



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 410 OF 2016

MICHEAL THOYA MBWANA.....PLAINTIFF

VERSUS

HUSSEIN KARIMBHAI ANJARWALLA.....DEFENDANT

AND

SALIM ANJARWALLA (Suing as the personal representative of the estate of

Hussein Karimbhai (Deceased).....APPLICANT

RULING

1. The applicant moved this court vide his notice of motion application dated 18th October 2018 under the provisions of order 40, order 2 rule 15(1) and order 51 of the civil procedure rules. The application is further brought under section 1A, 1B and 63E of the Civil Procedure Act. The application urged the court to grant the following orders;

1. Spent;

2. Spent;

3. Spent;

4. That this honourable court be pleased to set aside and/or discharge the consent order comprised in the letter dated 25th July 2017 recorded in court on 21st November 2017 and the decree issued in the suit on 18th January 2018;

5. That this honourable court be pleased to strike out the originating summons dated 21st December 2016 and the supporting affidavit of the plaintiff sworn on the 22nd December 2016;

6. That the suit herein be dismissed with costs to the estate of the late Hussein Karimbhai Anjarwalla;

7. That the costs of this application be awarded to the applicant.

2. The application is supported by several grounds on the face of it. One of the grounds is that the Originating Summons has been filed against a person who is deceased thus it is a nullity and incurably defective. The application is supported by the affidavit of Salim Anjarwalla who represent the estate of his late father Hussein Karimbhai Hussein by virtue of a grant ad litem issued on 18th September 2018 in Mombasa High Court Succession Cause No. 118 of 1989. Mr Salim also annexed a copy of death certificate for Mr Hussein Karimbhai Anjarwalla at page 2 of annex SA-1.

3. Mr Salim deposed that Mr Anjarwalla died on 19th February 1989 therefore he could not have executed the sale agreement dated 21st July 1989 or been served with the pleadings herein as alleged on 22nd December 2016. That the deceased could also not have appointed Messrs Maranga Maosa & Co Advocates to act on his behalf in this case or file a defence on 4th July 2017. That this suit is an attempt to perpetrate a fraud on the estate of the deceased therefore it is in the interest of justice that the orders sought be granted.

4. Mr Samuel Okumu Odingo Advocate filed a replying affidavit on behalf of the defendant on 9th November 2018 in opposition to the

application. He deposed that he duly received instructions on 21st September 2018 from Hussein Karimbhai Anjarwalla to represent him in the matter. That after the matter was concluded his client told him of intent to relocate outside the jurisdiction of the Republic of Kenya. Therefore he closed his file and no longer has contacts of his client.

5. The plaintiff also filed a replying affidavit on 12th November 2018. Mr Thoya deposed that the proceedings were well conducted between him and the defendant. He objected to the contention that the defendant died on 19th February 1989 and that the letters of administration were obtained through misrepresentation of facts to the court. He also urged the court to dismiss the application.

6. The simple question for the court to determine in resolving the application is whether there is proof that the pleadings were filed against a deceased person thus a nullity. The plaintiff's claim was pursuant to a sale agreement dated 21st July 1989 signed between him and the defendant. That he entered into occupation of the suit plot 859/I/MN because of this agreement and claimed to be declared the owner under the Limitation of Actions Act. The applicant in rebutting the consent entered between the plaintiff and the defendant annexed a copy of a death certificate which shows date of death on the face of it as 19th February 1989. The applicant also annexed an order from the High Court appointing him as the administrator of the estate of the defendant.

7. Although the plaintiff said the said grant was obtained through misrepresentation of facts, he did not present any documentary evidence to support that proposition. There was no evidence to counter that the certificate of death of the defendant presented to the court was a forgery. This suit was filed on 22nd December 2016 some 25 years after the death of the defendant as per the death certificate. Unless the estate was sued, the suit as against the deceased is a nullity *abinitio*. Once the irregularity is brought to the court's attention, any orders made by the court are automatically set aside.

8. In the absence of contrary evidence, I do hereby find merit in the application dated 18th October 2018. The same is hereby allowed in terms of prayers 4, 5, 6 and 7 of the motion.

Dated, Signed and Delivered at Mombasa this 5th day of July 2019.

A. OMOLLO

JUDGE