



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 260 OF 2003

SHEIKH ALI TAIB.....PLAINTIFF
VERSUS
GEORGE ELLAM WEKESADEFENDANT
SELINA WEKESAINTERESTED PARTY

RULING

This is an application dated 16th October 2009 under the provisions of inter alia, Section 1A, 1B and 3A of the Civil Procedure Act, and Order XXIII Rule 4 (3), 8 (1) and Order XLIV, Rules 1 (1) a and 2 of the Civil Procedure Rules.

The Applicant is made by the legal Representative of the deceased Defendant for the following Orders:-

- *This application be certified as urgent and be heard ex parte in the first instance.*
- *That the application by the legal representative of the deceased defendant dated 19th July 2007 for joinder be granted.*
- *That there be a stay of proceedings and execution of the resultant decree arising from the interlocutory judgment entered by the Deputy Registrar on a date not indicated in the court file for vacant possession and specific performance in respect of the suit property pending the hearing and determination of this application inter partes.*
- *That there be a stay of proceedings and execution of the resultant decree arising from the interlocutory judgment entered by the Deputy Registrar on a date not indicated in the court file for vacant possession and specific performance in respect of the suit property pending the hearing and determination of this application.*
- *That the exparte interlocutory judgment for vacant possession and specific performance entered herein by the Deputy Registrar in respect of the suit property herein be set aside.*
- *That all proceeding, founded on the judgments be declared null and void ab initio and be expunged from the court record.*
- *That the costs be in the cause.*

The Application is supported by an Affidavit sworn by Kennedy Ellam Wekesa, the legal representation

of the Estate of George Ellam Wekesa, the deceased Defendant and sworn on 16th December 2009.

The Application is opposed by the Plaintiff/Decree-holder who filed a Replying Affidavit sworn on 10th November 2009.

In view of the Prayer 2, I think the said issue must be dealt with as a Preliminary issue and at the outset.

It is a fact that the deceased Defendant died after judgment had been entered. The Decree was given and issued on 23rd March 2004. The Deceased Defendant die not appeal or challenge the judgment during his life-time.

The Applicant is the legal Representative of the Deceased Defendant and obtained Letter of Administration on 23rd March 2007. The Law is that for the Administration and/or legal Representative to proceed with the suit in any manner, he must apply to be made a party. It is only after the Court has made him a party that he can take a step and proceed with the suit. In this case, judgment had been obtained against the Defendant, while he was alive and strictly there is no case of abatement. The mandatory requirement however is that the Legal Representative must formerly move the court to be joined as a party before he makes any application of the kind before the court. Order 23, Rule 4 of the Old Civil Procedure Rules and which is now replicated in the New Rules – Order 24, Rule 4; it is provided inter alia that:-

“4 (1)

.....**or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court or an application made in that behalf shall cause the legal Representative of the deceased defendant to be made a party and shall proceed with the suit.”**

I have carefully considered the application before me and find that it is Prayer 2 that the legal Representative seeks to be joined in its suit.

It reads as follows:-

“2. THAT the application by the legal Representative of the deceased defendant dated 19th July 2007 for joinder be granted.”

This shows that there is a pending application dated 19th July 2009. I perused the record and traced the said Application which was filed on 20th July 2007. It seeks the following orders:-

“.....
· **THAT KENNEDY ELLAM WEKESA, the legal representative of the Estate of GEORGE ELLAM WEKESA (Deceased Defendant) be made a party to and proceed with this suit,**
· **THAT the costs of this Application be in the cause.”**

The application states that the defendant died on 26th July 2006. In his affidavit the Applicant states that the Application had been served for hearing on 22nd August 2007 when it was not listed and could be fixed for hearing because of a pending application by Interested party.

I am truly puzzled and do not comprehend why the Applicant has not prosecuted the application earlier and in particular after the so-called Interested Party’s applications were dismissed.

Is there a procedure in which an order can be granted in one application for orders sought in a prior and pending application? I am not aware of any such procedure. The Applicant should either have

prosecuted the said application first and applied to set aside the judgment after being enjoined as a party or should have withdrawn the application and perhaps filed a similar omnibus application as the present are in which he would have sought he failed as a party and to set aside the judgment at the same time.

The earlier application has not been withdrawn and is still pending.

I do hold that the orders sought in the application dated 19th July 2007 cannot be granted through the present application. There is no procedure for such a process. As a result I do find that Orders 2 cannot be granted. The Applicant cannot be made a party in through the said application. The application is therefore defective and incompetent. As the Applicant has never been made a party before and cannot be made a party in the present application, he has no locus standi to proceed with the rest of the prayers. He is a stranger at the moment and non-suited.

The Applicant ought to have prosecuted the application dated 19th July 2007 in good time. The Applicant should not have allowed the so called interest party to meddle in the case and purport to usurp his functions as the legal representatives. The Applicant has clearly led to delay in this matter and abdicated his duties if they are bona fidely grounded.

I have no hesitation to strike out and which I hereby do the application dated 16th October 2009 with costs to the plaintiff, The interim orders of stay of execution are hereby discharged unconditionally and with immediate effect.

Orders accordingly.

Dated and delivered at Mombasa this 11th day of May 2011.

**M. K. IBRAHIM
J U D G E**

Coram:

Ibrahim J

Court clerk – Kazungu

Mr. Lijoodi for the Plaintiff

Mr. Wameyo for the Defendants

Ruling delivered.

Ibrahim, J