



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 226 of 2000

**LATIFA YAKUB & 4 OTHERS.....
.....PLAINTIFF**

VERSUS

**SHAMSHUDIN M. KASSAM.....
DEFENDANT**

RULING

This is a application by the Plaintiffs brought under the provisions of Order 1 Rules 10 and 22 and Order 6A Rule 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. It seeks orders: -

- 1. THAT ZIYANA ABDULAZIZ IBRAHIM and MAHDIN IBRAHIM ACHU be enjoined in these proceedings as the personal representatives of the late ABDULAZIZ IBRAHIM ACHU and KHADIJA SHERKHAN MOHTAJ named respectively as the 2nd and 3rd plaintiffs herein and the latter’s names be expunged from the proceedings.**
- 2. THAT the pleadings be re-amended to accord with such joinder as per draft herewith exhibited.**
- 3. THAT in furtherance of such order, the plaintiffs be allowed to file a further verifying affidavit in terms of copy herewith exhibited.”**

In support of the application Mr. Moses Mwakisha, counsel for the plaintiff swore an affidavit and deponed that when giving them instructions to institute this suit the 5th plaintiff overlooked to inform them that the second and third plaintiffs were dead before the suit was instituted and that in the interest of justice their legal representatives should be substituted and that the plaint should accordingly be amended.

Arguing this application for the plaintiffs Mr. Hamza elaborated the point and contended that the court has jurisdiction under section 3A to grant this application.

Mr. Hamza further submitted that though the plaintiffs did not file a verifying affidavit as required by Order 7 Rule 1 (2) on the authority **Kizingo Distributors (1984) and others – Vs – Tibbet & Britten (K) Ltd Mombasa HCCC No. 26 of 2001** they can be allowed to file one belatedly.

Mrs. Moolraj for the defendant submitted that the suit having admittedly been filed in the names of deceased persons is a nullity and incapable of amendment. In support of that proposition she cited the

case of **Pathak – Vs Mrekwe [1964] EA 24**. She also submitted that as the suit property was held by the plaintiffs as tenants in common the shares of the deceased plaintiffs did not devolve to live plaintiffs but to their legal representatives.

As regards the failure to file a verifying affidavit Mrs. Moolraj submitted that that also makes the suit a nullity.

I entirely agree with Mrs. Moolraj. As was stated by Law J (as he then was) in the said case of **Pathak – Vs – Mrekwe** a suit instituted in the name of a dead person is a nullity. The power conferred by Order 1 Rule 10 of the Civil Procedure Rules to substitute a plaintiff where a suit has been filed in the name of a wrong person can only be exercised where the wrong person was living at the date of instituting the suit and has no application where the wrong person was dead before such date.

The suit is also a nullity for failure to file a verification affidavit along with the plaint as required by Order 7 Rule 1 (2). That provision is mandatory and failure to comply with it renders the suit a nullity – see **Gwao – Vs – Nairobi City Council [2001] 1 EA 69 (CA)**.

The case of **Kizingo Distributors Ltd** cited by Mr. Hamza is distinguishable. In that case there was a verification affidavit filed along with the plaint which, however, turned out to be defective. The court allowed the plaintiff to file a proper one. In the case of **Shashikant C. Patel – Vs – Oriental Commercial Bank Ltd, Mombasa HCCC No. 264 of 2005** where there was also a defective affidavit I allowed the plaintiff to file a proper one. In this case, like in the **Gwao case (supra)** no verifying affidavit, not even a defective one, was filed at all. The suit is therefore a nullity. This being my view of the matter I need not bother myself about the validity or otherwise of the affidavit in support of this application which was sworn by counsel.

For these reasons I hold that this suit is a nullity and the plaint is therefore incapable of amendment for you cannot amend what in law does not exist. In **Auto Garage v. Motokov (No 3) [1971] EA 514 at page 519** Spry V.P. stated that “...where the plaint is a nullity there can be no amendment ...” Accordingly the plaintiff’s application dated the 14th November 2002 is hereby dismissed with costs.

The defendant has not applied to have this suit struck out but he has raised that in his grounds of opposition and prayed that the suit be struck out. Having held that the suit is a nullity I think he is entitled to that order. In the circumstances I strike out this entire suit with costs of the entire suit to the defendant.

DATED and delivered this 15th September 2006.

D. K. MARAGA

JUDGE