

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 66 of 2005

EVALINE CHEPKOSKEI RONO.....1ST PLAINTIFF

JOHANA KIPROP LANGAT.....2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA.....DEFENDANT

RULING

The plaintiffs/applicants have made an application under provisions of Order XXI rule 22 and Order IXB rule 8 of the Civil Procedure Rules seeking the orders of this court to have the order issued on the 27th March 2007 dismissing the suit with costs set aside. The application is supported by the annexed affidavit of Paschal Mbeche and grounds stated on the face of the application. The thrust of the plaintiffs' application is that the application was dismissed on the 27th March 2007 in the absence of the plaintiff's counsel because the application was heard before the time it had been listed on the cause list. It was Mr. Mbeche's argument that was he present in court on that day, he would have presented the plaintiffs' case and in most probability the application would not have been allowed. He therefore asked this court to set aside the said order of dismissal.

The defendant filed grounds in opposition to the application to set aside the order of dismissal. The salient argument by the defendant is that whether or not the plaintiffs' counsel was present during the hearing of the said application, it would not have made any difference due to the fact that the plaintiffs had neither filed ground in opposition nor a replying affidavit to the defendant's application. Mr. Kiburi for the defendant further argued that this court had earlier ruled that the plaintiffs lacked *locus standi* to bring this suit on behalf of a deceased person's estate without letters of administration.

What are the facts in issue in this application? On 17th February 2006 this court did rule as follows as regard the suit filed by the plaintiffs;

“Having considered the arguments made, it is evident that the plaintiffs herein are purporting to file suit in regard to a parcel of land registered in the name of a deceased person. They have not obtained letters of administration to administer the said deceased's person's estate. They therefore lack capacity to bring any suit in regard to the said parcel of land.”

On the 24th February 2006, the defendant filed an application seeking to have the plaintiffs' suit struck out with costs under **Order VI rule 13(1)(a) of the Civil Procedure Rules** on the grounds that the said suit did not disclose any reasonable cause of action. The defendant wanted the suit to be struck out because the plaintiffs lacked *locus standi* to file the present suit because they had not obtained letters of administration in respect of the deceased's estate. The application was served upon the plaintiffs on 20th March 2006. By the time the application was heard by Musinga J, (*i.e. on the 27th March 2007*), the plaintiffs had not filed any grounds of opposition or a replying affidavit to the said application. They failed to attend court during the hearing of the said application. Their said application was allowed after the learned Judge was satisfied that the plaintiffs had been duly served.

Now, the plaintiffs want the said order striking out their suit for disclosing no reasonable cause of action set aside. What are the grounds in support of their application? They claim that the application was heard before the time it was listed for hearing. It is this court's opinion that it would not have mattered whether or not counsel for the plaintiffs appeared in court on that day. This is in view of the fact that the plaintiffs had neither filed a replying affidavit nor grounds in opposition to the said application. I agree with the decision of Mwera J, in **Geoloy Investments Ltd vs Behal t/a Krishan Behal & Sons [2002] 2KLR 447** at page 451 where he held that where a respondent does not file either a replying affidavit or grounds in opposition to an application, the court will presume that the respondent did not intend to oppose the said application.

In the present application it is clear that the plaintiffs did not intend to oppose the said application because they had not filed either grounds in opposition or a replying affidavit to the application over one year after they were served with the said application for striking out. Further, this court having ruled that the plaintiffs lacked *locus standi* to bring suit on behalf of a deceased's person's estate without first obtaining letters of administration, and the plaintiffs having not obtained the said letters of administration, they cannot be heard to say that they have a suit capable of being heard and determined on merits.

The application therefore lacks merit and is hereby dismissed with costs.

DATED at NAKURU this 29th day of May, 2007

L. KIMARU

JUDGE