



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE NO. 155 OF 2015**

**WILSON NDIRANGU MURUTHI.....PLAINTIFF**

**VERSUS**

**CHARLES SAMERI MUKURIA.....DEFENDANT**

**EMILY MURUGI KAMAU.....APPLICANT**

**RULING**

1. Upon hearing this matter, Munyao J. rendered judgment on 26<sup>th</sup> June 2018 as follows:

**i. That as between the plaintiff and the defendant it is hereby declared that it is the plaintiff who is the rightful proprietor of the land parcel Kijabe/Kijabe Block 1/3757.**

**ii. That it is hereby declared that the defendant is a trespasser in the said land parcel Kijabe/Kijabe Block 1/3757.**

**iii. That the defendant is hereby granted 30 days to remove himself and all his developments from the said land parcel Kijabe/Kijabe Block 1/3757 and restore the said land to its pre-development state or to such state as may be agreed by the plaintiff.**

**iv. That in default of the above, the plaintiff is at liberty to evict the defendant and keep or remove all the developments therein as he may wish and any costs incurred to be passed over to the defendant.**

**v. That upon his eviction and/or removal a permanent injunction is hereby issued barring the defendant from the land parcel Kijabe/Kijabe Block 1/3757.**

**vi. That the order of stay of proceedings of the case Naivasha Chief Magistrate's Court criminal case No. 722 of 2015 is hereby lifted.**

**vii. That the plaintiff shall have the costs of this suit.**

2. Subsequently, the learned judge considered an application dated 4<sup>th</sup> March 2019 filed by the plaintiff seeking an order of eviction. The judge made the following order on 28<sup>th</sup> March 2019:

**5. I therefore allow the application. I issue an order for the eviction of the respondent from the land parcel Kijabe/Kijabe Block 1/3757. The eviction order may be executed by M/s Tango Auctioneers or any other auctioneer or court broker that the applicant may appoint. I further order the OCS of Mai Mahiu police station to supervise the eviction and provide adequate security to the auctioneer/court broker and further ensure that peace and order is maintained during the eviction exercise.**

3. Emily Murugi Kamau (hereinafter "the applicant") later filed Notice of Motion dated 14<sup>th</sup> June 2019 seeking the following orders:

1. ...

2. ...

3. THAT the Honourable Court do order Emily Murugi Kamau who is the legal representative of the deceased defendant be made a party and proceed with the suit.

4. THAT the Judgment and Decree issued on 26<sup>th</sup> June, 2018 granted (sic) be set aside or vary such judgment and any consequential decrees or orders together with the proceedings and the defendant be granted an opportunity to defend this claim to its logical conclusion.

5. THAT upon substitution of Charles Sameri Mukuri with Emily Murugi Kamau, the Honourable Court allows Emily Murugi Kamau leave to put in a statement of Defence to the plaintiff's claim.

6. THAT the costs of this application be on the cause.

4. The application is supported by an affidavit sworn by the applicant. She deposed that the defendant passed away on 21<sup>st</sup> April 2018 and that she obtained letters of administration in respect of his estate on 14<sup>th</sup> May 2019. She added that the deceased defendant never mentioned to her during his lifetime that this suit existed and that she only came to know about it in April 2019 when the plaintiff entered the suit property and started demolishing a building on it. That she believes that although mention notices and hearing notices were served on the deceased's advocates on record, the notices were not communicated to the deceased.

5. The plaintiff opposed the application through his replying affidavit in which he deposed that upon judgment being delivered on 26<sup>th</sup> June 2018, an extracted decree was pinned on the defendant's door on 20<sup>th</sup> September 2018, costs were taxed, certificate of costs issued and an eviction order granted on 28<sup>th</sup> March 2019. Further that the eviction order was duly executed by Ms Tango Auctioneers. Additionally, he deposed that the firm of M. Mutinda & Associates has been on record for the defendant since 18<sup>th</sup> June 2015 without ceasing to act, that the defendant was aware of the matter and even swore a replying affidavit in it on 30<sup>th</sup> June 2015 and was served with hearing notices through his advocates on record.

6. The plaintiff also filed Notice of Preliminary objection dated 25<sup>th</sup> June 2019 in which he seeks striking out of the application on the grounds that:

1. THAT the advocates who prepared and filed the application herein are in contravention of Order 9, rule 9 of the Civil Procedure Rules, 2010 since the application has been filed after judgment has been delivered.

2. THAT there is no consent filed between M. Mutinda & Associates Advocates, the outgoing advocates and Ashitiva Advocates LLP, the proposed incoming advocates.

3. THAT the application therefore was drafted and filed by advocates improperly on record and should be of necessity be struck out from the record.

4. THAT the Application is in contravention of Order 23, rule 10 of the Civil Procedure Rules, 2010.

5. THAT the proceedings in this matter are in the execution stage and that Order 24, rule 4 does not apply.

6. THAT the applicant therefore has no locus standi to either be substituted in place of the Defendant or be enjoined as a party to the suit.

7. THAT the application is improper and in contravention of clear set out rules and procedures of this Honorable Court.

8. THAT the plaintiff's (sic) application is incurably defective, bad in law and incompetent, null and void ab intio (sic).

9. THAT in the alternative to all the foregoing the application is instituted by a stranger in the proceedings herein.

7. This ruling is in respect of both Notice of Motion dated 14<sup>th</sup> June 2019 and Notice of Preliminary objection dated 25<sup>th</sup> June 2019. Both were canvassed together through written submissions.

8. For the plaintiff, it is argued that the advocates on record for the applicant have not complied with Order 9 rule 9 of the Civil Procedure Rules and further that since the deceased defendant has an advocate on record and since the applicant's only connection to the case is by virtue of her relationship with the deceased, the applicant cannot seek exemption from the rule on the suggestion that she was never a party to the case. The case of **Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR** is cited in support of the argument. It is further argued that prayers 2 and 3 of the application cannot be issued considering that execution already took place and in view of the provisions of Order 24 rule 10 of the Civil Procedure Rules. Relying on the case of **Pyaralal Muhand Bheru Rajput v Barclays Bank of Kenya Ltd & 3 others [2004] eKLR**, it is argued that the application has so many unrelated procedures that it omnibus and therefore fatally defective. In conclusion, it is argued that the deceased duly defended the suit through the firm of M. Mutinda & Associates, was served with notices through the said firm and that therefore no valid reasons are given to warrant setting aside the judgment.

9. It is argued on behalf of the applicant that the judgment and all consequential orders should be set aside since although the firm of M. Mutinda & Associates were served, they did not communicate to the deceased and that therefore the deceased's estate ought not be punished for mistake of his counsel. The case of **Three Ways Shipping Services (Group) Ltd v Mitchell Cotts Freighters (K) Ltd [2005] eKLR** is cited in support of that argument. It is further argued that the application is neither defective nor omnibus since the orders sought in it

complement each other and that in any case the court has jurisdiction to do justice in all situations. It is also argued that pursuant to section 37 of the Civil Procedure Act substitution ought to be done even at the execution stage, more so in this case where the plaintiff commenced execution long after the defendant's death. Citing **Bakari Ibrahim v Issa Ibrahim [2016] eKLR**, it is argued that execution which is commenced against a deceased defendant's estate without first making his legal representative a party to the suit is unlawful. The applicant therefore prays that she be made a party to enable her challenge the execution. Regarding Order 9 rule 9 of the Civil Procedure Rules, it is argued that those provisions are not applicable to the applicant since she was not a party to the suit and further since the deceased's relationship with advocates on record for him ceased upon his death.

10. I have considered the application, the affidavits filed and the preliminary objection. I will deal with the preliminary objection first and if it fails, I will then deal with the question of whether the application has merit.

11. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the *locus classicus* on preliminary objections in this region, Law JA stated:

**So far as I'm 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.**

12. Charles New Bold, P. added as follows:

**A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.**

13. For a preliminary objection to be valid, it must raise a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the other side are correct. Lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Looked at from these perspectives, the objection herein raises points of law and therefore merits consideration.

14. The record herein shows that this suit was filed on 5<sup>th</sup> June 2015. The firm of M. Mutinda & Associates filed Notice of Appointment of Advocates on behalf defendant on 18<sup>th</sup> June 2015. On 3<sup>rd</sup> July 2015, the firm filed a replying affidavit sworn by the defendant on 30<sup>th</sup> June 2015. The firm remains on record for the defendant since record does not have any notice of change of advocates. Indeed, my brother Munyao J. was satisfied with service of hearing notices and mention notices that was effected upon the defendant through the said advocates throughout the proceedings leading up to the judgment delivered on 26<sup>th</sup> June 2018. Pursuant to Order 9 rule 5 of the Civil Procedure Rules, the said advocates are deemed to have remained on record until and after judgment. The rule provides:

**A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.**

15. Judgment having been delivered herein the provisions of Order 9 rule 9 of the Civil Procedure Rules as to the manner of change of advocates after judgment kick in. That rule provides:

**When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**

**a. upon an application with notice to all the parties; or**

**b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be. [Emphasis supplied]**

16. There is no dispute that the applicant has not complied with Order 9 rule 9 despite filing the present application on 20<sup>th</sup> June 2019, after judgment was delivered. The applicant contends that Order 9 rule 9 does not apply to her since she was not a party to the suit and further since the deceased's relationship with advocates on record for him ceased upon his death. One must recall that the reason why the applicant has sought to come into these proceedings is because according to her the defendant passed away on 21<sup>st</sup> April 2018 and further because she obtained letters of administration in respect of his estate on 14<sup>th</sup> May 2019. I deliberately say "according to her" since although she has purported to annex a copy of a death certificate and letters of administration, no copy of those documents was actually annexed to the affidavit filed in court. Assuming that it is true that the defendant passed away on 21<sup>st</sup> April 2018 and that the applicant obtained letters of administration in respect of his estate on 14<sup>th</sup> May 2019, she would only be seeking joinder as a legal representative of the deceased. Indeed, the present application is made under Order 24 rule 4 (1) of the Civil Procedure Rules which provides:

**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.**

17. The term "legal representative" is defined at section 2 of the Civil Procedure Act as meaning:

**a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.**

18. It is therefore beyond argument that the applicant seeks to join these proceedings to stand in the place of the deceased defendant. That being the case, she cannot disown the actions of the deceased such as that of appointing the firm of M. Mutinda & Associates. If she must change advocates, she must comply with Order 9 rule 9 of the Civil Procedure Rules which is couched in mandatory terms. Compliance with the said mandatory provisions is crucial especially in this case where it is alleged that although the firm of M. Mutinda & Associates were served, they did not communicate to the deceased and that therefore the deceased's estate ought not to be punished for mistake of his counsel. It may very well be that the said advocates have a different position on those allegations or even on the question of whether the defendant is deceased or whether the applicant qualifies to be his legal representative. Compliance with rules of procedure, as has been reiterated severally by various courts, is not antithetical to the mission of the court to do substantive justice. See **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.**

19. In the result, I find merit in the preliminary objection. I uphold it. That being the case, I need not address the issue of whether or not there is merit in Notice of Motion dated 14<sup>th</sup> June 2019. The application is struck out with costs to the plaintiff.

20. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17<sup>th</sup> April, 2020).

**Dated, signed and delivered at Nakuru this 30<sup>th</sup> day of April 2020.**

**D. O. OHUNGO**

**JUDGE**