



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.27 OF 2015

SHEVA HOTELS LIMITED.....PLAINTIFF

VERSUS

1. SHAIBU SHOSI FAMAU.....1ST DEFENDANT

2. ELGA MACHOTI.....2ND DEFENDANT

3. GIOVANNI OSS.....3RD DEFENDANT

4. BARBARA BLACHI.....4TH DEFENDANT

5. HANS-DIETER KURT WALTER LOYALI.....5TH DEFENDANT

6. PIERE LAPORTE.....6TH DEFENDANT

7. LAND REGISTRAR, KILIFI.....7TH DEFENDANT

8. COMMISSIONER OF LANDS.....8TH DEFENDANT

9. HON. ATTORNEY GENERAL.....9TH DEFENDANT

RULING

1. By this Notice of Motion application dated and filed herein on 19th December 2018, Elizabeth Muthoni Ritho (the Applicant) prays for orders:-

2. That this Court be pleased to substitute Samuel Kanogo Ritho with Elizabeth Muthoni Ritho who is one of the three administrators acting for and on behalf of the Estate of the Late Gladys Luhunga Ritho (who) is managing all the affairs of Samuel Kanogo Ritho whenever he so appears as

(i) The Plaintiff in HCCC No. 955 of 1995 and as;

(ii) The Defendant in HCCC No. 2387 of 1987, and as

(iii) The Interested Party in ELC 27 of 2015.

3. That once the Orders sought for substitution are granted the Court is requested to grant Elizabeth Muthoni Ritho ample time to file the necessary pleadings, witness Statements and documents as may be deemed.

2. The application which is supported by an affidavit sworn by the Applicant is premised on the grounds inter alia:-

i. That Samuel Kanogo Ritho is the registered proprietor of Kilifi/Jimba/431 and Kilifi/Jimba 435 but is currently unwell and undergoing treatment in the United Kingdom having suffered a debilitating stroke in the year 2009.

ii. That the wife and Court appointed Legal Administrator and Guardian ad Litem of the said Samuel Kanogo Ritho, one Gladys Luhunga Ritho also passed away on 14th October 2013 thereby creating a vacuum in the representation of Samuel Kanogo Ritho in these proceedings.

iii. That owing to that predicament it is necessary that Samuel Kanogo Ritho be urgently substituted by the Applicant herein for purposes of safeguarding the interest of the estate of the said Gladys Luhunga Ritho and the affairs of Samuel Kanogo Ritho.

3. The Application is opposed. In Grounds of Opposition dated 27th February 2019 as filed herein on 1st March 2019, Sheva Hotels Ltd (the Plaintiff herein) opposes the application on the grounds that:-

1. The Application is misconceived and incompetent.

2. The application is an abuse of the Court process as the Applicant ought to file the necessary Petition in the High Court to be appointed guardian of Samuel Kanogo Ritho to manage his affairs. This will give the High Court opportunity to examine her and inquire into the latest medical condition of the patient.

3. The Court Order dated 7th May 2013, appointing Gladys Luhunga Ritho (Deceased) was interim pending the hearing and determination of the application inter-partes.

4. The Responsibilities of the deceased under the said Order of 7th May 2013, which was interim in any event, do not survive her.

5. The Limited Grant ad Litem in respect of the estate is also specific to a certain purpose and do not confer the Applicant powers of a personal representative.

4. Similarly, the Advocates for Samuel Kanogo Ritho as the Plaintiff in *Nairobi HCCC No. 955 of 1995* (consolidated herewith) are equally opposed to the application. In their Grounds of Opposition dated 1st April 2019, they assert that:-

1. The application is a grave abuse of the Court process, lacks merit and is a non-starter;

2. Mr. Samuel Kanogo Ritho is alive and the Applicant cannot purport to substitute him under the Provisions of Order 24 Rules 3(1) and 4(1) (of the Civil Procedure Rules);

3. The Limited Grant of Litem dated 17th June 2014 was issued for the sole purpose of substituting the Applicants therein with the late Gladys Luhunga Ritho in HCCC No. 16 of 2013 (OS) and not for any other suit or purpose;

4. The late Gladys Luhunga Ritho was never a party in this suit so the Applicant cannot purport to use the said Deceased's Limited Grant ad litem in the suit;

5. The Applicant lacks locus standi to make any application in this suit;

6. The order issued by Justice Kimaru in HCCC No. 16 of 2013 on 7th May 2013 were temporary and there is no evidence that they were ever extended;

7. In any event the person in whose favour the orders were issued in HCCC No. 16 of 2013 has already died and she cannot delegate anything to the Applicant;

8. The said HCCC No. 16 of 2013 (OS) has already abated and any temporary orders issued thereon have lapsed and thus the Applicant cannot hinge her application on that suit;

9. The Applicant was ordered by the Court to serve all the parties but she has failed to serve the Advocates appearing for Mr. Samuel Ritho, ie the firm of Thuita Kiiru & Company Advocates.

5. On their part, the 6th, 7th and 8th Defendants herein oppose the application by their Grounds of Opposition dated 29th March 2019 wherein they state that:-

1. The application is fatally defective, incompetent and bad in law.

2. The Applicant has not filed the authority to act and have no locus standi to appear in the matter on behalf of Samuel Kanogo Ritho or even to file the application before the Court.

3. The Applicant has not been appointed guardian (of) Samuel Kanogo Ritho.

4. The appointment of Gladys Luhungo Ritho as a guardian ad litem cannot be delegated to the Applicant.

5. **The person in whose favour orders were issued in HCCC No. 16 of 2013 has since passed on.**

6. **The Applicant confirmed that the party to be substituted is still alive (and she) cannot purport to substitute him in his capacity as party to this suit under the Provisions of Order 24 Rules 3(1) and 4(1).**

7. **The application is totally devoid of merit and an abuse of the Court process.**

6. The application is also opposed by Giovanni Oss and Barbara Biachi (the 3rd and 4th Respondents respectively). In their Grounds of Opposition dated and filed herein on 3rd May 2019 they state:-

1. That the Applicant has not been appointed as guardian ad litem in respect of the estate of the late Gladys Luhunga Ritho, she has not even filed a Petition in the High Court to that effect.

2. That even the High Court order dated 7th March 2013 given to Gladys Luhunga Ritho was (on an) interim basis and the same should have expired by now and the said does not survive her.

3. That this application is premature as the Applicant ought to move the High Court to obtain the Limited Grant before filing the application.

4. That it is only the High Court through a Petition to be filed by the Applicant which will have power to inquire into the allegations of ill health of the said Samuel Kanogo Ritho before granting the Applicant any orders.

7. I have perused and considered the Applicant's application as well as the Grounds of opposition thereto as filed by all the parties to the consolidated suits.

8. The Applicant before me Elizabeth Muthoni Ritho urges this Court to be pleased to substitute the name of Samuel Kanogo Ritho whenever it appears in these proceedings with her name. It is her case that she is the eldest child and biological daughter of the late Gladys Luhunga Ritho and Samuel Kanogo Ritho who is a party in these proceedings.

9. The Applicant asserts that her father Samuel Kanogo Ritho is presently unwell and undergoing treatment far away in the United Kingdom and that her mother Gladys who had been appointed the Legal Administrator and guardian ad litem of the said Samuel Kanogo Ritho passed away abruptly on 14th October 2013 thereby creating a crisis in the management of the affairs of the said Samuel Kanogo Ritho.

10. Owing to the predicament created by the sudden death of her mother, the Applicant now urges this Court to substitute the name of her father with that of her own for purposes of safeguarding the interests of her mother in the affairs relating to her father.

11. The application before me invokes the Provisions of Order 24 Rule 3(1) and 4(1) of the Civil Procedure Rules to clothe the Court with jurisdiction to grant the Orders sought. Order 24 provides at the said Rules 3(1) as follows:-

“3. (1) Where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving Plaintiff or Plaintiffs alone, or a sole Plaintiff or sole surviving Plaintiff 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 Plaintiff to be made a party and shall proceed with the suit.”

12. Order 24 Rule 4(1) on the other hand makes similar provisions for substitution in the case of a deceased defendant.

13. From a perusal of the record herein, Samuel Kanogo Ritho is indeed the Plaintiff in one of the consolidated suits herein. He is also a Defendant in another and an Interested Party in yet another one. It was however evident to me that while the said Samuel Kanogo Ritho may be unwell as stated by the Applicant, he remains alive and cannot therefore be substituted under the provisions of order 24 as cited by the Applicant.

14. Indeed as it turned out the said Samuel Kanogo Ritho as the Plaintiff in *Nairobi HCCC No. 955 of 1995* had prior to his said incapacitation appointed Messrs Thuita Kiiru & Company Advocates as his Advocates. That Law Firm remains on record in the consolidated suit to-date and according to their Grounds of Opposition filed herein on 2nd April 2019, they had instructions to oppose the intended substitution by the Applicant.

15. While this Court indeed sympathises with the situation that has befallen the Applicant's family, I did not think that she has the locus standi to come before this Court in the manner in which she has done. In my view, her Mother's appointment as guardian ad litem to the affairs of her father must have ended at the very latest at the point of death of her mother on 14th October 2013.

16. There was no explanation why for more than five (5) years the Applicant had not filed an application like her mother did before the High Court's Family Division for herself and the Co-Administrators of her mother's estate to be appointed as guardian ad litem for her father's affairs. It is only that Court in my view which can inquire into the issue as to whether Mr. Ritho can manage his affairs and/or if someone else needs to be appointed as his guardian ad litem.

17. In the absence of any such appointment, the application filed herein by Elizabeth Muthoni Ritho was dead on arrival. The same is accordingly dismissed.

18. Given the nature of the relationships and the circumstances of this case, I make no order as to costs.

Dated, signed and delivered at Malindi this 29th day of April, 2020.

J.O. OLOLA

JUDGE