

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Civil Case 136 of 2001

JUSTO OTWERE SABLA :::::::::::::::::::::::::::PLAINTIFF

V E R S U S

RAMESH KOTECHA :::::::::::::::::::::::::::DEFENDANT

R U L I N G

The applicant filed her application on 16th September, 2005 to be substituted as the plaintiff for reasons that the plaintiff who was her husband died on 23rd September, 2004. Mr. Athung'a, counsel for the applicant submitted that the applicant obtained a limited grant through Succession Cause No. Vihiga 50 of 2005. The application was made within one year. Counsel submitted that the defendants were doubting the authenticity of the grant and that the Vihiga Court did not have jurisdiction to issue the same which allegations were not proved by way of evidence.

Mr. Mukavale for the respondent relied on the respondents' affidavits filed on 19th May 2006 and 7th May 2006 by the 1st and 2nd respondent respectively. Counsel submitted that there was no evidence exhibited proving that the plaintiff is dead. No death certificate was exhibited and it is risky to assume that the grant was issued after the court saw the death certificate. The applicant was aware that the respondent had raised the issue of proof of death but never bothered to file a further affidavit to put in the death certificate. The Senior Resident Magistrate's Courts are gazzeted to entertain succession matters within the regions of their jurisdiction throughout the country. Counsel further submitted that the plaint shows that the suit is brought by the plaintiff who is trading as Otwere Miti Shamba Ltd. and is a Director of the Company. There is an application pending for purposes of enjoining the 2nd respondent and the 2nd respondent is therefore not a party to this suit.

I have perused the pleadings herein and it is evident that the only way to have the matter duly completed is to hear the evidence of witnesses. The applicant claims to be the wife of the deceased. It will be unwise for her to come to court and state on oath through affidavits that her husband died on 23/9/2004 while knowing that that is not correct. Order 1 rules 9 and 10 empowers this court to deal with issues related to parties in a suit. **Order XXIII rule 5** provides that where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the court. Since there is a grant issued by the court, it can be taken that the applicant is a legal representative of the deceased for purposes of this suit.

I do find that the respondent shall have an opportunity to call for the death certificate by way of a notice to produce, I do not wish to fault the grant issued herein as the judicial officer who issued it must have been convinced that there was proof to grant the same. I do not see any prejudice that would befall the respondent and it is only fair for the interest of justice that the applicant be allowed to be substituted as the plaintiff. I do therefore grant the applicant's application dated 16/9/2005. Costs shall be determined by the outcome of the main suit. It is so ordered.

Date, delivered and signed at Kakamega this 23rd day of July, 2009

SAID CHITEMBWE

J U D G E