



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1944 of 1998**

**ZAHUL MOHAMED REHMTULLA PLAINTIFF
V E R S U S
THE PUBLIC TRUSTEE 1ST DEFENDANT
PATRICK DONGA KANGETHE 2ND DEFENDANT
RATAN SHIVJI BHUDI 3RD DEFENDANT
R U L I N G**

The Plaintiff states in his plaint that he is the grandson of the Haji Jhanda who died in 1956 while he was the registered owner of parcel L.R. No. 36.111.993 Eastleigh, Nairobi which he had bought for KShs. 6,000/= in 1951 from one Ravia Bibi, as shown by copy as indenture ("2MR2") annexed to the supporting affidavit sworn on 11th August, 1998. He claims that by acts of fraud and illegality the Defendants have defrauded the estate of the deceased of the suit property and seeks to recover the same.

Regarding his capacity to sue on behalf of the estate of the deceased, he has annexed to the affidavit a Limited Grant of Letters of Administration *ad colligenda bona* which was issued under **section 67 (1)** of the **Law of Succession Act** by the High Court in Nairobi in **Succession Cause No. 1333 of 1998** ("2MRI"). The suit was filed on 8th September, 1998. On 4th May, 1999 the 2nd Defendant applied under **section 3A** of the **Civil Procedure Act** and **Order 6 rule 13** of the **Civil Procedure Rules** to have the suit struck out with costs on the grounds that the same was:-

- a) time – barred,
- b) unsustainable in law
- c) an abuse of the process of the court, and that
- d) the Plaintiff had no *locus standi*.

When I heard the application, Mr. Maina for the 2nd Defendant, relying on the decision in **Morjaria –Vs- Abdalla [1984] KLR 490**, submitted that the letters granted in this case did not give the Plaintiff capacity to bring this suit on behalf of the estate of the deceased. Mr. Oyalo for the 3rd Defendant agreed with him. The application was however opposed by Mr. Omondi for the Plaintiff who stated that the limited grant was obtained urgently to protect the property of the deceased that was threatened by an auction; that the property was in need of preservation and there was no time to get the proper grant. Counsel asked he court to bear in mind the provisions of **section 1A** and **1B** of the **Civil Procedure Act** to ensure justice to the Plaintiff.

Under **section 67 (1)** of the **Law of Succession Act**.

“No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant, inviting objection thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.”

It is clear that a limited grant can only be for the purpose of collection and preservation of the assets of the deceased. The grant in this case was for the purpose only of:-

“collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the same until further representation be granted”

by the court to the Plaintiff. Under **section 82** of the **Act**, it is only an administrator to whom grant of representation has been made that can enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate.

It was expected that the Plaintiff would use the limited grant issued to him to gather, collect and preserve the estate of the deceased. If he wanted to sue on behalf of the estate, he was required to apply for a grant. Such grant would then enable him to enjoy the powers of a personal representative of the deceased for all purposes and to vest all the property of the

deceased in him.

In **Morjaria –Vs- Abdalla**, the Court of Appeal held that the purpose of a grant of letters of administration *ad colligenda bona* is to collect the property of the deceased person where it is of a perishable or precarious nature, and where regular probate and administration cannot be granted at once. Such a grant, it was held, cannot give the person to whom it is issued the right to institute a suit on behalf of the estate. It is to be noted, and this was also pointed out by the Court of Appeal, that under **section 54** and **paragraph 14** of the **Fifth Schedule** to the **Act**, the court may issue a limited grant for the purpose of having the person to whom it is issued to participate in a pending suit to protect the interests of the estate of the deceased.

The result is that the grant that was issued to the Plaintiff did not give him a capacity to bring the present suit. The suit is incompetent and is struck out with costs.

DATED AND SIGNED AT NAIROBI
THIS 21ST DAY OF OCTOBER 2010

A. O. MUCHELULE
J U D G E