



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 47 OF 2014**

**LUTHER KASHOLO LAMEK & OTHERS.....PLAINTIFFS**

**VERSUS**

**AMINA RASHID WARSHOW.....DEFENDANT**

**RULING**

***(Application to set aside judgment and to have defendant substituted; suit for adverse possession having been filed against a person who was deceased; judgment entered and executed; applicant demonstrating that she is the administrator of the deceased defendant; suit could not have proceeded against a deceased person; judgment set aside and order that title do revert back to the name of the defendant as it was before the judgment; suit was a nullity ab initio for having been filed against a dead person and cannot be cured by a substitution; suit struck out)***

1. The application before me is that dated 18 January 2019 filed by one Amina Rashid Washo. The principal prayers are prayers 3, 4, and 5 in the application which seek the following orders :-

*(a) That this honourable court be pleased to substitute Amina Rashid Washo as the defendant in this suit.*

*(b) That this honourable court be pleased to review, set aside, discharge and/or vary the ex parte judgment and decree dated and delivered on 28 June 2017.*

*(c) That this honourable court be pleased to grant leave to the intended defendant/applicant to enter appearance and file a defence out of time and consequently rehear the suit.*

2. By way of background, this suit was commenced by 12 persons through an Originating Summons where the applicants in the Originating Summons (whom I will refer to as the plaintiffs) sought orders that it be declared that they have acquired title to the land described as Plot No. 363/I/MN by way of adverse possession. The respondent in the Originating Summons (whom I will refer to as the defendant) was named as Rashid Warshow. Upon filing the Originating Summons, the plaintiffs sought orders to serve the defendant by way of an advertisement in the newspapers as they averred that they could not trace the defendant. That application was allowed and an appropriate advertisement was placed in the Daily Nation Newspaper of 30 April 2016. No appearance was entered and no defence was filed. Thereafter the suit was fixed for hearing before Komingoi J on 13 February 2017. On that day, Mr. Anjarwalla, counsel holding brief for Mr. Kenga for the plaintiffs, basically relied on the witness statements filed and sought to file written submissions, which was allowed, and the matter was fixed for 15 March 2017 to confirm filing of submissions. On 15 March 2017, counsel did confirm that he has filed his submissions and the matter was then fixed for judgment on 28 June 2017, on which day judgment was duly delivered.

3. In her supporting affidavit, the applicant has contended that there are errors on the face of the record as the plaintiffs never testified nor produced evidence during the hearing. She has further disclosed that Rashid Warshow died on 17 August 1969 and was incapable of being sued. She has averred that she is the administrator of the estate of Rashid Warshow and she was never notified of this case. She has further deposed that the occupation by the plaintiffs of the suit land has been of less than 12 years and that the plaintiffs are not the only occupants of the land. She believes that the plaintiffs acted fraudulently in failing to disclose that Rashid Warshow had died; that they failed to disclose that she has attempted to evict them since the year 2009; that they failed to disclose that the squatters on the land are more than the 12 persons who have sued but are in fact over 45. She believes that she has a good defence which she should be allowed to ventilate. She stated that she only came to know of the case when she went to the Land Registry to transfer the title, only to find that the same has already been transferred into the name of the plaintiffs. She annexed a grant of letters of administration in respect of the estate of Rashid Warshaw Pishoki which was issued to her on 23 September 2016 and the confirmed grant which shows that the suit land was wholly vested upon her.

4. I probably need to mention that on 17 October 2018, some 32 persons filed an application seeking orders that they also be deemed as beneficiaries of the judgment as they have been resident on the suit property. That application is yet to be prosecuted.

5. The application is opposed by the replying affidavit of Luther Kosholo Lameck, who is one of the plaintiffs. He has contended that the person sought to be associated with the defendant is a different person from the defendant herein. There was also filed a notice to produce the Certificate of Death of Rashid Warshaw and a letter from the Provincial Administration to confirm the heirs of the late Rashid Warshaw.

6. The applicant, in reply, filed a supplementary affidavit where she deposed that if the plaintiffs have an issue with the fact that she is administrator of the estate of the defendant, they can file an application in the succession matter.

7. At the hearing of the application, only Mr. Mwawasa, learned counsel for the applicant was present. There was no appearance on the part of counsel for the plaintiffs. Mr. Mwawasa urged me to allow the application.

8. I have considered the same. The main gist of this application is that the defendant was dead when this suit was filed. To support her assertion, the applicant has annexed a grant of letters of administration issued in Mombasa High Court Succession Cause No. 371 of 2015. I have looked at the grant and I have no reason to doubt it. The same does show that Rashid Warshaw Pishoki, died on 17 August 1969 and the applicant was appointed administrator of his estate. I am aware that the plaintiffs have raised issue on the identity of the person who is subject to the succession matter, probably because of the slight difference in the description of the names, but I am of the view that the subject of that succession matter is the defendant herein. I say so because the confirmed grant does distribute the suit land herein which is clearly noted in the confirmed grant as Plot No. 363 Section I Mainland North. That is the same land which is the subject of these proceedings. If the plaintiffs have an issue with how the succession proceedings were conducted, they are at liberty to apply in that case.

9. It is therefore apparent that this suit was filed against a dead person and that by itself is an irregularity. If the court was aware that the suit had been filed against a dead person, then the matter would not have proceeded and judgment would not have been entered in favour of the plaintiffs. I am therefore persuaded that the judgment herein was an irregular judgment and the same must be set aside. I do proceed to set the same aside.

10. There was mention within this application that the plaintiffs have already executed the judgment. I was not shown any search to prove this, but if that is the case, with the setting aside of the judgment, then the registration of the plaintiffs or their representative/s as proprietors of the suit land must be nullified. Thus I do issue an order cancelling the title of the plaintiffs and or their representative/s as proprietor/s of the suit land and the land must revert back to the ownership of Rashid Warshaw as it was before judgment was entered. It will then be transmitted to whoever is the successor in title of Rashid Warshaw following the law of succession.

11. I am aware that the applicant argued within this application that the proceedings were also conducted improperly as the plaintiffs never testified. Given that I have already set aside the judgment on other reasons, I do not see the need of addressing this point within this application.

12. The last issue that I need to grapple with is whether to allow a substitution of the deceased defendant as sought in this application and to have the applicant defend the suit on behalf of the estate of the deceased. Technically, the case was non-suited *ab initio*, for one cannot sue a dead person. Whether or not such suit can be cured by a substitution was one of the issues that the court looked at in the case of *Viktar Maina Ngunjiri & 4 Others vs Attorney General & 6 Others (2018) eKLR*. In that case, Mboghli Msagha J, cited with approval various Indian cases. He stated as follows :-

*“The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to court. In the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity.*

*In the Indian case of C. Muttu vs. Bharath Match Works AIR 1964 Kant 293 the court observed,*

***“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 plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”***

*In yet another Indian Case of Pratap Chand Mehta vs Chrisna Devi Meuta AIR 1988 Delhi 267 the court citing another decision observed as follows,*

***“ ....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 if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”***

13. I am in agreement with the above dictum. There is no doubt that this suit was instituted against a dead person and was thus a nullity. The representative of the deceased cannot take over a nullity. The only order I can make in the circumstances is that this suit is hereby struck out. There will be no orders as to costs save for the costs of this application which I assess at Kshs. 25,000/= payable to the applicant by the plaintiffs jointly and/or severally.

14. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 26<sup>th</sup> day of February, 2020.**

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**MUNYAO SILA,**

**JUDGE.**

**IN THE PRESENCE OF:**

Mr. Mwawasa for the applicant.

No appearance on the part of M/s Kenga & Co. Advocates for the plaintiffs.

Court Assistant; David Koitamet.