



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LANDS COURT OF KENYA AT KISII

MSC APPLICATION E002 OF 2021

BENARD DOEL MAKABUNI.....APPLICANT

-VERSUS-

LEONARD NDEMO OMBACHI

(T/A OMBACHI & CO. ADVOCATES)..... RESPONDENT

RULING

1. The Applicant has brought the Notice of Motion dated 17th March, 2021 seeking the following orders.

a) Spent

b) THAT the Honourable Court be pleased to set aside the decree dated 10th of July 2002 of the suit known as **KISII HCCC NO. 59 of 1996 of Pascallia Nyanchama Makabuni versus Francis Makabuni Ogetuka.**

c) THAT the costs of this application be borne by the Respondent.

2. The application is premised on the grounds set out on the face of the Notice of Motion and the affidavit of Doel Bernard Makabuni in which he averred that he was the administrator of the Estate of Francis Makabuni Ogetuka whose Succession Cause was still pending in the High Court in HC Succession Cause No. 351 of 1998.

3. He also averred that the Respondent who is an advocate of the High Court of Kenya while representing some undisclosed Interested Party moved the High Court on 29th day of July 2000, ex-parte and as a result a decree dated 12th April, 2000 was reviewed.

4. The Applicant further averred that the Respondent intentionally lied to the court that he had served the Applicant, which lies led to the court to review the said decree. It was his further averment that by the time the decree was reviewed the parties to the suit had died some three years earlier. He also averred that in as much as the reviewed decree meant that the title to the suit property (L.R NO. MANGA SETTLEMENT SCHEME/291) was to be revoked, the family of the late Francis Makabuni Ogetuka which he represents are still in occupation of the same.

5. He finally deponed that it was on the said grounds that he sought to have the decree set aside through this application as the same was obtained through fraud.

6. Responding to the Applicant's Notice of Motion the Respondent filed a Notice of Preliminary Objection and Grounds of Opposition dated 3rd day of April 2021, wherein he stated that the application was statute-barred by virtue of order 45 Rule 6 of the Civil Procedure Rules 2010 as read with section 8 (sic) of the Civil Procedure Act. He also stated that the Applicant lacked the capacity to institute the application as the administrator of the estate of Francis Makabuni Ogetuka as he had not annexed the Grant of Letters of Administration issued to him.

7. The Respondent stated that the application offended the provisions of order 9 Rule 9 of the Civil Procedure Rules, 2010 as both the Plaintiff and Defendant were represented by counsel. Further, the Respondent stated that the application offended the provisions of order 51 Rule 13 (2) of the Civil Procedure Rules, 2010.

8. It was also the Respondent's contention that the application was wrongly brought as a Miscellaneous Application given that the substantive orders were made in Kisii High Court Civil Case No. 59 of 1996. The Respondent further pointed out that this court had neither been supplied with the application the Respondent filed in court on behalf of the Interested Party seeking a review of the court order nor the ruling on the said application and the award which was adopted as the judgement of the court.

9. It was the Respondent's conclusion that the application had been brought in bad faith against the Respondent, who only acted for a party in the proceedings and had no personal interest in the suit property and the Applicant had not shown any ground or sufficient cause to the court to justify a review and as such his Notice of Motion ought to be dismissed with costs.

10. On 23rd April 2021, The Respondent filed the Notice of Motion seeking inter-alia that the name of the Respondent be struck out for being improperly joined. The motion was brought pursuant to the provisions of order 1 Rule 10 (2) and order S1 Rule 1 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act.

11. In the said application, the Respondent contended that he was not a party in the **HIGH COURT CIVIL CASE NO. 59 OF 1996**. He averred that the Plaintiff and Defendant in the said case were represented by M/S G.J.M Masese Advocate and M/S Makori Omwario Advocates respectively. He further averred that on 24th day of March 1997, the court entered judgement and thereafter a decree which was not in line with the judgement was extracted.

12. The Respondent deposed that he was later instructed by an Interested Party named in the application to apply for review of the said erroneous decree, which he did and the Court proceeded to set aside the decree after ascertaining the error.

13. He averred that the firms of M/S G.J.M Masese Advocate and Makori Omwario Advocate were served with the application but did not respond to the application or appear in court and that none of the said firms of Advocates had sworn any affidavits denying service of the application by the Interested Party's Advocates (the Respondent herein).

14. It was his further averment that there was no communication by way of a letter or any information to court, before it reviewed the decree that the Plaintiff or Defendants were deceased.

15. In response to the application by the Respondent, the Applicant herein filed a Replying Affidavit sworn on 29th April, 2021. In the said Affidavit, the Applicant averred that Mr. Ombachi had not demonstrated why his name should be struck out from the suit as he did not disclose the name of the Interested Party on whose behalf he was acting.

16. He further averred that the Respondent all along knew that the parties had died three years before he filed a false Affidavit purportedly for an Interested Party in the **HIGH COURT CIVIL CASE NO. 59 OF 1996** and went ahead to mislead the court to review its order in the said case against the late Francis Makabuni Ogetuka.

17. It was his averment that the Respondent in his application had openly stated that while acting for the Interested Party, he filed an application dated 29th June, 2000 seeking a review of the court order made in **HIGH COURT CASE NO. 59 OF 1996** but failed to disclose the identity of the Interested Party.

18. It was his averment that there was no Affidavit on record to signify that the application dated 29th July, 2000 was served upon the Advocates that they were on record for the parties in the said suit.

19. On 27th April, 2021 the court directed that the applications dated 17th March 2021 and 23rd April 2021 be disposed of by way of written submissions. The Applicant filed his submissions on 30th April 2021 while the Respondent filed his submissions on 31st May, 2021.

ISSUES FOR DETERMINATION

20. From my analysis of both applications, rival affidavits and submissions filed by both parties, I deduce the following as the main issues of determination;

- a) Whether this court can proceed to review an order of the High Court that has not been presented before it.
- b) Whether the 1st Plaintiff has capacity to institute the application dated 17th March, 2021 against the Respondent.
- c) Whether the Respondent has wrongfully been included as a party to the application dated 17th March, 2021.

ANALYSIS AND DETERMINATION

Whether this court can proceed to set aside an order of the High Court that has not been presented before it.

21. The main prayer sought in the Applicant's application dated 17th March, 2021 is that this court be pleased to set aside the decree dated 10th of July 2002 in **KISII HCC NO. 59 of 1996 Pascallia Nyanchama Makabuni versus Francis Makabuni Ogetuka**. I note that the decree dated 10th July, 2000 and the one dated 12th April 2000 differ slightly. However, in the absence of the pleadings and judgment in KISII HCCC No. 59 of 1996, it is not possible to ascertain which decree is accurate.

22. The Applicant has also alluded to an application dated 29th June 2000 by an Interested Party who has not been disclosed by either of the parties. In connection with the said application, he has annexed some incomplete proceedings to his Supporting Affidavit. It is unfortunate that this court does not have the order in respect of the application dated 29th June, 2000 which the Applicant seems to be dissatisfied with and which he wants this court to set aside. Without the said order of the court in respect of the application dated 29th June, 2000 which the Applicant feels is a creation of the Respondent, there is nothing before this court to set aside.

Whether the 1st Plaintiff has capacity to institute the application dated 17th March, 2021 against the Respondent.

23. It is trite law that the estate of deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who has been issued Grant of Letters of Administration has capacity to represent the estate of a deceased person. A party can thereof not commence a suit on behalf of the estate of a deceased person without letters of administration and thereafter obtain the letters of administration subsequently. Where a suit is commenced without Letters of Administration in respect of a deceased estate such a suit is null and void *ab initio*.

24. It is also trite law that pleadings filed in court by persons with no *locus standi* are void *ab initio* and the court does not have jurisdiction over such. This was observed in case of **Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party [2019] eKLR where Nyakundi J observed that:-**

“Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues.”

25. In the instant application, the Applicant has not attached the Grant of Letters of Administration to prove that he is the administrator of the estate of the late Francis Makabuni Ogetuka. Clearly therefore without the evidence of the Letters of Administration, the Applicant cannot purport to institute an application seeking orders against the Respondent on behalf of the estate of his late father.

Whether the Respondent has wrongfully been added as party to the application dated 17th March, 2021.

26. It is clear that the Applicant has filed this application without any information regarding the application dated 29th July 2000, parties thereto and the court’s final determination of the same. He talks of an affidavit sworn by the Respondent on behalf of his client, the Interested Party and fails to attach the same to his affidavit.

27. From the incomplete record before me, it is clear that the Respondent was acting for an Interested Party in the suit. The Applicant has not demonstrated that the Respondent had any interest in the matter apart from acting for the third party.

28. It was the Applicant’s duty to peruse the file and obtain all proceedings in **KISII HCCC NO. 59 of 1996** including those touching on the application dated 29th June, 2000 before filing this application. It is quite clear that he has chosen to pick on the incomplete proceedings especially on the oral submissions by the Respondent as a ground to hold the Respondent responsible for the actions of the Interested Party.

29. From the limited information supplied to this court by the Applicant regarding the proceedings of the court touching on the Application dated 29th June 2000, it would be unjust to hold the Respondent responsible for the acts of the Interested Party on whose behalf he was acting. Further, apart from the fact that the Repondent represented the Interested Party, there is no other evidence submitted by the Applicant demonstrating that the Respondent has in anyway interfered with the suit property. In fact, there are two letters attached to the Replying Affidavit sworn by the Applicant dated 29th April, 2021, 15th April, 2021 and 18th July, 2000 which did not originate from the Respondent nor did the same mention the name of the Respondent.

30. From the foregoing therefore, I am not persuaded that there is a good reason why the Respondent should be made a party to this application. The upshot is that I find no merit the application dated 17th March and I dismiss it with costs to the Respondent. On the other hand, I allow the application by the Respondent dated 23rd April 2021 with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF OCTOBER, 2021.

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J.M ONYANGO

JUDGE