



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 175 OF 2009

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

PAUL LOBO.....1ST DEFENDANT

BERNARD ATATI.....2ND DEFENDANT

SAMMY KOMEN MWAITA.....3RD DEFENDANT

RULING

1. The application before me for determination is the Notice of Motion dated 5th July 2019 brought under Sections 1A, 3A and 80 of the Civil Procedure Act, Order 45 Rule 1 (1) (a) and Order 51 of the Civil Procedure Rules and Article 159 (2) (d) of the Constitution of Kenya. The 1st defendant/applicant seeks orders to review and/or set aside the orders made on 18th March 2019 joining the 1st defendant as a party to this suit. The application is supported by the affidavit of Myrtle Mary Desa sworn on 1st July 2019 and a further affidavit sworn on 2nd September 2019 and is premised on the grounds on the face of the motion. The applicant states that the court proceeded and issued orders joining the applicant in the original suit as the 1st defendant on 18th March 2019. It is the applicant's contention that the said order of 18th March, 2019 was issued through mistake and/or upon an error on the face of the record by dint of the following:

- i. The pleadings herein disclose that the deceased had long prior to his death sold the suit property to the 2nd defendant.**
- ii. The pleadings similarly reveal that the cause of action against the deceased was in persona, and the liability thereof did not survive him upon his demise.**
- iii. The applicants as administratrixes of the deceased estate can only sue or be sued over property forming part of the deceased's estate.**
- iv. The suit property herein does not constitute part of the deceased's estate and thus the beneficiaries have no interest in the same.**
- v. That the prayers sought in the Amended Plaintiff neither discloses any cause of action as against the estate of the deceased nor do they seek any specific relief as against the applicant's and/or Estate of the deceased.**

2. The applicant contends that the application has been brought timeously and without inordinate delay and that no prejudice shall be visited upon the plaintiff and other parties to the suit were the application to be allowed. The applicant has annexed copies of petition for probate of written will, application for confirmation of Grant of Probate and Certificate of Confirmation of Grant.

3. The application is opposed by the plaintiff through a replying affidavit sworn by Dedan Okemwa on 7th August 2019 and grounds of opposition dated August 2019. It is the plaintiff's contention that the claim herein is persona and that there was no error or mistake to enjoin the legal representative of the deceased in the suit for purposes of the continuity of the suit to its conclusion. The plaintiff further contends that the application is incompetent and does not meet the threshold for review under order 45 Rule 1 of the Civil Procedure Rules.

4. The application was canvassed by way of written submissions. The 1st defendant filed submissions on 8th November, 2019. Mr. Oloo, learned counsel for the applicant submitted inter alia, that there is no relief flowing from the 1st defendant to the plaintiff as required under the provisions of Order 1 Rule 3 of the Civil Procedure Rules. It was counsel's submission that the joinder of the 1st defendant was done

through an error apparent on the face of the record and urged the court to allow the application with costs.

5. In their submissions filed on 27th November, 2019, the plaintiff submitted that the 1st defendant has not provided sufficient grounds to warrant the review of the court's orders of 18th March, 2019. That the application has not met the threshold set under the provisions of Order 45 Rule 1 of the Civil Procedure Rules. The Plaintiff further submitted that the deceased had filed his defence and had actively participated in defending the suit through his various advocates until on 18th September, 2019 when the court was informed of his demise through Messrs Omulama E. M. Advocates. That the Applicant herein being the lawful appointed legal representative of the estate of the deceased are pursuant to Section 2 of the Civil Procedure Act, the rightful representative of the estate of the deceased to proceed with the suit on behalf of the deceased. The plaintiff urged the court to dismiss the application with costs.

6. I have considered the application, the submissions made as well as the authorities cited. I have also considered the relevant law. The application basically seeks to review and set aside the orders issued by the court on 18th March 2019. The ruling and orders issued by the court on 18th March 2018 followed an application dated 17th October 2018 by the 2nd defendant seeking orders that the suit against the 1st defendant be declared to have abated and upon such declaration, the suit against the 2nd defendant should accordingly fail. The said ruling also determined the plaintiff's application dated 17th October 2018 which sought to revive the suit against the 1st defendant, Paul Lobo (deceased) by substituting him with the applicant who are the legal representatives of the estate of the deceased. After considering the two applications, the court declined to grant the orders sought by the 2nd defendant but allowed the application by the plaintiff. In the present application, the applicant wants those orders reviewed and set aside.

7. Section 80 of the Civil Procedure Act gives power of review while Order 45 sets out the rules. The rules restrict the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds: a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made, or b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground, there is a requirement that the application has to be made without unreasonable delay.

8. In the case of National Bank of Kenya Ltd –v- Ndungu Njau (1997) eKLR, the Court of Appeal held that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission- must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of law cannot be ground for review.”

9. In the instant case, the application is made principally on the ground that there is a mistake or an error apparent on the face of the record in that the court in its ruling of 18/3/2019 proceeded to join the applicant in the suit as the 1st defendant in their capacity as administratrixes of the estate of the original 1st defendant who is deceased. The applicant avers that the court issued the orders without notice to and/or participation of the applicants herein.

10. In the ruling sought to be reviewed, I note that the issue of substitution of the deceased with the applicant was extensively canvassed and determined by the court. The issue whether the plaintiff's cause of action against the deceased was in persona or in rem and whether they survived upon his demise were also canvassed. It was after hearing arguments over those issues that the court allowed the plaintiff's application dated 17th October, 2018 which included an order to substitute the deceased with the applicant as the 1st defendant. It is evidently clear from the ruling of 18th March 2018 that the issues raised in the present application were articulated before this court and the decision of the court now sought to be reviewed were informed by the arguments advanced by the parties. It was held in the case of National Bank of Kenya Ltd –v- Ndungu Njau (supra) that an issue which has been contested as in this case cannot be reviewed by the same court which had adjudicated upon it. I would be sitting on appeal against a ruling of this court if I was to review the orders made on 18th March 2018, which is contrary to the law. In my view if a party, including the applicant were dissatisfied with the said ruling, their remedy was to lodge an appeal against it. I am guided by the decision of the Court of Appeal in the above case where it was held inter alia, that it cannot be a ground for review that the court proceeded on an incorrect exposition of the law. By reason of the foregoing, I find that the application has no merit. Accordingly, the Notice of Motion dated 5th July 2019 is hereby dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MARCH 2020.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Makori holding brief for Mrs. Abdukrahim for Plaintiff

Ajeko holding brief for Busieka for 1st defendant

Rutto for 3rd defendant and holding brief for Magut for 2nd defendant

Yumna Court Assistantl

C.K. YANO

JUDGE