



REPUBLIC OF KENYA



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**Juma & others v Shah & another; Shah (Respondent) (Civil Suit
631 of 2011) [2022] KEELC 13819 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13819 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 631 OF 2011
M SILA, J
SEPTEMBER 28, 2022**

BETWEEN

HAMISI OMAR JUMA & OTHERS APPLICANT

AND

AMRALAL J RAJSHI SHAH 1ST DEFENDANT

PEDRO JOSE CONSANCIO CLODROMO 2ND DEFENDANT

AND

SHEILEEN CHANDRA NAROTTAM SHAH RESPONDENT

RULING

(Application seeking orders to order title of the respondent to be cancelled and title be registered in name of the plaintiffs; plaintiffs having filed suit against two persons for orders of adverse possession; plaintiffs obtaining judgment and wishing to register themselves as owners; respondent filing an application that he was the registered owner when the matter proceeded and judgment should not have been entered against the defendants as the defendants were dead; the said application dismissed; applicants now seeking to have respondent's title cancelled; court of opinion that the entire suit is null and void as it was filed against persons who were dead at the time it was instituted; judgment and decree set aside; plaintiffs cannot succeed in this application given that the judgment and decree have been nullified)

1. The application before me is that dated December 2, 2020 filed by the plaintiffs. It seeks the following orders (slightly paraphrased for clarity):-
 - i. That the respondent's interests on Plot No MN/I/399, Title No CR7876 be extinguished.
 - ii. That the honourable court do issue an order revoking title deed issued in the name of the respondent on March 6, 2012.



- iii. That the registrar of titles Mombasa do delete entry for ownership by the respondent and issue a new certificate of title in the names of the applicants : Hamisi Omar Juma, Mwamuye Dau Ngala and Mwalumbi Mwangara holding in trust for the other plaintiffs.
 - iv. That the costs of this application be provided for.
2. The application is based on the following grounds :-
- a. That the court issued a decree granting ownership of the plot to the applicants on 18 September 2014;
 - b. That the registration of the respondent as owner was done in bad faith and fraudulently so as to defeat justice and was done after the applicants had already instituted this suit for adverse possession;
 - c. The court's ruling of June 26, 2015 upholds the applicants' claim to having rightfully acquired possession of the land hence should be registered as such.
 - d. In view of the foregoing, it is only fair, just and equitable that the said plot be registered to the applicants herein as the rightful owners and the title in favour of the respondent be revoked.
3. Nothing was filed to oppose the motion and the only material that I have is that filed by the applicants and the record of the court.
4. I have established that this suit was commenced by the applicants on December 8, 2011 through an originating summons claiming title to the land parcel MN/I/399, CR No 7876 (the suit land). The suit land was said to be owned by Amralbai J. Rajshi Shah and Pedro Jose Constancio Clodomiro, who are the two persons sued as respondents in the originating summons. When they filed the originating summons, the applicants attached a certificate of official search which showed the two respondents as owners of the land each holding a half share. The summons were advertised as it was said that the respondents could not be traced but no appearance was entered. The suit thus proceeded as an undefended cause and judgment was entered by Mukunya J in favour of the applicants on September 18, 2014. The court ordered that the applicants be registered as owners of the suit land. A decree conforming to the judgment was issued on October 4, 2014.
5. On December 1, 2014, an application was filed by one Sheileen Chandra Norattam Shah, the respondent herein, seeking to be joined to this suit as defendant. He also sought orders to stop the transfer of the suit land to the applicants. He mentioned that he was registered as owner of the land on 6 March 2012 pursuant to orders issued in Nairobi High Court Succession Cause No 230 of 1985 and Mombasa High Court Succession Cause No 191 of 1988 and the land vested in him. This application to be joined as defendant was dismissed by Omollo J, in a ruling delivered on 26 June 2015. There was intention to appeal but I do not know if an appeal has been filed.
6. This application was then filed and I have already set out the prayers at the beginning of this ruling. What the applicants want is an order to revoke the title of Sheileen Chandra Norattam Shah.
7. When Mr Shah filed his application of December 1, 2014, he annexed an extract of the title. From it, it is discernible that what he registered on January 18, 2012 was a grant of probate of the estate of Amritben Premchand Nathu Shah (deceased) and an order vesting his half share to himself. On March 6, 2012, he registered a grant of letters of administration for the estate of Pedro Jose Constancio Clodomiro da Costa (deceased) for the other half share. There are two critical issues which arise. The first issue is that it will be seen that both Amritben Premchand Nathu Shah and Pedro Jose Constancio Clodomiro da Costa, the respondents sued in the Originating Summons, were already dead when the suit was filed.



They had in fact died somewhere in the 1980s or before, for the two succession causes for their estates are of 1988 and 1985 respectively. The second issue is that at the time the matter was heard, which was on February 14, 2014, and judgment was being delivered, which was on September 18, 2014, the 3rd respondent was already a proprietor of the suit land but he was not a party to the suit.

8. We cannot close our eyes and ears to the fact that one cannot sue a dead person and that a suit against a dead person is null and void. This was ably put by Mbogholi Msagha J in the case of *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others*, where the Judge cited two Indian cases to demonstrate this point. He stated as follows :-

In the Indian case of *C Muttu v Bharath Match Works* AIR 1964 Kant 293 the court observed,

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

In yet another Indian Case of *Pratap Chand Mehta v Chrisna Devi Meuta* AIR 1988 Delhi 267 the court citing another decision observed as follows,

“if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even order 1 rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

9. The Court of Appeal also had occasion to address this point in the case of *Geeta Bharat Shah & 4 others v Omar Said Mwatayari & another* (2009)eKLR. An interlocutory judgment had been entered against the appellants and the matter proceeded for formal proof leading to final judgment against the appellants. The appellants filed an application to set aside the judgment, partly on the ground that the 1st defendant was deceased when the case was filed, and that the 2nd defendant and executors of the 1st defendant have a good defence. The application was dismissed. On appeal, the Court of Appeal stated as follows :-

“ We have no doubt whatsoever that the learned Judge, in refusing to allow the application as in favour of the deceased against whom a suit was filed after his demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased’s estate to urge the court to do so for once the respondent also admitted that he sued a dead person, the court was duty bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed.”



10. I think it will be appreciated from the above that a suit against a dead person is null and void. The applicants filed this suit against two persons who were already dead. The issue about their death may not have been brought to the attention of the court hence the proceedings and judgment against them. But now that the court is alive to the fact that the defendants in the suit were dead when the suit was filed the court must do the right thing and order that the suit is a nullity *ab initio*. No judgment could issue in such suit and I must therefore proceed to set aside the judgment and decree herein on the ground that the judgment and decree were issued on a suit that is a nullity. For the avoidance of doubt, I declare that this suit is null and void *ab initio*. On that basis, I set aside the judgment of Mukunya J of September 18, 2014 and the ensuing decree. I order the land registrar, Mombasa, not to act on the said judgment or decree for it has been declared null and void.
11. Having done that there is really nothing upon which I can issue orders in this application. This application is dismissed but I make no orders as to costs.
12. If the applicants still wish to have the land, they will need to file a fresh suit against the current registered proprietor.
13. Orders accordingly.

DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

