably defective and has to be struck out. It is averred that the court lacks jurisdiction to determine a succession cause without a civil suit. It is further contended that the issues raised by the plaintiff/respondent was the subject matter in H.C. Succ. Cause No. 187 of 2008 (Mombasa) which the respondent has signed a consent in respect of the distribution of the estate of her late son, EZEKIEL LUYALI LIYAI.

In opposition to the application, the plaintiff/respondent, HOLOBA LIYAI swore a replying affidavit on 25.9.12.

The respondent criticized the affidavit in support, stating that the deponent did not have the authority of the other defendants to swear the affidavit. It is further averred that paragraphs No. 2, 3, 4 and 5 are based on information and that paragraphs No. 6, 7, 8, 9 and 10 of the affidavit are full of lies. According to the respondent, H.C. Succ. No. 187/2008 (Mombasa) is riddled with forgery and fraud including the consent

on distribution purported to be signed by the respondent.

The replying affidavit further states that the application herein is scandalous, frivolous and an attempt to delay the fair trial of this matter and ought to be struck out as the same is an abuse of the court process.

It is not in dispute that H.C. Mombasa Succ. 187/2008 is pending in respect of the estate of the late EZEKIEL LUYALI LIYAI.

Parcel of land No. Block No. MN1117665 is situated in Kengeleni area was owned by the late EZEKIEL LUYALI LIYAI who died intestate. The said property being the subject matter of a Succession Cause, the plaintiff herein ought to have filed for the orders that she seeks within the Succession cause. This being a civil suit and the subject matter being an immovable property situate in Mombasa, if this suit was properly before the court, it would have required to be heard within the local limits of the court where the property is situated. (see Section 13 CPA).

Although the respondent has averred that the Succession cause aforestated is riddled with forgeries and fraud, those issues ought to be dealt with in the Succession cause.

The issues of technicalities raised by the respondent do not deal a fatal blow to the application. I have borne in mind the overriding objectives of the Civil Procedure Act and article 159 of the Constitution of Kenya. However, I find the suit as filed is incurably defective and allow the application. The suit is hereby struck off with costs to the applicants.

Delivered, dated and signed at Kakamega this 6th day of December, 2012

B. THURANIRA JADEN

J U D G E