



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 410 OF 2016

MICHAEL THOYA MBWANAPLAINTIFF

VERSUS

HUSSEIN KARIMBHAI ANJARWALLADEFENDANT

AND

SALIM ANJARWALLA (Personal Representative of the

Estate of Hussein Karimbhahi Anjarwalla (deceased)RESPONDENT

RULING

(Application to have suit reinstated and to have the application that caused the dismissal of the suit argued afresh inter partes; applicant having filed suit for adverse possession; consent entered with the named defendant allowing the suit; subsequently an application being filed to show that the defendant was dead when the suit was filed; before the application could be heard, counsel for the applicant passing on; an advocate nevertheless appearing on the day of the hearing but declining to participate in the application; court making an order for the application to proceed and making a ruling allowing it thus dismissing the suit for having been filed against a dead person; applicant appointing new counsel and arguing that he was not represented when the application was argued inter partes since his appointed advocate had died; special circumstances existing in this case which would dispel that argument; fact that the defendant had died before suit was filed not contested within the application; futile to reinstate the application; apparent that suit was a fraud ab initio; application dismissed)

1. The application before me is that dated 23 January 2020 filed by the plaintiff. The application is brought pursuant to the provisions of Section 3 and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, and Order 51 Rule 1 of the Civil Procedure Rules, 2010. It seeks orders to set aside the proceedings of 27 June 2018 and the ruling of 5 July 2019 and further that the plaintiff be granted an opportunity to defend and make submissions to the application dated 18 October 2018. The application is opposed.

2. To give a brief background to the application, this suit was commenced through an Originating Summons filed on 22 December 2016 through the law firm of M/s Richard O & Company Advocates. In the Originating Summons, the applicant (referred to as the plaintiff in the Originating Summons), claimed to have acquired, by way of adverse possession, title to the land parcel LR No. 858/1/MN, CR No. 8908 measuring 2.204 acres, which title was in the name of Hussein Karimbhahi Anjarwalla, named as defendant in the Originating Summons. The applicant claimed that he purchased the suit land from the defendant on 21 July 1989 and took possession of it and has been in quiet possession since. He claimed to have purchased the land for a sum of KShs. 1, 300,000/= and that he paid KShs. 1,000,000/= leaving a balance of KShs. 300,000/=.

3. The defendant filed a “defence to the Originating Summons”, where he averred that the applicant has not paid the balance of KShs. 300,000/= and sought to have the applicant evicted. This “defence” was filed by the law firm of M/s Maranga Maosa & Company Advocates on behalf of the named defendant in the suit, Hussein Karimbhahi Anjarwalla.

4. On 21 July 2017, the applicant appointed the law firm of M/s C.K Areba & Company, to come on record in place of the law firm of M/s Richard O. & Company Advocates.

5. On 25 July 2017, a consent dated 24 July 2017 was filed. The consent was signed by the law firm of M/s C.K Areba & Company Advocates for the applicant and M/s Maranga Maosa & Company Advocates for the defendant. The consent was in terms that the applicant be declared the owner of the suit land and be registered as proprietor, and that the applicant do pay the sum of KShs. 2, 500,000/= to the defendant, as the remaining part of the purchase price and accrued interest. This consent was taken before the Deputy Registrar for endorsement, on 25 September 2017, but the Deputy Registrar declined to endorse it, because there had been a change of advocates on behalf of the defendant on 21 September 2017 by the law firm of M/s S.O Odingo & Company Advocates, coming on record on behalf of the law

firm of M/s Maranga Maosa & Company Advocates.

6. The matter went to court on 21 November 2017, when Mr. Atancha appeared for the applicant, and Mr. Mwabonje held brief for Mr. Odingo for the defendant. They asked for the consent to be adopted and the court obliged. A decree was subsequently signed and sealed on 18 January 2018.

7. On 18 October 2018, one Salim Anjarwalla (Mr. Salim or the respondent), represented by the law firm of M/s Daly & Inamdar Advocates, filed an application of even date under certificate of urgency. Mr. Salim described himself as the personal representative of the estate of Hussein Karimbhai Anjarwalla, the defendant in the Originating Summons, (Mr. Hussein) and in that application, he averred that Mr. Hussein died on 19 February 1989. He stated that the suit was filed against a person who was deceased and thus a nullity. He pointed out that the Originating Summons could never have been served upon the defendant as he was long dead. He averred that since he was dead, Mr. Hussein could not have appointed advocates, or instructed such counsel to enter into a consent to compromise the suit, and neither could he have signed the alleged sale agreement of 21 July 1989 relied upon by the applicant. To his application, he annexed the Certificate of Death of Mr. Hussein. In his application, he sought orders to have the consent order and decree set aside and for the whole of the Originating Summons to be struck out as being a nullity.

8. After several adjournments, all caused by the applicant, the application dated 18 October 2018 came up for *inter partes* hearing on 27 June 2019 before Omolo J. Mr. Atancha appeared for the applicant and applied for adjournment, on the ground that Advocate Mr. C.K Areba, on record for the applicant, had died. The court declined to adjourn, holding that Mr. Atancha is counsel who has been appearing in the matter. The court then allocated time for the hearing of the application. At the appointed time, only Mr. Kinuthia, learned counsel, holding brief for Mr. Noorani, for Mr. Salim, appeared. He proceeded to argue the application and ruling was reserved for delivery on 5 July 2019. On 5 July 2019, ruling on the application was delivered, with only Mr. Kinuthia appearing. The learned Judge found that there was sufficient evidence to demonstrate that Mr. Hussein had died in the year 1989, and therefore the suit against him was a nullity *ab initio*. She allowed the application and struck out the Originating Summons and set aside the decree.

9. On 24 January 2020, the applicant appointed the law firm of M/s Omulama E.M & Company Advocates to act for him. The said firm then filed this application on his behalf. In the application, the applicant has averred that he was not aware of the hearing date of 27 June 2019, and neither did he instruct Mr. Atancha Advocate to represent him in place of Mr. C.K Areba who had died. He avers that he ought to have been personally served. He filed a notice showing that Mr. Areba died on 5 March 2019. He deposed that he came to know of Mr. Areba's death on 24 September 2019.

10. Mr. Salim has replied to the application through a lengthy replying affidavit. He has deposed *inter alia* that the applicant had filed a notice to revoke the grant that he holds in Mombasa High Court, Succession Case No. 118 of 1989, *In the Matter of the Estate of Husseinbhai Karimbhai Anjarwalla (deceased)*. He filed it through the law firm of M/s C.K. Areba & Company Advocates. However, a notice of change of advocates dated 16 May 2019 was filed in that cause, with the law firm of M/s Areba Atancha & Company Advocates coming on record. He has pointed out that it is the same Mr. Atancha who also appeared in this matter during the hearing of the application. He displayed letterheads of M/s C.K Areba & Company Advocates showing that Mr. Atancha was a member of the said law firm.

11. Both Ms. Mukoya for the applicant, and Mr. Noorani, for the respondent, relied on the affidavits on record.

12. I am aware that the applicant has raised the issue, that at the time the application was heard, he was unrepresented, because Mr. Areba, whom he instructed had died. In other circumstances, I would probably have been sympathetic to this argument. However, with the special circumstances of this case, I would consider that a "clever" argument which I do not buy. First, the applicant deposes that he came to be aware of Mr. Areba's death on 24 September 2019, way after the application dated 18 October 2018 had been argued. That cannot be true, because in the succession cause, where he had applied to revoke Mr. Salim's grant, he was now being represented by Mr. Atancha, in place of Mr. Areba. Surely, as at May 2019, when Mr. Atancha filed the notice of change of advocate in the succession matter, the applicant must have known that Mr. Areba was deceased. It also does appear to me that the applicant actively allowed Mr. Atancha to continue appearing in this matter, even after Mr. Areba's death, though no formal notice of change of advocate was filed. The fact that no formal notice of change of advocates was filed, to me, in the circumstances of this case, would merely be a technicality that cannot bring me to set aside the order of Omolo J, dismissing the suit.

13. Assuming I am wrong on the above, and I need to agree with the applicant that there had not been a change of advocates, and thus he was technically unrepresented on the day that the application was heard, what will change even if I reinstate the application dated 18 October 2018? The applicant had tried, in the succession cause, to claim that the said cause relates to a different person who is not the defendant herein. That argument was rebuffed by the court (Thande J), in a ruling delivered on 20 September 2019. The applicant does not in his supporting affidavit, contend that the defendant was alive when this suit was filed, and does not deny that the defendant died in the year 1989. Mr. Hussein's death is a matter of fact that he has not dispelled. Probably if the applicant had said within this application that Mr. Hussein was alive when he filed suit, and demonstrated some evidence of this, say, by having Mr. Hussein swear an affidavit to show that he is alive and ready to be bound by the consent, I would have been moved to consider setting aside the ruling of Omolo J. But without such claim, nor evidence of Mr. Hussein being alive, there will be no point of reinstating the application, because the fact that Mr. Hussein died in 1989 does not change. It will simply be a waste of court's time to reinstate the application just for the sake of it.

14. The truth of the matter is that the applicant, for his own purposes, filed suit against a person who was deceased, and somehow, mischievously I must say, obtained a decree in his favour. Once the decree was obtained, the alleged defendant disappeared without trace. It is obvious to me that there was no such defendant who was alive when the case was filed. This was a calculated scheme by the applicant to seize land from the estate of the late Mr. Hussein (also known as Husseinbhai). It is obvious to me that this case was a fraud from the word go. I am unable to reinstate such a suit.

15. For the above reasons, this application fails and is dismissed with costs to Mr. Salim.

16. Orders accordingly.

DATED AND DELIVERED THIS 12 DAY OF JUNE 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA