



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 3 OF 2009

PHILIP arap KIRUI.....1ST PLAINTIFF
SALLY CHEPWOGEN KIRUI.....2ND PLAINTIFF

VERSUS

ORIENTAL COMMERCIAL BANK LIMITED

(Formerly known as DELPHIS BANK LTD.....1ST DEFENDANT
MOSES KORIR T/A DAWNING AGENCIES.....2ND DEFENDANT
STEVE ELKINGTON.....3RD DEFENDANT
JIMMY JOSHI.....4TH DEFENDANT

RULING

This is a Chamber Summons application brought under Order VI Rule 13 (1) (b), (c) and (d) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act. The application is dated 31st March, 2006 and it seeks the following orders:

- 1. The Complaint herein and this entire suit be struck out.**
- 2. The 1st and 2nd Defendant’s costs of this application and also of the entire suit be borne by the 2nd Plaintiff.**

The application is based on the following grounds:

- (a) This suit seeks Orders of Injunction to stop the Defendants from transferring the property known as L.R. No. KERICHO/CHEMAGEL/4101 which property was sold at Public Auction conducted on 22nd March 2002.**
- (b) The said Public Auction sale was conducted pursuant to a lawful Decree dated 19th January 1990 and issued at NAIROBI HCCC No. 3154 of 1989 in which suit Judgment was entered against the deceased 1st Plaintiff.**

(c) Consequent to the death of the 1st Plaintiff on 20th May 2004, this Honourable Court by the Orders made by the Honourable Lady Justice Aluoch on 22nd February 2006, declared that the deceased 1st Plaintiff's suit was abated.

(d) The said suit property is exclusively registered in the sole name of the deceased 1st Plaintiff whose claim has abated as aforesaid.

(e) In view of the foregoing, the 2nd Plaintiff has no legal interest or locus standi to sustain, maintain or continue with this suit.

(f) The continuance of this suit by the 2nd Plaintiff is accordingly unsustainable, an abuse of the process and is scandalous, frivolous and vexatious.

There is a supporting affidavit sworn by the General Manager of the 1st Defendant Mr. Binay K. Dutta, with annexures thereto which I have considered.

The application was opposed. The 2nd Plaintiff swore on an affidavit dated and filed on 26th September, 2006. I have considered the contents of this affidavit.

When this application came up for hearing only Mr. Wananda for the 1st and 2nd Applicant came for the hearing. The Respondents who are represented by Khaminwa & Khaminwa Advocates, did not come to oppose their application in court. Mr. Wananda for the Applicants submitted that the suit should be struck out because the 1st Plaintiff, who had the locus standi to file the suit has since passed away and that consequently the suit has abated. Mr. Wananda submitted that as evidenced by the first annexure to the supporting affidavit, Justice Alouch as she then was, did make an order that this suit had abated. That order has not been annexed to this application. Counsel did not state the date when the order was made. However, I note that under paragraph 6 of the supporting affidavit a reference is made to an order by J. Aluoch on 12th February 2006, declaring the 1st Plaintiff's suit to have abated due to the passing away of the 1st Plaintiff on the 20th May, 2004. Mr. Wananda argued that the only Plaintiff on record is the 2nd Plaintiff. Counsel argued that the 2nd Plaintiff had no locus standi to maintain the suit at all since the suit property was registered in the name of the 1st Plaintiff. Counsel urged the court to find that there is no proper Plaintiff in this suit and on that ground the suit should be dismissed.

I have considered the issue raised by the 1st and 2nd Defendant in this case. It appears to me that the case was argued on the premise that the 2nd Plaintiff has no locus to bring the suit and that since the 1st Plaintiff had died and has not been substituted, then the entire suit should be considered to have abated. Mr. Wananda has relied on the order of Aluoch, J. as she then was. However the order made by the Hon. Judge, which is on record is that only the claim by the 1st Plaintiff had abated. The learned judge did not declare that the entire suit had abated. The argument by the Applicant does not hold any water.

I have looked at the plaint and I see that the suit was brought by both the 1st and 2nd Plaintiffs, and the prayers were sought jointly by the two Plaintiffs. The mere fact that the 1st Plaintiff is now deceased cannot be used as a basis of declaring the entire suit abated since the 2nd Plaintiff has survived him. The two Plaintiffs were husband and wife. This is a unique relationship. Whether the 2nd Plaintiff can sustain the suit is both a question of law and fact. It cannot be dealt with at an interlocutory stage. Besides this, as will be noted herein below, the Applicants have to bring their application within the order and rule invoked.

The application before the court is that the suit should be struck out under Order VI rule 13(1) (b), (c) and (d). The grounds upon which the application is made are cited on the face of the application. Those grounds do not support the application. The Applicant having invoked order VI rule 13(1) should have brought the application within the epithets cited in its application. Under rule 13(1) (b), the Applicant should have established that the suit was scandalous, frivolous or vexatious. Under rule (c) the Applicant

should have demonstrated that the suit may prejudice embarrass or delay the fair trial of the action. Under rule (d) the Applicant should have shown that the suit is an abuse of the court process. The Applicant has not demonstrated any one of these epithets. Instead, the Applicant has argued that the suit property was sold in 2002, that the 1st Plaintiff has since passed away and that since the property had been registered solely in the name of the 1st Plaintiff who has not been substituted in this matter, the entire suit has abated and it should be struck out. With due respect to the Applicant's Advocate, the arguments advanced in support of this application do not support the order and the rule invoked and under which the application was brought. The jurisdiction invoked under this application was not supported by the grounds and submissions by counsel. The court is therefore unable to exercise its jurisdiction under the order and rule cited by the Applicant. The proper order to make in these circumstances is to strike out this application for being incompetent.

In conclusion, the application dated 31st March, 2008 is hereby struck out with costs for being incompetent.

Before I end this matter, I think it would be appropriate to make another order. This file was brought from the High Court Central Registry for hearing and disposal before Milimani Commercial Court. It is a 2002 matter. **I direct that the Advocates of both the parties in the suit should be summoned to come before the court on 3rd July, 2009 for directions as to the hearing of this matter.**

Dated at Nairobi this 5th day of June 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Ms. Maina holding brief Mr. Wananda for the Applicant/1st and 2nd Defendants

N/A for Mr. Khaminwa for 1st and 2nd Plaintiff

N/A for Ms. Janmohamed for the 3rd Defendant

LESIIT, J.

JUDGE