



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 26 OF 2020

DAVID WATHAKA KAGURU.....PLAINTIFF

VERSUS

ABRAHAM KIPKEMBOI KIMAIYO (*sued as the personal representative of the estate of*

DAVID KIMAIYO SANG).....DEFENDANT

RULING

1. This is a ruling in respect of a Notice of Motion dated 14th May, 2020 in which the Applicant seeks the following orders:-

a) Spent

b) An order of injunction do issue against the Defendant restraining him whether by himself his servant, employees and/or agent from constructing a house, continuing constructing, erecting any structure, fence and/or in any other way interfering with that parcel of land known as **ELDORET MUNICIPALITY LANGAS PHASE 11 SHEET IV/64 AND 77** pending the hearing and determination of this application in the first instance and thereafter pending the hearing and determination of this suit.

c) The Respondent be and is hereby committed to civil jail for a period not exceeding two (2) years and/or be fined a sum of Kshs.20,000,000/= for being in contempt of court.

d) Costs for this application be provided for.

2. The suit herein was filed against David Kimaiyo Sang on 21st February, 2019. The Plaintiff/Applicant contemporaneously filed a Notice of Motion of even date in which he sought injunctive orders against the said David Kimaiyo Sang. It is clear from the Plaintiff that the plaintiff was aware that the said David Kimaiyo Sang was deceased but he nevertheless named him as a Defendant.

3. On 28th February, 2020, Abraham Kipkemboi Maiyo filed a replying affidavit on behalf of the Estate of Daudi Kimaiyo Sang who died on 16th April, 2014. On the 1st day of April, the advocates for the parties compromised the Notice of Motion dated 21st February, 2020 by opting to maintain the status quo until the suit is heard and determined.

4. Aware that the Plaintiff had filed a suit against a deceased Person, the Plaintiff amended the plaint on 17th April, 2019 and brought in the Administrator of the Estate of the deceased. Before I move on to determine the merits of the application, I have to determine whether there was a suit capable of giving rise to contempt proceedings against the administrator of the estate of the deceased and if the proceedings were properly taken over by the Administrator of the Estate of the deceased.

5. There is no contention that Daudi Kimaiyo Sang died on 16th April 2014 as per the death certificate. The present suit was filed on 21st February, 2019. The suit was therefore filed against a dead person. It is therefore clear that the suit was a nullity ab initio and any subsequent orders or proceedings were a nullity.

6. In the case of **Benjamin Leonard Mc Foy vs= United Africa Company Ltd [1961] ALL ER 1169**, it was stated 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 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”.

7. In the **Indian case of C.Muttu =vs= Bharath Match works Air 1964 Kant 293**, it was observed as follows:-

“If he (Defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of a plaint by substituting the legal representative of the deceased as the Defendant allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bonafide and in ignorance of the death of such a person.”

8. In another **Indian Case of Pratap Chand Metha =vs= Chrisna Devi Air 1988 Delhi 267**, it was held as follow:-

“----- If a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as no suit had been filed.”

9. It is therefore clear that one cannot seek to have orders based on a suit which was a nullity ab initio. The amendment which was made bringing in the legal representative as a Defendant was also null. The legal representative would not purport to take over proceedings which were nullity ab initio. It therefore follows that the Notice of Motion dated 14th May, 2020 is a nullity and no order can be made on the same. The suit being a nullity I make an order declaring it as a nullity and proceed to strike out the same with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 4TH DAY OF NOVEMBER, 2021.

E.O. OBAGA

JUDGE

In the virtual absence of parties who were aware of the date of ruling.

Court Assistant – Mercy

E.O. OBAGA

JUDGE