REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 4 of 2003

LAWRENCE KWATSIMA ....PLAINTIFF/APPLICANT

V E R S U S

TARIA MUTAKALE SHILAMA

PHILIP CHUKUYU SHILAMA ....
DEFENDANT/RESPONDENT

R U L I N G

The suit herein was instituted by Lawrence Kwatsima, **the Applicant,** on 30.1.2003 by originating summons dated 29.1.03 against Taria Mutakale Shilama and Philip Chukuyu Shilama, **the 1st and 2nd Respondent** respectively. It was a claim for land under the doctrine of adverse possession founded on section 38 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.

Before the suit came up for hearing, a Preliminary Objection was filed by the 2nd Respondent in which it was intended that the suit was a non-starter, incompetent and void ab inition as it was filed against both Respondents when the 1st Respondent was already dead.

It was common ground between both counsel who appeared for the parties that the 1st Respondent was already dead when the suit was instituted.

Mr. Nandwa, learned counsel for the 2nd Respondent submitted that the suit was bad in law and that it did not matter that the Applicant's advocate had by Notice dated 7.4.03 withdrawn it against the 1st Respondent. It was his contention that the suit was a nullity. No authority to buttress his submission was cited. Judges who regrettably have no researchers have to spend valuable time trying to dig up authorities on their own. Serious law practice, however behoves counsel to research and organise proper presentation of their cases in court.

In reply, Mr. Momanyi, learned counsel for the Plaintiff, submitted that the suit was valid as against the 2nd Respondent. To buttress the point, he invoked Order 1 Rule 9 which provides that no suit shall be defeated by reason of non-joinder of parties. He also relied on Rule 1 of Order 10 relevance of which was not clear.

I have given due consideration to the submissions of both counsel. The issue for determination is whether the suit was bad in law because the one of the two defendants, namely, Taria Mutakale Shilama, (1st Defendant) was dead when the suit was instituted. It is accepted that a suit instituted in the name of a dead person is a nullity ***(see B. D. P. ITHAK v. Z. MREKWE (1964) EA 24*** in which the court not only so held but also, if I may digress, stated that the power of the court under Order 1 Rule 9 of our Civil Procedure Rules to substitute a plaintiff where the suit has been filed in the name of a wrong person can only be exercised where the "wrong person" is living at the date of the institution of the suit, and has no application where the 'wrong person" is dead at such date.

It is now well settled that where the suit is filed against a dead person the suit is bad in law because it is

filed against nobody and there is simply no suit. But where there are several defendants, and one or none of them is or are dead on the day the suit is instituted, there is no rule of law or practice that (says that) the entire suit is null and void even against the defendants who are living at the time of its institution. In interpreting the law in such matters, the court leans in favour of the interpretation that preserves the suit. Perhaps that is why even in cases where limited companies are sued with the omission of the word limited, meaning therefore that they are not properly described, the courts have held that it is a mere misnomer the omission of the word (Limited). Courts have held that such omission does not mean that no person is sued at all or that until the omission is corrected there is no defendant to the proceedings *(see Whittam v. W. J. Daniel & Co. Ltd. (1961) 3 All ER 796.* Cohen L. J. *in Alexander Mountain & Co. v. Rumere Ltd. (1953) 2 All ER 482* opined that "*there is no magic in the name of a corporation. It seems to me that the name of the Defendant inserted in the writ originally was merely a misdiscription which was plainly directed to the defendants and it is a case in which such misdiscription can be corrected*"

In the instant case, the suit was clearly bad against the first defendant as the 1st defendant was not living on the day when the suit was instituted against him. There was no valid suit against the first defendant and as such the question of withdrawing it did not arise. However, there was a suit against the 2nd defendant and the absence of a valid suit against the 1st Defendant did not vitiate the suit against the 2nd Defendant. The cause of action alleged against the 2nd Defendant did not hinge on the existence of the 1st Defendant at the time of the institution of the suit.

For these reason, the Preliminary Objection is dismissed with costs to the Plaintiff.

Dated at Kakamega this 24th Day of February 2006

G. B. M. KARIUKI

J U D G E