



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 232 OF 2017

MOSES MASIVAI BARASA

STEPHEN NDAYIYA BUHASIA.....PLAINTIFFS

VERSUS

MOHAMED AKRAM KADERDINA.....DEFENDANT

MOHAMED YASIN M.A KADERDINA

(as Sole Trustee of the Estate of

MOHAMED AKRAM KADERDINA.....APPLICANT

RULING

1. By an Amended Notice of Motion dated 25th November 2019, Mohamed Yasin Kaderdina (the Applicant) prays for orders: -

2. That this Honourable Court be pleased to set aside the ex-parte Judgment and Decree entered herein on 26th June 2019;

7. That this Honourable Court be pleased to strike out the Originating Summons dated 23rd November 2017 and the Supporting Affidavit of the 1st Plaintiff sworn on 23rd November, 2017; and

8. That the suit herein be dismissed with costs to the Estate of the late Mohamed Akram Kaderdina.

2. The application which is supported by an affidavit sworn by the Applicant is premised on the grounds that: -

i) On 26th June 2019 Judgment was delivered herein in favour of the Plaintiff/Respondent as follows: -

a) That the Plaintiffs are entitled to be declared as the proprietors of 2.028 Ha of all that parcel of land known as Plot No. 12889/127 Kilifi by way of adverse possession; and

b) That the Plaintiffs are entitled to be registered as the owners of the said Plot No. 12889/127 Kilifi and to be issued with a Certificate of title thereto.

ii) The suit was instituted and filed on 24th November 2017 against Mohamed Akram Kaderdina after his death and without proper service of summons being effected upon

iii) the Applicant who is the sole surviving legal trustee and or any other beneficiary of the Estate of the late Mohamed Akram Kaderdina;

iv) The late Mohamed Akram Kaderdina who is the registered proprietor of Plot No. 12889/127 Kilifi died on 12th July 2014;

v) The Plaintiffs were aware of the death of Mohamed Akram Kaderdina but proceeded to institute the suit against him after which on 12th March 2018, they applied for orders to grant them leave to serve summons by way of advertisement in a newspaper

which orders were granted on 11th April 2018;

vi) The Applicant was not aware of the advertisement and only came to learn about this case long after Judgment was delivered in the Plaintiff's favour; and

vii) The Applicant is aware that the Plaintiff did institute another suit being Malindi ELC No. 87 of 2014 wherein he prayed for similar orders of adverse possession in respect of a different parcel of land belonging to Charles David Howard Hewitt Stubbs and David Ewart Lennard Slater and should therefore be investigated for fraudulent attempts to dispossess innocent people of their land.

3. Moses Masivai Barasa and Stephen Ndayiya Buhasia (the Plaintiffs) are opposed to the application. By their Grounds of Opposition filed herein on 16th July 2020, they state: -

1. That the Applicant's application is misconceived and bad in law;

2. That the Applicant's application is an abuse of the Court process and/or fatally defective and thus wholly incompetent;

3. That the Plaintiffs'/Applicants' application (sic) is a non-starter and/or frivolous and/or scandalous;

4. That the orders sought for herein are incapable of being granted as they are premised on non-existing defence; and

5. That for the above said reasons, the Applicant's application dated 25th November 2020 (sic) ought to be dismissed with costs.

4. I have considered the application and the grounds filed in opposition thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.

5. It was not contested that the Plaintiffs herein moved this Court vide an Originating Summons dated 23rd November 2017. That originating Summons was instituted against one Mohamed Akram Kaderdina against whom the Plaintiffs sought orders of adverse possession in relation to the parcel of land described therein as Plot No. 12889/127 Kilifi.

6. The said matter proceeded ex-parte after the said Mohamed Akram Kaderdina failed to enter appearance after being served by way of substituted service and Judgment was thereafter delivered in favour of the two Plaintiffs on 26th June 2019.

7. From the material placed before me, it turns out that the said Mohamed Akram Kaderdina could not have entered appearance and/or filed a defence as he had been dead some three (3) years before the suit was instituted against him. While indeed Mohamed Akram Kaderdina was the registered proprietor of the parcel of land claimed by the Plaintiffs, the Certificate of Death annexed to the application before me (Annexure MYK2) reveals that he passed away on 12th July 2014 at the prime age of 62 years.

8. The Plaintiffs have not disputed that the Defendant was long dead as at the time they instituted the claim against him. In providing for those who can be joined as a defendant in a suit, Order 1 Rule 3 of the Civil Procedure Rules provides as follows: -

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons any common question of law or fact would arise.”

9. I did not by any stretch of imagination think that those words can also refer to a dead person. It is indeed common knowledge that when a suit is filed against a non-existent person, such a suit is void ab initio. It follows therefore that the filing of the Originating Summons and the purported service were a nullity.

10. As was stated in *Benjamin Leonard Mcfoy –vs- United African Company Ltd (1961) All ER 1169*: -

“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 more 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.”

11. That appears to me to be what the Plaintiffs are trying to do in their submissions that a legal representative be substituted in the Defendant's stead. That is an attempt to place something on nothing. The estate of a deceased person can only take over proceedings against a person if that person were alive at the time the suit was filed. That is not the case herein because in the instant matter, the deceased died before the suit was filed. The legal representative cannot therefore as proposed by the Plaintiffs be called upon to take over what is in essence a nullity.

12. It follows therefore that I find merit in the Motion dated 25th November 2019. I allow the same, set aside the Judgment and strike out the Originating Summons with costs as sought at Prayers 2 and 7 thereof.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF MAY, 2021.

J.O. OLOLA

JUDGE