



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Misc Civ Case 237 of 2005**

**IN THE MATTER OF: THE ESTATE OF YUMBE HABIBI Also**

**Known as YUMABE BINTI SHEIKH**

**(A PATIENT)**

**A N D**

**IN THE MATTER OF: SHAFI MUHAJI SHEHE**

**A N D**

**BUNU MAHAZI SHALIMA (INTERESTED PARTY)**

**Coram: Before Hon. Justice Njagi**

**Court clerk - Ibrahim**

**Mr. Sangoro for Applicant/Plaintiff**

**R U L I N G**

This application is brought by a notice of motion dated 20<sup>th</sup> April, 2007, and is expressed to be made under Sections 3A and 27 of the Civil Procedure Act. The applicant seeks from the court the following orders –

1. THAT directions be given herein to the effect that every party in these proceedings to bear their own costs
2. THAT the party and party bills of costs filed and pending herein be dismissed/struck out.

The application is supported by the annexed affidavit of Shafi Muhajji Shehe, and is based on the following grounds –

- (a) That the proceedings herein were commenced ostensibly to inquire into the mental health of a patient (now deceased).
- (b) That no party is to blame for her death
- (c) That the subject matter having been senility (mental health of the patient) and the patient being dead,

the proceedings became overtaken by events such that they could not proceed.

(d) That the court has discretion upon proper material being put before it to grant this application.

The interested party filed some 6 grounds of opposition three of which I find to be most pertinent.

These are that –

(i) The subject matter was not only senility of the patient but also that the applicant went further to obtain an injunction against the interested party and the interested party is entitled to costs.

(ii) In the circumstances the application is made in bad faith and should be dismissed with costs which the interested party prays should be assessed and paid forthwith.

(iii) The applicant has come to court seeking the court's discretion without disclosing all facts such as that the applicant withdrew this suit and immediately filed another one No. H.C.C.C. No. 196 of 2006 which was also dismissed by the court with costs.

The court file discloses that this dispute was first taken to the Resident Magistrate's Court, Mombasa, as Civil Suit No. 244 of 2005. It was first between the Applicant and his niece against whom he sought an injunction to restrain her from collecting and or receiving ground rent from the tenants occupying plot No. MN/1/2923, Kisauni, which was owned by the patient, now deceased. Initially, the patient had donated a general power of attorney to the Applicant. The donation was subsequently revoked and immediately donated to the Applicant's niece. It was thereafter the applicant's case that the patient was senile and therefore had no mental capacity to execute the deed or donate the power of attorney to the Applicant's niece.

It is not clear from the record whether that matter was ever sorted out. But be that as it may, by an originating motion dated and filed in the High Court on 20<sup>th</sup> April, 2005, the Applicant sought to be appointed the manager of the estate of the patient, so that he may deal with it in the manner authorized by the Mental Health Act, Cap 248. On 22<sup>nd</sup> April, 2005, he was accordingly so appointed in the interim period pending the hearing and final determination of that application.

Meanwhile, using her general power of attorney, the applicant's niece sold part of the patient's plot to the Interested Party, Bunu Muhasi, in order to raise money to pay the municipal rates which she deposes that she indeed paid. Her contention was that the Applicant had neglected the patient and collected rents from the patient's tenants but failed to pay the rates thereby exposing the property to the risk of sale by the Municipal Council. It is not lost on this court that each of the two parties blames the other for the same misfeasance.

After purchasing a part of the patient's plot, the Interested Party started constructing a house thereon despite protests from the applicant that the property was not for sale. By that time, the Interested Party had already bought the property. Indeed, by an agreement for sale dated 18<sup>th</sup> July, 2005, the applicant's niece acknowledged having received Shs. 1.3 million by way of the Purchase Price. By a notice of motion dated 4<sup>th</sup> August, 2005, the Applicant moved the court to grant, inter alia, an injunction to restrain the Interested Party from taking possession of, constructing or continuing to construct upon the property. One of the grounds upon which that application was based was that the Applicant needed to be empowered to file a substantive suit to protect the estate by stopping or canceling any purported sale and injunctioning construction that had commenced on the patient's estate. The injunctive orders were granted ex parte on 3<sup>rd</sup> November, 2005.

Somehow, the Interested Party managed to complete the construction works. However, he could not install electric power in the house because Kenya Power & Lighting Co. Ltd. had received explicit instructions from the Applicant not to connect power to the house. This prompted the Interested Party to file an application by notice of motion on 23<sup>rd</sup> December, 2005, seeking orders that the Applicant and his

niece be restrained from interfering with the Interested Party's house.

The patient passed away on 2<sup>nd</sup> January, 2006. By a consent letter dated 13<sup>th</sup> January, 2006, and filed in court on 16<sup>th</sup> January, 2006, the Interested Party was allowed to connect electricity to the premises. The record shows that the suit was withdrawn wholly pursuant to Order XXIV rule 1 by way of a notice dated 3<sup>rd</sup> April, 2006 and filed in court on 4<sup>th</sup> April, 2006. Thereafter the Interested Party requested judgment for the costs of the suit under Order XXIV rule 3 by a letter dated 16<sup>th</sup> August, 2006. On 9<sup>th</sup> October, 2006, the Deputy Registrar signed the decree ordering the Applicant to pay the Interested Party the costs of the withdrawn suit. It is against this background that the Applicant now prays that directions be given herein to the effect that every party in these proceedings do bear their own costs.

I agree with Mr. Oddiaga that this was not an inquiry into the patient's mental health per se. It went beyond. The applicant took the initial liberty to apply for an injunction against the Interested Party restraining him from taking possession of or continuing to construct in the suit plot No. 2923. These prayers were granted ex parte against the Interested Party. Having paid a cool Kshs. 300,000/= for the plot, the Interested Party was understandably incensed by this development. He had to fight back and protect his interest, and this led to the filing of his own applications.

For want of better language, one may say that the Interested Party was forced to participate in these proceedings, and thereby incurred costs in defending his interest as an innocent purchaser for value. If the order sought were to be granted, it would subject the Interested Party to unnecessary costs which he would not have incurred in respect of a matter with which he had nothing to do until the applicant brought him on. In these circumstances, I direct that the Applicant herein will pay Bunu Mahazi Shalima, the Interested Party herein, the costs of the withdrawn suit, as well as the costs of this application.

It is so ordered.

Dated and delivered at Mombasa this 7<sup>th</sup> day of December, 2007.

L. NJAGI

JUDGE