



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CIVIL SUIT NO. 110 OF 2007 (OS)**

**JAMES ROBERTSON MWAROME**

**CHARO MWANJE MBISHA .....PLAINTIFF**

**-VERSUS-**

**SAID BIN SEIF**

***(as the administrator of the Estate of Liwali Salim Bin Khalitan (deceased)).....DEFENDANT***

**RULING**

The Chamber Summons application dated 26<sup>th</sup> November 2009 is made under Order VI Rule 13 (1) (d) rule 13(3) and 16 Civil Procedure Rules – section 1A and 3A of the Civil Procedure Act, seeking that the Originating Summons dated 10-12-07 be struck out. Further, that costs of this application and costs of the entire suit be borne by the plaintiffs in any event.

It is based on grounds that, the plaintiff filed the Originating Summons against the defendant who is deceased. Said bin Seif who is the administrator of the estate of Liwali Salim Bin Khalifan died on 23<sup>rd</sup> February 1999 in Muscat.

The Originating Summons having been filed against a deceased person as a non starter and must be struck out as a suit cannot lie against an estate of a deceased person, so the originating summons herein amounts to an abuse of the court process.

The application is supported by the affidavit sworn by Ali Fedha, a manager of Said Bin Seif Properties Ltd in which he states that he has worked as the manager since 2003 and is versed with the late Said Bin Seif who was also known as Said Seif Salim Busaidy. He depones that the late Said Bin Seif was appointed administrator of the Estate of Liwali Salim Bin Khalifan (deceased on 20<sup>th</sup> October 1949 as per letters of administration which are annexed and marked AF1.

Said Bin Seif died on 23-02-99 as per the death certificate marked AF2

Sometime in July 2009, Ali Fedha saw an advertisement in the Daily Nation, addressed to Said Bin Seif asking him to enter appearance in respect of the Originating Summons, Fedha immediately contacted their advocate to take up conduct of the matter and file a memorandum of appearance for the estate of Liwali Salim Bin Khalfan.

The application is opposed, and in a replying affidavit sworn by the 1<sup>st</sup> plaintiff, he states that the searches conducted at the Land Registry Mombasa and the titles indicate that the defendant is the registered proprietor of the suit property. He contests the notification of death saying the same relates to Said Seif Salaim Busaidy and not Said Bin Seif and in any event Ali Fedha has no locus to swear the supporting affidavit.

At the hearing of the application, Mr. Olaba held brief for Mr. Kiarie (who is on record for the defendant/applicant) he submits that Said bin Seif, who is sued as the administrator of the Estate of Liwali Salim died and since his death, no one has taken his place as the administrator which means that correctly, the Estate is unadministered and so no cause of action lies. As regards the different names, Mr. Olabi seeks to rely on a family tree which shows Said Seif as a member of the El Busaidy clan, so it was just the naming system and Said Bin Seif Bin Salim.

In response, Mr. Otara who acts for the respondent contests the document with the purported family tree, saying its origin is unknown, it is not signed by any party and it is not clear under whose authority it was prepared and there is nothing on record to prove that the two different names belong to one and the same person.

He terms Ali Fedha's role in this matter as that of a busy body since he is manager of a concern which is not even a party to this suit.

The issue is really very simple – he who alleges must prove – what proof is there that Said Bin Seif is the same person as Said Bin Seif Bin Salim who is deceased? None. It is not for the respondent to prove that the said individual is one and the same person, respondents are not the ones asserting that contested position, it's the applicants. Indeed the origin or authorship of the purported family tree is not disclosed and an answer as to why no member of the family of Said Bin Seif found it necessary to swear an affidavit confirming the purported state of affairs, preferring to leave it to the manager of some property to do so. I am not persuaded by the bona fides of that affidavit.

There isn't a single document produced to show that at any one time Said Bin Seif was also referred to as Said Bin Seif Bin Salim, and the argument about a naming system is being made from the bar with no evidence to support that – this court is being asked to presume that Said Bin Seif automatically adopted the names Said Bin Seif Bin Salim at death – they could well be two different individuals – one living and one dead. I am not persuaded by the arguments advanced and I find no merit in striking out the originating summons on the basis. The upshot is that the application is dismissed with costs to the respondent.

Delivered and dated this 3<sup>rd</sup> day of **November 2010** at Malindi.

**H. A. Omondi**  
**JUDGE**

Mr. Otara for plaintiff  
Miss Obura for defendant