



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. CIVIL APPLICATION NO.25 OF 2009

REPUBLIC

EXPARTE – JOSEPH OYOO MAUNDA.....APPLICANT

V E R S U S

**THE CHAIRMAN MATUNGU LAND DISPUTES TRIBUNAL & 2
OTHERS.....RESPONDENT**

R U L I N G

The *exparte* applicant and the interested parties have a long running land dispute. The *exparte* applicant died on 27th October 2009. Christopher Opiyo Oyoo obtained grant of letters of administration ad litem for the purposes of taking over the proceedings in this case. On 10th February 2011, this court allowed the said Christopher Opiyo Oyoo's application to substitute the deceased as the *exparte* applicant in the case. Prior to the deceased *exparte* applicant filing the present suit, he had previously filed another action by way of judicial review against the present respondent and interested parties. The suit in question is **Kakamega HC.Misc. Application No.127 of 2006**. This suit was struck out with costs on 25th June 2009 by Ochieng J. on the ground that it was fatally defective for being wrongly entitled. The deceased *exparte* applicant did not pay the costs ordered by the court before he filed the present suit.

On the date that this case was scheduled to be heard, the interested parties raised a preliminary objection to the hearing of the suit on the ground that the present *exparte* applicant cannot proceed with this suit before settling the costs that was awarded by the court in favour of the respondents in the previous suit that was struck out. In particular, the interested parties stated that the *exparte* applicant had no right of audience before settling the costs that was awarded to the interested parties to the sum of KShs.60,039/=. The interested parties relied on the provisions of **Section 27** of the **Civil Procedure Act** in support of their assertion that the *exparte* applicant should not be heard until and unless he settles the costs that was awarded to the interested parties in the previous suit. On his part the *exparte* applicant argued that it is the estate of the deceased that was required to settle the said costs. He submitted that he

had only obtained a limited grant to enable him prosecute this suit. He did not have authority to settle the costs that was awarded in favour of the interested parties in the previous suit. He further submitted that there was no law that prevented him from prosecuting this case before settling the costs that was awarded in the previous suit. He urged the court to dismiss the preliminary objection with costs.

This court has carefully considered the rival arguments made in the preliminary objection. The issue for determination by this court is whether the hearing of the present suit should be stayed pending the settlement of costs that was awarded in a previous similar suit that was struck out on grounds of incompetent. Under **Order 25** of the **Civil Procedure Rules**, where a suit is withdrawn, discontinued or compromised, the defendant will be required to be paid his cost. Under **Rule 4**, where a subsequent suit is brought before the costs awarded in the discontinued suit is paid, the subsequent suit will be stayed until such costs as assessed is paid. The circumstances of this case are similar. The previous suit which was filed by the deceased *ex parte* was struck out with costs. The deceased *ex parte* filed the present suit before he had settled the costs that were awarded to the interested parties. This court was not persuaded by the argument advanced by the present *ex parte* applicant that it is the estate of the deceased applicant that should be compelled to pay the said costs. This court is of the view that the present suit is being prosecuted by the present *ex parte* applicant for the benefit of the estate of the deceased. The *ex parte* applicant cannot therefore escape liability.

In the circumstances, the interested parties' objection has merit. Unless the *ex parte* applicant settles the costs that were awarded in favour of the interested parties in the previous suit, he cannot prosecute this case. It is evident that the interested parties will be prejudiced if they are subjected to another legal process before being paid costs for a previous suit which was determined in their favour. The proceedings in this case are therefore stayed pending settlement of the costs that was awarded to the interested parties in **Kakamega HC Misc. Civil Application No.127 of 2006**. It is so ordered.

DATED AT KAKAMEGA THIS 14TH DAY OF JUNE 2011

L. KIMARU

J U D G E