



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 224 OF 2015

SAID BAYA MWABAYA (Suing as the administrator of the estate of

Nuru Mohamed Omar (deceased)1ST PLAINTIFF

ZAINAB TSUMA BENGOJA2ND PLAINTIFF

VERSUS

SUHEEL AHMED NAZIR1ST DEFENDANT

SBM BANK (BANK) LIMITED

(FORMERLY FIDELITY COMMERCIAL BANK).....2ND DEFENDANT

RULING

This ruling is in respect of the 1st Defendant's Notice of Preliminary Objection dated 23rd September 2021 which was filed in response to the plaintiff's application dated 23rd August 2021 seeking for the following orders:

a) Spent

b) Spent

c) That the status quo existing on the suit property namely Plot No. Kilifi/Kawala 'A'/Kadzonz0/309 be maintained pending the hearing and determination of this suit.

d) That the order of dismissal of the suit that was made on 22nd July 2021 be set aside and this suit be reinstated to its former status prior to the said dismissal order and be set for hearing.

e) That costs be in the cause

The 1st defendant filed a Notice of Preliminary Objection dated 23rd September 2021 on the following grounds:

1. The 1st Plaintiff died on 23.9.2015 and her suit abated on 22.9.2016. Said Baya Mwabaya is not a Party in the suit as no substitution has been made to replace Nuru Mohamed Omar (deceased) with the administrator of her estate. He therefore had no capacity to file that application.

2. The 1st Defendant died on 20.7.2019. No substitution having been made within one year the suit against him abated on 19.7.2020, more than one year ago. The Court has no jurisdiction over a deceased Defendant.

3. SBM Bank Kenya Limited (formerly Fidelity Commercial Bank Limited) is not a party in the suit as the Plaintiffs have to date not prosecuted the Notice of Motion application dated 23.4.2014. As correctly held by the Honourable Mr. Justice J. O. Olola in his Ruling delivered on 14.12.2018 while dismissing the Plaintiffs' application dated 18.1.2017 the Plaintiffs could not further amend the Plaint which had never been amended.

4. The application is res judicata. The Plaintiffs sought orders of injunction in the Notice of Motion application dated 30.3.2011 concerning the same property but the application was dismissed on 11.12.2012 and the Plaintiffs were ordered to give vacant possession of the suit premises to the Defendant. There was no appeal against the Ruling and orders of 11.12.2012.
5. The Plaintiffs filed a Notice of Motion application dated 8.2.2013 for staying of execution pending appeal and obtained orders of status quo to last until 21.2.2013. The Plaintiffs' application is therefore res judicata in relation to the Motion dated 8.2.2013.
6. The orders made against the Plaintiffs to deliver vacant possession of the suit premises to the Defendant within 60 days from 11.12.2012 are still in force and valid. The orders to maintain status quo given on 25.8.2021 are in direct contradiction of the final orders made on 11.12.2012.
7. Had the Plaintiffs disclosed the existence of previous applications and orders on the same property no Ex parte orders would have been given on 25.8.2021.
8. There is no existing suit in which any order could have been given on 25.8.2021, the suit having been dismissed for want of prosecution on 22.7.2021. The Court is functus officio.
9. The Court has no jurisdiction to hear and determine a suit by a dead person against another dead person or to sit on appeal over its own previous decisions on the same issue between the same parties.

Counsel agreed to canvas the application and the preliminary objection vide written submissions which were duly filed.

1ST DEFENDANT'S SUBMISSION ON THE PRELIMINARY OBJECTION

Counsel submitted that there is no suit by either the 1st plaintiff or the Administrator of her estate as upon the demise of the 1st Plaintiff on 23rd September 2015 the suit abated on 22nd September 2016 and that no substitution was done. Further that the purported administrator of Nuru Mohamed Omar one Said Baya Mwabaya, has no locus standi to prosecute the present suit.

Similarly, counsel submitted that there is also no suit against the 1st defendant as the defendant died on 20th July 2019 and no substitution was done hence the suit against him abated on 19th July 2020. That no orders can be sought and granted against a deceased person.

Shakil Ahmed a brother deponed that on 11th December 2012, the High Court sitting in Mombasa dismissed a similar application to the present one and ordered the 1st Defendant to deposit a sum of Kshs. 433,000/- in an interest earning joint account. That the Plaintiffs have refused to cooperate and have never fixed the suit for hearing despite being directed by the High Court to do so.

Mr. Kinyua further submitted that SBM Bank Kenya Limited is not a party to this suit as there was an application for joinder dated 23rd April 2014 which was never prosecuted but the plaintiff assumes that SBM Bank is a party to this suit.

Counsel also submitted that this application is res judicata as this court already refused to grant injunction orders vide its ruling dated 11th December 2012. That the plaintiffs were granted orders to maintain status quo pending appeal of the orders of 11th December 2012, which expired on 21st February 2013 and are therefore precluded from seeking similar orders.

Mr. Kinyua urged the court to uphold the preliminary objection as there is no existing suit hence the orders sought cannot be granted.

PLAINTIFF'S SUBMISSIONS

Counsel relied on the 2nd plaintiff's affidavit whereby she deponed that there has been a long standing dispute over the suit Plot No. Kilifi/Kawala 'A'/Kadzozzo/309 and that the court dismissed this suit for want of prosecution on 22nd July 2021.

Counsel submitted that the suit was dismissed and yet parties had been directed to ascertain the existence of the 1st Defendant and the demise of the 1st Plaintiff and that the 2nd plaintiff had never lost interest in prosecuting the case.

It was counsel's submission that the 2nd Plaintiff did not know of the demise of the 1st Defendant until 28th September, 2021 when the Plaintiffs' advocates were served with the Replying Affidavit sworn by Shakil Ahmed Khan, who is a brother of the 1st Defendant, who indicated that the 1st defendant was deceased.

Counsel submitted that the preliminary objection should be dismissed because even though the 1st plaintiff is deceased, the 2nd plaintiff is still alive, secondly the plaintiff only became aware of the 1st Defendant's demise on 28th September 2021, hence time started running on the said date for purposes of substitution, thirdly that where new circumstances present themselves, which were not previously known to the 2nd Defendant in this case, when the injunction application was heard, the court will have jurisdiction to entertain another application for injunction,

Counsel therefore urged the court to invoke the provisions of Article 159 of the Constitution of Kenya, 2010 and sections 1A, 1B and 3A of the Civil Procedure Act, 2010 and allow the plaintiff's application and dismiss the preliminary objection

ANALYSIS AND DETERMINATION

The ingredients of preliminary objections are well settled and the court cannot reinvent the wheel. Preliminary Objection was described in the Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696 to mean: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

I must admit that the grounds in the notice of preliminary objection were a mouthful but they basically raise three points namely locus standi, res judicata and whether the court is *functus officio*

It is settled that the issue of *locus standi* raises a pure point of law that touches on the jurisdiction of the court as was held in the Supreme Court case in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** where the court held that:

“The issue of locus standi raises a point of law that touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity. In Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, Sup. Ct. Petition No. 7 of 2013; [2014] eKLR, this Court held (at paragraphs 68 and 69) that the question of jurisdiction is a “pure question of law,” and should be resolved on a priority basis.”

On the issue as to whether the application is res judicata, the court wishes to rely on the case of **George Kamau Kimani & 4 Others... Vs...County Government of Trans Nzoia & Another (2014), eKLR**, where the Court held that:-

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

The court has to ascertain facts raised by both counsel as it is their word against each other. Where there are disputed facts to the existence of certain facts then the court must call for evidence to prove the same. Even though the brother of the 1st defendant has annexed a copy of the death certificate of the 1st defendant, Counsel for the plaintiff has submitted that they only became aware of such occurrence on 28th September 2021 hence they still have a chance to substitute this having been a highly contested matter.

The following issues arise in the preliminary objection and the application:

- a) ***Whether the suit abated upon the demise of the 1st Plaintiff.***
- b) ***Whether the suit abated upon the demise of the 1st Defendant.***
- c) ***Whether the orders sought by the Plaintiffs are res judicata.***
- d) ***Whether this court is functus officio having dismissed the suit for want of prosecution on 22nd July 2021.***
- e) ***Whether this court should set aside its orders of 22nd July 2021, dismissing the suit for want of prosecution.***

On the first issue as to whether the suit abated upon the demise of the 1st plaintiff,

Order 24 rule 1 of the Civil Procedure Rules, 2010 provides that the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues. **Rule 2** thereon provides for the Procedure where one of several plaintiffs or defendants dies and right to sue survives. It reads:

Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

The 2nd plaintiff is alive and can proceed with the case if she so wishes and if the dismissed suit is reinstated. She cannot be locked out due to the demise of the 1st plaintiff.

On the second issue as to whether the suit abated upon the demise of the 1st defendant, the issue is whether the suit abates upon the death of a sole defendant.

Order 24 rule 4 provides that:

Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4.]

(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

It is clear from the said provisions that a suit abates by operation of the law when no substitution is made within one year on the death of a Defendant. However, Order 24 rule 7 (2) provides a window to reinstate a suit that has abated as follows:

“The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”

It is on record that the sole defendant died on 20th July 2019 and has not been substituted. It was counsel’s submission that they have not substituted because they only came to learn about his death on 28th September 2021. From the court record it is clear that counsel was aware of the defendant having passed away as early as July 2021 when the suit was dismissed for want of prosecution, therefore it is not factual that they only became aware on 28th September 2021.

On whether the application is res judicata, the Plaintiffs vide a notice of motion dated 30th March 2011 sought an injunction order restraining the Defendant from occupying, developing and alienating the suit land. In a ruling delivered on 11th December 2012, Muriithi J. did not grant the prayer and ordered that possession be given to the Defendant. 9 years later, it appears that the Plaintiffs are yet to give possession as directed by the High Court, and are now seeking an order for maintenance of status quo.

I find that this is a similar application which the court has heard and determined hence an abuse of court process.

On the issue whether the court is *functus officio* having dismissed the suit for want of prosecution on 22nd July 2021, the Supreme Court of Kenya discussed the doctrine of *functus officio* in **Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others [2013] eKLR** cited with approval an excerpt from an article by Daniel Malan Pretorius, in **“The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832:**

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

The Defendant’s objection is that this court having dismissed the present suit for want of prosecution, it has become *functus officio*. The matter was dismissed for want of prosecution where the court stated that there was no sufficient cause shown why the matter should not be dismissed. The court having found that no sufficient cause was shown why the suit should not be dismissed.

Having analyzed the application, the submission by counsel, I notice that there are many issues which do not or cannot work for the plaintiff. The application is not tenable as there is no suit, the suit having been dismissed for want of prosecution on 22nd July 2021 in the presence of counsel for the plaintiff and the defendant.

It is on record that counsel for the plaintiff informed the court *“the defendant apparently passed away and we thought they would substitute”*

I find that the application lacks merit and is therefore dismissed with costs to the defendant. The applicant has other avenues for redress. The preliminary objection succeeds to the extent of the points of law raised.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF DECEMBER, 2021.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on

the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.