

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 629 of 2005

BETH WANJIRU KAMAU THE LEGAL REPRESENTATIVE OF

DAVID KAMAU NJOROGE (DECEASED)

.....PLAINTIFF

VERSUS

SAVINGS & LOAN (K) LTD.....

DEFENDANT

R U L I N G

By chamber summons dated 19th September, 2005 the Plaintiff, **BETH WANJIRU KAMAU**, sought the main prayers that the Defendant be ordered to render an account of all monies paid by the Plaintiff towards servicing the loan granted to her late husband by the Defendant, and that the Plaintiff be allowed to continue servicing the outstanding loan account by monthly payments of KShs.100,000/=. She subsequently filed an amended plaint and an amended chamber summons, both dated 17th October, 2005, by which she sought to introduce a 2nd Plaintiff, **GRACE WAIRIMU**.

The Defendant took a preliminary objection of the application as per notice dated 1st December, 2005 upon the following grounds:-

- 1. That the application is incurably defective, bad in law and unsustainable.**
- 2. That the joint affidavit of Beth Wanjiru Kamau and Grace Wairimu sworn in support of the amended chamber summons offends rule 5 of Order 18 of the Civil Procedure Rules.**
- 3. That the application and the suit offend provisions of the Law of Succession Act, Cap. 160, the Civil Procedure Rules and the Interpretation and General Provisions Act, Cap. 2.**
- 4. That the application is premised on the wrong procedure.**

Learned counsel for the Defendant submitted that the amended chamber summons was filed without leave of the court, and further that it seeks to regularize the want of form of the original chamber summons dated 19th September, 2005. Counsel further submitted that the Plaintiff had no capacity to file the suit herein as she did not at that time have the requisite grant of representation in respect of her deceased husband's estate. She subsequently obtained a limited grant of representation and then filed an amended plaint and the amended chamber summons. In the view of the learned counsel the Plaintiff is attempting to give life to a suit and application that were null and void *ab initio*, and she cannot be permitted to do so.

In his reply learned counsel for the Plaintiff conceded that the Plaintiff had no capacity to file the suit and chamber summons as originally filed. But in his view, this was cured by amendment to the plaint and to

the chamber summons, which amendments required no leave. In his further submission, the court must look at the totality of the suit as the original defect was not fatal to the suit or application.

I have considered the submissions of the learned counsels. None of them quoted any authority. It is now trite law that a suit instituted by a person who has no capacity or *locus* to institute it is a non-suit. Such suit is null and void from the very beginning. The Plaintiff herein had no capacity or *locus* to file the suit on 19th September, 2005 as she did not then possess the requisite grant of representation to her deceased husband's estate. The suit was brought for and on behalf of that estate. The subsequent obtaining of the necessary grant could not put life into a suit that was dead when instituted. The Plaintiff's only option is to bring another fresh suit.

In the circumstances this present suit, together with all application filed therein, is hereby struck out with costs to the Defendant. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF MAY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 5TH DAY OF MAY, 2006.