



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Misc 606 of 2003

JOSEPH KAHINDI

KASUNGU GONA

KASICANA MRAMBA

DAMA MRAMBA (Suing for and on behalf of 310 others).....
PLAINTIFFS

A N D

ESTATE OF THE DECEASED MOHAMMEDAL

SULEMANJI

ESSAJIDEFENDANTS

R U L I N G

In this suit the applicants/plaintiffs commenced proceedings under the procedure set out under order 36 Civil Procedure rules by Originating summons. They claim under Rule 3D of the said Order that they had acquired right to be registered as owners of some land in Kisauni area within Mombasa District. The applicants are said to be 310 in number. The respondents are named as the estate of one Mohammedali Sulemanji Essaji deceased. The application was served upon

1. Moiz Mohammed Sulemanji Essaji
2. Noorunnisabai Mohamadalli Esaji

Who are described in the Memorandum of appearance (entered in protest) as beneficiaries of the estate of Mohamedali Sulemanji Esajee. Upon entering appearance in protest they also filed Chamber Summons on 7.4.04 seeking to strike out the Originating Summons filed by the plaintiffs as aforesaid. They applied under Order 6 rule 13 (1) and 13(3) of the Civil Procedure Rules. The grounds upon which Orders were sought is that the suit

“raises no reasonable cause of action, that the suit is otherwise an abuse of court process and that it is incompetent and bad in law and finally that the defendant is now non suited and lacks capacity to be sued.”

The plaintiff now respondent raised some grounds of opposition challenging the right of the applicants to

seek striking out orders.

On 27.7.04 the plaintiff amended the Originating Summons by indicating service upon the advocates, not a substantial matter. On arguments on legal issues the plaintiff/respondents relied on the authority of Ruling in Civil Appeal no. 175 (Nai) of 1997 Unga Limited –vs- Amos Kinuthia and another to support his ground of opposition that application(O.S.) cannot be dismissed for want of form at page 219 (8) of the report the court quotes a passage from the judgment of Castello –vs- Rodrigues 1972 E.A. 223 that the respondent could not possibly have been prejudiced by the form of the notice, since he had before him all grounds on which leave to defend was being sought.

“In these matters of procedure irregularities, it is the question of prejudice that is all important. If there is no possible prejudice the wide power to allow amendment should normally be exercised”.

The case of Trust Bank Ltd –vs- Amalco Co. Limited was also cited for the expression of the same principle. The Plaintiff/Respondent did not answer the important issues raised by the applicant namely that the estate and the beneficiaries have capacity to be sued.

The applicant herein has cited the ruling of Judge Azangalala in HCC. No. 1703 of 2001 Consortium Holding Ltd –vs- Estate of Jeremiah Cheruiyot deceased where the issue of suing in the name of an estate as defendant was discussed.

Section 82 (a) of the Law of Succession Acts provides :-

“Personal representative shall subject only to any limitation, imposed by their grant have the following powers.

a) to enforce by suit or otherwise all causes of action which by virtue of any law the deceased or arise out of his death for his estate”.

The judge was of the opinion that English Common Law where the estate could be sued does not apply here in view of the provisions of Succession Act and Civil Procedure Act.

In my view the law of procedure demands that the proceedings concerning deceased person only personal representative or legal representatives have capacity to sue or be sued. In the circumstances of this case the persons served admit they are beneficiaries. That may be so but they are not the executors or holders of a grant issued by any court. On the other hand the plaintiffs claim rights granted by law (acquiring of land by prescription) the suit has not been tried yet to determine rights. The suit has many possibilities when directions are taken in accordance with the procedure. There is also Rule 10 of the Order which provides the manner of conducting contentious Originating Summons. In the circumstances I do not think that the suit is for striking out. In my view it is for deciding on whether the plaintiff has sued the right defendant. However as the application is framed I decline to grant the orders sought under prayer no. 1 and the same is dismissed. On prayer no. 2 the costs shall be to plaintiff/respondent.

Dated this 18th day of October, 2004.

J. KHAMINWA

JUDGE

18.10.04

Khaminwa – Judge

Mr. Cege – Court clerk

Mr. Nyongesa – holding brief.

Ruling read in their presence in open court.

J. KHAMINWA

JUDGE

Mr. Nyongesa – My instructions are to apply for typed copies of proceedings and ruling. I am also applying for leave to appeal. There is no provision for filing appeal under the rules. The respondent shall not be prejudiced

Mr. Okanga – I have no objection.

Court – Leave granted as prayed. Proceedings to be supplied upon payment of copying charges.

J. KHAMINWA

JUDGE