



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

CIVIL SUIT NO. 117 OF 2001

WALTER KUNDERT.....PLAINTIFF

-VERSUS-

NAJMA RAHID MOHAMED.....DEFENDANT

RULING

A preliminary objection has been raised by way of notice dated 9th September 2010 with regard to the Notice of Motion dated 11th August 2010. The preliminary objection is raised by Mr. Gikandi who acts for Rosemary Njeri Mbuci (who is not a party in this matter) – her intention, it seems is to be enjoined in this matter as an interested party.

Mr. Gekanana argued the preliminary objection on behalf of Mr. Gikandi. The preliminary objection seeks that the Notice of Motion dated 11th August 2010 be struck out with costs on grounds that:

- (1) The said Rosemary is not a party in this suit and therefore no order whatsoever can be made against her until she is properly joined in the proceedings
- (2) The Notice of Motion has short circuited the proper system as the deponent of the supporting affidavit Warda Mohammed Shali is also not a party in the proceedings.
- (3) That ground number 3 of the Notice of Motion states that this suit has already abated, and so no order can be granted unless it is resuscitated.
- (4) The applicant is aware of **HCCC No. 118 of 2006 Mombasa** where the applicant has been restrained by a court order (that is still alive), from interfering with the peaceful and quiet occupation of plot no. 2349 Malindi by the said Rosemary, and the application here amounts to an attempt to override the said order irregularly.
- (5) The entire application is an abuse of the court process and Warda Mohamed Shali should be ordered to pay the costs of this application to Rosemary.

To this preliminary objection is attached an affidavit in which is annexed a copy of pleadings in HCCC 18 of 2006 filed in Mombasa High Court on 2nd June 2006. The last time that matter went for hearing before Hon. D. K. Maraga, he ordered for the court file to be transferred to Malindi for hearing and final disposal and the interim orders were extended until the next hearing date – those orders remain in force.

It is her contention that if the said Warda believes that Rosemary has no right being in occupation of the suit premises, she should file a counterclaim on the said suit and seek eviction orders.

The application is opposed, and Mr. Khatib who appears for the defendant describes the same as misconceived and calculated at delaying the application referred to.

He points out that the applicant in the application dated 9th September 2010 is an attorney to Dorcas Kundert (2nd plaintiff) having obtained powers of attorney donated by the said Dorcas. In that event it is not necessary for the defendant to apply to join the attorney, to the proceedings, as she has already given documents to show she represents the donee.

He further explains that Warda Mohamed was joined as a party to the suit, having obtained Grant of Letters of Administration in 2003 and she applied to be joined to the suit as a representative of the deceased's estate.

He confirms that the plaintiff's suit abated, and defendant was at liberty to obtain judgment on the counterclaim- none has been obtained, and that is the stage where parties are.

Further, that upon the death of the original 1st plaintiff who was the joint proprietor with the original defendant, the suit abated and under provisions of Order XXIII Rule 8, where a suit abates or is dismissed no fresh suit shall be brought in the same cause of action.

Rosemary is claiming as an attorney of the 2nd plaintiff yet the two plaintiffs had a suit meaning it was the same cause of action and when it abated, she had no right to file a similar suit touching on the same cause of action. He urges for the dismissal of the preliminary objection saying it has no basis and it's just Rosemary's way of ensuring she continues in occupation of the property where she has no right.

The Notice of Motion dated 11th August 2010 seeks for orders that Rosemary Njeri Mbugi be ordered to vacate the house on plot no. 2849 (original No. 1935/221)

The application is made by the defendant against Rosemary who is not a party to this suit. Does Rosemary have a power of attorney in respect of any one of the plaintiffs? I don't know – she has not been given a chance to state that. From what she has annexed in HCCC No. 118 of 2006, she claims the property on the basis of having inherited it from the plaintiffs (who by the way are now deceased).

Incidentally the defendant in the present case is also deceased and that is how Warda Shali features here as a legal representative.

Surely can adverse orders be issued against a party who has not been given a chance to be heard. That goes against the principles of natural justice – there must be fairness and a party cannot be condemned unheard. I however do not agree that Warda Mohamed is not properly before this court, if she obtained letters of administration relating to the defendant's estate, then she has the right to swear the affidavit in matters affecting the defendant.

Applicant cannot begin to argue ground No. 3 of the Notice of Motion when she is not yet a party to the suit – in fact to my mind abatement would be a ripe issue for consideration when dealing with the application dated 9-9-10 at an appropriate moment.

There does exist **HCCC No. 118 of 2006** which was filed AFTER this suit and where orders exist which make it possible for the said Rosemary to enjoy the status quo since 2006 to the disadvantage of all interested parties. It would be a travesty of justice to decline to hear the application simply because of the orders existing in that case, especially when the said Rosemary has not demonstrated what steps she had taken since 2006 to prosecute the matter and she obtained stay orders - for stay orders for the last 4 (four) years is a mockery of justice.

My finding is that Rosemary Njeri should not seek for dismissal of the application at this stage because she is not a party yet. What she ought to seek is to be allowed to join the proceedings as an interested party or if that may be deflated by virtue of the suit having abated then she ought to take steps to prosecute HCCC NO. 118 of 2006 so as to secure her interests on the property and she must act within 21 (twenty one) days from today.

In fact I will take an administrative step here and order that the said HCCC NO. 116 of 2006 be placed before me for directions.

In the meantime I will stay the Notice of Motions proceedings for at least 21 (twenty one) days and in the event that Rosemary Njeri Mbuci will not have taken any appropriate steps, then the application dated 9-9-10 shall be listed for hearing.

Delivered and dated this **10th** day of **December 2010** at Malindi.

H. A. Omondi
JUDGE