



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 21 OF 2016

VIKTAR MAINA NGUNJIRI.....1ST PLAINTIFF
GEORGE GACUMA NJOROGE.....2ND PLAINTIFF
JOHN NJOROGE KINYUA.....3RD PLAINTIFF
JOHN NJAU KARANJA.....4TH PLAINTIFF
STEPHEN NGANGA KAMAU.....5TH PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT
JACK AND JILL SUPERMARKET LIMITED.....2ND DEFENDANT
STEGMA ENTERPRISES LIMITED.....3RD DEFENDANT
HINDUSTINE SPICE MILLS LIMITED.....4TH DEFENDANT
KISHORE MOENNSAD t/a VICTORY
WELDING WORKS.....5TH DEFENDANT
HARRY KABIRU GITUNDU t/a
PREETI STUDIO.....6TH DEFENDANT
RAICHAND VELJI SHAH t/a VERJI HIRJI.....7TH DEFENDANT

RULING

This suit was filed on 27th January, 2016 vide a plaint dated 26th January of the same year. The plaintiffs had sued seven defendants claiming damages for malicious prosecution for which they blamed the defendants jointly and severally.

The record shows that on 15th February, 2016 a firm of advocates known as Maingi Musyimi and Associates filed a Memorandum of Appearance dated 12th February, 2016 on behalf of the 2nd to 7th defendants. This was followed by a defence on behalf of the same parties dated 1st and filed on 3rd March, 2016. On 11th March, 2016 the plaintiffs filed a reply to the defendants' defence.

The record shows that on 11th August, 2016 a Notice of Change of Advocates was filed to the effect that the 7th defendant had appointed Ms. Muchangi Nduati & Company Advocate, in place of Maingi Musyimi & Associate Advocates. This was followed by a Preliminary Objection dated and filed on 23rd August, 2016 on behalf of the 7th defendant in the following terms,

1. The suit as drawn and filed is incompetent as against the purported 7th defendant and cannot be sustained in law.

2. The suit has abated against the purported 7th defendant who passed away on 1.7.2015 and should be struck out as against him.

3. The suit as a whole is an abuse of the process of the honourable court as drawn and filed against the purported 7th defendant.

On 5th December, 2016 the plaintiffs filed a Notice of Withdrawal of the suit against the 7th defendant herein under Order 25 Rule 1 of the Civil Procedure Rules. An entry was made in the court file on 20th December, 2016 which was signed by the Deputy Registrar on the same date to the effect that the plaintiff's suit against the 7th defendant had been withdrawn and discontinued.

The firm of Muchangi Nduati & Company Advocate then filed a party to party bill of costs on 25th January, 2017. The advocates for the plaintiffs filed a Notice of Preliminary Objection on 21st June, 2017 objecting to the bill of costs on the following grounds,

1. The suit and proceedings against the deceased 7th defendant are *void ab initio* and a nullity having been filed after his demise.

The proceedings against the 7th defendant being a nullity, the summons to enter appearance and the subsequent pleadings filed as regard the deceased 7th defendant are also a nullity.

2. For all practical purposes the alleged bill of costs filed by the deceased 7th defendant is incompetent for being founded on a null and void act.

The plaintiff has cited some authorities which were also relied upon in the argument of the preliminary objection. Both counsel for the plaintiffs and the said 7th defendant then appeared before the court to argue the preliminary objection.

It is the plaintiffs' position that the bill of costs having been taken out on a suit and proceedings against a deceased defendant is a nullity. It is clear that the 7th defendant was already deceased as at the time the suit was filed on 27th January, 2016 having passed away on 1st July, 2015. In effect, the suit was filed against a deceased party.

It is the plaintiff's case that it is surprising for a deceased party to instruct a firm of advocates to enter appearance and file a statement of defence. It is also surprising how the same deceased person instructed counsel to file a list of issues on 21st July, 2016.

I have already alluded to the notice of change of advocates filed by Muchangi Nduati and company advocates on behalf of the 7th defendant on 11th August, 2016. Once again it is puzzling that the 7th defendant would instruct counsel to change representation.

There is then an amended Notice of Change of Advocate dated and filed on 23rd August, 2016. This time the estate of the purported 7th defendant appointed the same advocate that is Muchangi Nduati and Company Advocates, "**to act for him**". The plaintiffs submit that the locus of the so called estate is questionable.

On the other hand, the advocates who took over the matter on behalf of the deceased 7th defendant relied heavily on the provisions of Order 25 Rule 1 of the Civil Procedure Rules and the consequences thereof. It is their position that the suit having been withdrawn the costs should be payable.

It is common ground that the 7th defendant was not alive when the suit was filed against him. It is also inconceivable how a party who is deceased can instruct counsel and that counsel takes over instructions from a non-existent person. It follows therefore any action including the filing of the plaint, the extraction of the summons; the entering of appearance and filing of the defence were a nullity. The cases cited by counsel for the plaintiffs include, **Benjamin Leonard Mc foy vs. United Africa Company Limited [1961] All ER 1169**. In that case the court stated as follows,

"If an Act is void, then it is in Law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

This is exactly what the instructing party to the counsel now on record for the deceased person and or his estate is attempting to do. In the words of the cited case above this is an attempt to place something on nothing and expect it to retain ground. This cannot happen.

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.”

Going by the material on record, submissions by counsel and cited authorities I am persuaded that the bill of costs filed by counsel for the 7th defendant and or his estate cannot be sustained. Having said so, the preliminary objection hereby succeeds and the said bill of costs declared incompetent, null and void as it is founded on proceedings that were also null and void ab initio.

It is so ordered.

Dated, signed and delivered at Nairobi this 7th day of November, 2018.

A. MBOGHOLI MSAGHA

JUDGE