



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 206 OF 2017 CONSOLIDATED WITH 211 OF 2017

ABDULRAHMAN SAID BAKAR suing on behalf of

BREK BIN AWADH ABDULLA ATTIMIMI as his Attorney.....PLAINTIFF

-VS-

1. AISHA KHAMIS AWADH

2. MADIHA ALWY KHALIFA.....DEFENDANTS

RULING

1) This ruling is in respect of the defendant/applicant's notice of motion dated 28th August 2020 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Articles 25 (c), 35 (2) and 50 (1) of the Constitution of Kenya and the inherent jurisdiction of the court seeking to strike out the plaint dated 14th June, 2017 with costs. The application is supported by the affidavit of Madiha Alwy Khalifa sworn on 28th August, 2020 and is premised on the grounds that the plaintiff herein filed Mombasa ELC Case No 211 of 2017 on behalf of Brek Bin Awadh Abdalla Attimimi as his Attorney. That the said Brek Bin Awadh Abdulla Attimimi died sometime in 1999 in Mombasa and therefore the plaintiff did not have the locus standi to institute the current court proceedings. That the plaintiff's action of filing this suit on behalf of Brek Bin Awadh Abdalla Attimimi who is deceased is illegal and such acts of illegalities ought not to be condoned by a court of law. The defendants aver that on 19th January, 2020 they requested the consulate of the Republic of Yemen to confirm whether Brek Bin Awadh Abdulla Attimimi is dead or alive and by a letter dated 24th February, 2020 the consulate confirmed that the said Brek Bin Awadh Abdulla Attimimi died sometime in 1999. Copies of the said letters have been annexed.

2) Mr. Gikandi, learned counsel for the defendants submitted that Brek Bin Awadh Abdulla Attimimi could not have given a power of attorney to the plaintiff as it is alleged since he was already dead. He added that the power of attorney has no PIN Certificate Number and no photographs have been attached, hence is highly suspicious. Mr. Gikandi pointed out that the power of attorney is not certified by the commissioner for oaths in the space provided thereon. It was submitted that the issue of the death of Brek Bin Awadh Abdulla Attimimi have been raised in the defence and the application herein and therefore if the person was alive, he would have been brought to the court or the person would have sworn an affidavit wherever he is. That from the year 2017, this has not been done and is clear evidence that the said person is dead. That the plaintiff is purporting to represent a dead man and urged the court to have the suit struck out.

3) The plaintiff/respondent opposed the application through a replying affidavit sworn on 22nd October, 2020. The respondent avers that the names in the letter from Yemen Consulate in Mombasa confirmed that one Mr. Birik Bin Awadh Al-Tamimi was dead while the defendants' advocates asked for confirmation of Mr. Brek Bin Awadh Abdulla Attimimi, and therefore the names are totally different. That a copy of the death certificate and/or burial permit have not been produced. The plaintiff questioned why he 2nd defendant enquired about the death from the Yemen Consulate and not the Kenyan Registration of Births and Deaths. The respondent stated that the 2nd defendant was tried and convicted for forging the death certificate of Mr. Brek Bin Awadh Abdulla Attimimi and annexed a copy of the judgment in Shanzu SPMC Criminal Case No. 750 for 2017. The respondent contends that the application herein is a red herring meant to circumvent a judicial process by making wild allegations which are unsubstantiated. The respondent avers that the defendants never questioned his participation in the above criminal case and prayed that the application herein be dismissed with costs.

4) In his submissions, Mr. Birir learned counsel for the plaintiff reiterated the averments in the replying affidavit and submitted that Mr. Brek Bin Awadh Abdulla Attimimi is old and alive and has given the plaintiff a power of attorney. He urged the court to dismiss the application and allow the case to proceed.

5) In reply, Mr. Gikandi submitted that the challenge before court is on the capacity of the plaintiff to approach the court purporting to represent Mr. Brek Bin Awadh Abdulla Attimimi. He submitted that in light of the evidence tendered, the burden of proof has shifted to the plaintiff. He further submitted that the power of attorney in issue is full of so many issues and deep and dark holes and that one should not

use the court to sanitize what is otherwise illegal. The plaintiff's counsel added that if the court strikes out the suit, the said, Mr. Brek Bin Awadh Abdulla Attimimi can approach the court properly if at all he is still alive.

6) I have considered the application and submissions made. The issues for determination arising out of the motion, affidavits and submissions are whether Mr. Brek Bin Awadh Abdulla Attimimi is dead or alive; whether there is a valid power of attorney given to the plaintiff and whether the suit should be struck out.

7) In this case, the plaintiff is suing on behalf of Brek Bin Awadh Abdulla Attimimi as his attorney by virtue of an undated power of attorney registered at the Land Titles Registry, Mombasa on 21st April, 2017. The defendant's submission is that the said Mr. Brek Bin Awadh Abdulla Attimimi is dead having died in 1999, and could not have given a power of attorney as is alleged. The defendants have exhibited a copy of a letter from the consulate of the Republic of Yemen confirming the alleged death. On his part, the plaintiff submitted that the said Mr. Brek Bin Awadh Abdulla Attimimi is alive and lives in South Yemen.

8) The general rule is that suits and actions must be prosecuted by and against living parties. Where a person is dead and since deceased persons cannot be party to legal proceedings, the effect of the death is to suspend the action as to the deceased until the legal representative is substituted as a party. In the case of **Otieno –v- Ongo & Another (1989-1989) EALR 468**, the Court of Appeal stated:

“...an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception....To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus means he cannot be heard, even on whether or not he has a case worth listening to....”

9) In the case of **Geeta Bharat Shah & Others –v- Jomar Said Mwatayari & Another (2009)**, the Court of Appeal while considering an appeal over a matter in which the suit was filed against a defendant who was dead at the time of filing suit stated as follows:

“We have anxiously considered the appeal. This is a first appeal. We have no doubt whatsoever that the learned judge, in refusing to allow the application as in favour of the deceased against whom a suit was filed after his demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased's estate to urge the court to do so for once the respondent also admitted he sued a dead person, the court was duly bound to trown its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed. In any event, because the person cited in the plaint as the first defendant was already dead by the time the suit was filed meant that the plaintiff (now first respondent) did not tell the truth when he said in his verifying affidavit that he had read the plaint and verified the facts therein for how could he say that against undisputed fact later discovered that by the time he was saying so, the first defendant was long dead....”

10) To paraphrase the above decision, it follows that if a suit is filed on behalf of a deceased person by virtue of a power of attorney given after his demise, is plainly wrong, and such suit is no doubt incompetent, bad in law and a nullity. In this case, evidence in form of a letter from the Honorary Consulate of the Republic of Yemen where Mr. Brek Bin Awadh Abdulla Attimimi lives have been shown to the court showing that at the time of donating the alleged power of attorney and at the time of filing suit on 14th June, 2017, Mr. Brek Bin Awadh Abdulla Athimimi was long dead, having died in 1999, and therefore not capable of donating a power of attorney or filing suit. The plaintiff has merely stated that the said Mr. Brek Bin Awadh Abdulla Athimimi lives in South Yemen and has not provided any evidence to back his allegation. The instant application is challenging the plaintiff's capacity to approach the court purportedly to represent Mr. Brek Bin Awadh Abdulla Athimimi. In light of the evidence tendered by the defendants I agree with Mr. Gikandi's submission that the burden of proof shifted to the plaintiff to show that indeed the said Mr. Brek Bin Awadh Abdulla Athimimi is not dead as alleged. I have perused the statement of defence filed on 12th July, 2017 and I note that the issue of the death of Mr. Brek Bin Awadh Abdulla Athimimi was raised. The court record herein does not show that the plaintiff filed any reply to defence. Order 2 Rule 11 of the Civil Procedure Rules provides that any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading, while rule 12 provides that if there is no reply to defence, there is a joinder of issue on that defence. In my considered view, the plaintiff has not traversed the allegation of fact raised by the defendants with regard to the death of the said Mr. Brek Bin Awadh Abdulla Athimimi. In my view, the said person and the plaintiff could have been jolted by the allegation of death raised and presented himself before court or at least file an affidavit denying the allegation of death directed at him. In the absence of any evidence to the contrary it is the court's presumption that Mr. Brek Bin Awadh Abdulla Athimimi is dead as alleged by the defendants. And if he was dead at the time the alleged power of attorney was given to the plaintiff and was dead by the time the suit was filed in the year 2017, having allegedly died in 1999, it follows that the suit is a nullity from inception. The plaintiff could not purport to have the necessary locus to institute the suit as he did.

11) In the case of **Benjamin Leonard McFoy –v- United Africa Company Limited (1961) 3 ALL ER 1169**, it was held as follows:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

12) The evidence presented by the defendants before court have not been challenged by the plaintiff and remain uncontroverted. In the result, I find that the Notice of Motion dated 28th August, 2020 is merited. It is my finding that the suit is a nullity as the same was filed on behalf of a plaintiff who was dead at the time the suit was filed and without the requisite authority. The application is allowed and the plaint dated 14th June 2017 is struck out with costs to the defendants.

13) Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 21st day of January 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE