REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

HIGH COURT CIVIL SUIT NO. 480 OF 2014

NICHOLAS WILLIAM BENTLEY-BUCKLE &

DEBORAH MARY BENTLEY-BUCKLE (suing in their

capacity as executors of the estate of Anthony William

Bentley-Buckle (deceased).....PLAINTIFF/RESPONDENTS

-VERSUS-

CUSTODY REGISTRARS SERVICES LIMITED.....DEFENDANT/APPLICANT

RULING

[1] The Notice of Motion dated **27th April 2015** was filed pursuant to the provisions of **Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 2 Rule 15 (b), (c) and (d)** and **Order 51 of the Civil Procedure Rules, 2010,** as well as **Section 77 of the Law of Succession Act, Chapter 160 of the Laws of Kenya,** for orders that the Plaint filed herein be struck out and/or dismissed with costs, and that the Plaintiffs do pay the costs of the application. The grounds relied on in support of the application are:-

(a). **That the Plaintiffs have filed this suit as executors of the estate of the deceased solely under the authority of a foreign Grant of Probate.**

(b). **That the said foreign Grant of Probate had not been sealed with the seal of the High Court of Kenya as required by law.**

(c). **That a foreign Grant of Probate that has not been resealed with the seal of the High Court of Kenya has no validity within the Kenyan Jurisdiction, and therefore the Plaintiffs lacked the capacity to institute this suit or indeed sustain it on behalf of the deceased's estate.**

(d). **That the suit is a flagrant abuse of the process of the Court having been filed in direct contravention of the provisions of the law.**

[2] The affidavit filed in support of the application is the one sworn **on 27th April 2015** by **Christopher Kilonzo**, the Defendant's Head of Legal. He deponed that he perused the pleadings filed herein and

noted therefrom that the deceased, on whose behalf the suit has been filed, died **on 24th May 2010,** and that as executors of his will, the two Plaintiffs applied for and received Grant of Probate from the District Probate Registry at Winchester in the United Kingdom, yet the Plaintiffs have not produced or supplied a Grant of Probate resealed by the High court of Kenya. It was thus deponed that, on account of this omission, the suit is incompetent and ought to be struck out accordingly.

[3] In response to the application, the Plaintiffs relied on the Replying affidavit sworn on **18th September, 2015** by their advocate **Alexander Muchemi**, in which it was deponed that the Plaintiffs did file a Petition in High Court of Kenya at Nairobi, being **High Court Succession Cause No. 2135 of 2014** for the resealing of the Grant of Probate issued to them by the High Court of Justice in the United Kingdom on **14th March 2011**; that since the petition and Affidavit in Support had been filed in the name of one personal representative, the Deputy Registrar, Family Division, directed that the second personal representative be enjoined, which was accordingly done. Thereafter the application for resealing of the said Grant was gazetted on the **14th July 2015** vide Gazette Notice No 5072 of the Special Issue of the Kenya Gazette Vol. CXVII No. 74; and that there being no objection raised to the application, the Grant was resealed with the seal of the High Court of Kenya on **11th September 2015.**

[4] It was thus averred by the Plaintiffs' Counsel that any delays in having the Grant resealed were unforeseen and not occasioned by the Plaintiffs; and that since no prejudice will be suffered by the Defendant, the resealed Grant should be admitted herein to validate the suit so as to have the issues raised in the Plaint disposed of on merit, rather than technicalities.

[5] The Court has carefully considered the pleadings, the affidavits filed in respect of the application dated **27th April 2015**, and the written submissions prepared and filed herein by Learned Counsel as well as the brief oral submissions that were made before me on **17th May 2016.** By way of background, it is not in dispute that the two Plaintiff's herein filed this suit on the **29th October 2014** in their capacities as the Executors of the estate of **Anthony William Bentley Buckle** (now deceased). The suit is in respect of shares in the name of the deceased that are alleged to have been fraudulently immobilized and sold by the Defendant, together with dividends earned therefrom. There is similarly no dispute that the deceased died testate on or about the **24th May 2010** and that he had, prior thereto, appointed the Plaintiffs as Executors and Trustees of his will dated **3rd September 2008**. A Grant of Probate of that Will was issued to the Plaintiffs on **14th May 2011**. There seems to be no dispute that the shares in East African Breweries Limited are the only known assets of the deceased in Kenya.

[6] It is evident, and again this is not contested, that to be able to assert the deceased's rights to the shares aforementioned, the Plaintiffs filed **Nairobi High Court Succession Cause Number 2135 of 2014** for the sealing of the Grant of Probate issued to them by the High Court of Justice in the United Kingdom. That petition was filed on **4th July 2014**. As has been explained in the Replying Affidavit, the Petition was initially signed by only one of the two Executors, **Nicholas William Bentley-Buckle**. Consequently, on the directions of the Deputy Registrar, the second personal representative, **Deborah Mary Bentley-Buckle** was later enjoined, whereupon the Grant was resealed on **11th September 2015** by the High Court of Kenya.

[7] Thus, although the Petition for the resealing of the grant was presented prior to the filing of this suit, there is no denying that by the time this suit was instituted, the Grant of Probate issued to the Plaintiffs herein in respect of the estate of the deceased, **Anthony William Bentley-Buckle,** had not been resealed by the High Court of Kenya as required. The Defendant's argument therefore is that the suit is incompetent for the reason that the Plaintiffs had no *locus standi* as at the time of its commencement. Counsel for the Defendant referred the Court to the following authorities in support of their posturing:

1. **Peter Mwai Macharia vs Ben Mungai [2008] eKLR** where the Court held that substantive prayers can only be granted to a party who has *locus standi;*

2. **In the matter of the Estate of Pranjivan Sesang Devji [2012] eKLR,** in which the Court held

that a party who has petitioned for Letters of Administration has to await the issuance of the same before he can acquire the *locus standi* to bring a cause of action;

3. (a) **Mollow Edilio v. Abdullahi Khanil & Another [1994] e KLR**

(b) **Re Estate of Naftali (Deceased) [2002] 2 eKLR1,** and

(c) **Homes v Permanent Trustee Co. of NSW Ltd [1932] HCA 1** for the proposition that a foreign Grant requires resealing to confer the personal representative of a deceased person with the capacity to commence and maintain a suit and perform such other powers as such a representative.

He thus urged that, the Plaintiffs having failed to obtain the resealed Grant prior to the institution of this suit, the same is incompetent and should accordingly be struck out with costs for being an abuse of the process of the Court.

[8] The Plaintiff's Counsel on the other hand relied on the cases of **Transcend Media Group vs Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR** and **Strategic Industries Ltd vs Solpia Kenya Limited [2014] eKLR** to support their submission that the power to strike out a pleading under **Order 2 Rule 15(1) of the Civil Procedure Rules** is one that should be exercised only in situations where the Plaintiffs' case is so weak as to be beyond redemption or cure by amendment. It was further argued by Counsel for the Plaintiff that all they were required to do was to comply with **Order 4 Rule 4 of the Civil Procedure Rules** by stating the capacity in which the Plaintiffs have approached the court, which they have done. In this regard the Plaintiffs relied on **Article 159 (2) (d) of the Constitution of Kenya** and the case of **Skair Associates Architects vs Evangelical Lutheran Church of Kenya & 4 Others [2015] e KLR** to support their submission that it would not be in the interests of justice for the Court to strike out the plaint merely on the ground of lack of capacity on the part of the Plaintiffs to sue herein.

[9] With regard to the Defendants contentions pertaining to **Section 77** of **the Law of Succession Act**, Counsel for the Plaintiff cited **Sections 2 and 4** thereof and posited that since the assets that are the subject matter of this suit comprise of movable property only, the aforesaid provision of the **Law of Succession Act** is inapplicable herein, and that, in any event, S**ection 77** is couched in permissive terms and does not make it mandatory for the grant to be resealed before commencement of Court proceedings. It was further argued by the Plaintiff that since the resealing has since been done, the Court should proceed, in the spirit of **Article 159(2)(d) of the Constitution**, to consider the suit on its merits. He noted that the Defendant has filed a Defence and therefore no prejudice would be occasioned to it if the matter was to be fully heard and determined on its merits.

[10] Order 2 Rule 15(1)(b), (c) and (d) of the Civil Procedure Rules under which this application has been brought provides that:

"At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that--

...

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

(Emphasis added)

It is evident therefore that that provision is specific to the pleadings as to their propriety in terms of the

viability of the **cause of action** or **the Defence**. It has not been alleged here that the Plaintiffs have no valid claim against the Defendants. To the contrary the issues raised in the instant application relate to the threshold matter of *locus standi*, and therefore ought to have been taken up as a preliminary objection as opposed to striking out of pleading under **Order 2 Rule 15 of the Civil Procedure Rules**.

[11] Be that as it may, it is now trite that the power donated by **Order 2 Rule 15 Civil Procedure Rules,** being discretionary, must be sparingly and judiciously exercised. In the case of **DT Dobie & Co. Ltd v Muchina [1980] eKLR, Madan** JA, (as he then was) made this point thus:

> **"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the court itself is not usually fully informed so as to deal with the merits…."**

[12] Thus, with the foregoing caution in mind, the question is posed as to whether the Plaint filed herein is otherwise an abuse of the process of the Court, for having been filed before the resealing of the grant issued to the plaintiffs. In this regard, the Court's attention was drawn to the provisions of **Section 77(1) of the Law of Succession Act,** which reads:

> **"Where a court or other authority, having jurisdiction in matters of probate or administration in any Commonwealth Country or in any other foreign Country designated by the Minister by notice in the gazette, has, either before or after the commencement of this Act, granted probate or letters of administration, or an equivalent thereof, in respect of the estate of the deceased, person, such grant may, on being produced to, and a copy thereof deposited with the High Court, be sealed with the seal of that Court, and thereupon shall be of like force and effect, and have the same operation in Kenya, as if granted and confirmed by that court."**

[13] The Grant issued to the Plaintiffs herein having been resealed on **11th September 2015** in accordance with the foregoing provision, it should follow that the application as it stands is misconceived and ought to be dismissed without further ado. However, it cannot be gainsaid that the resealing came after the commencement of this suit and it still remains to be determined whether the omission is fatal to the Plaintiffs' suit and if so, whether the resealing can operate retrospectively to cure the alleged defect.

[14] First and foremost, it is noteworthy that in all the authorities relied on by the Defence Counsel in support of their application, the instrument in issue was Grant of Letters of Administration as opposed to Grant of Probate. It is now trite that there is a clear distinction between Grant of Probate and Grant of Letters of Administration, for instance in the case of **Kothari vs Qureshi & Another [1967] EA 564,** this distinction was made thus:

> **"It is elementary law that an executor's title dates from the death of the deceased and springs from the will not from the grant of probate. An executor's actions before probate are valid in themselves without recourse to any doctrine of relation back and they have effect by virtue of the will. Probate is merely authentication of the will in such cases...The position of an administrator is different; his rights date from the grant of letters of administration and any prior acts of administration of the estate can only be validated by the doctrine of relation back from the grant..."**

[15] It would follow therefore that the Plaintiffs cannot be faulted for having filed this suit before the authentication of their Grant of Probate by way of resealing. Indeed in **the Kothari Case** aforementioned, the Court proceeded to state that:

> **"Where a person dies leaving a will appointing an executor, the person so appointed as executor represents the estate of the deceased testator as from the date of death of the**

testator ...An executor may commence suit before grant of probate and he can carry on the proceedings without grant as far as is possible until he has to prove his title ... and if the will is ultimately proved no one can question the validity of such acts."

[16] Accordingly, it is my finding that the Plaintiffs had the requisite *locus standi* to file this suit even before the resealing of their Grant and that, in any event, the Grant having since been resealed, it would go against the grain of **Article 159(2)(d) of the Constitution** to ignore that fact and drive the Plaintiffs away from the seat of judgment. In the premises, I would dismiss the Defendant's Notice of Motion dated 27th April 2015 with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8th DAY OF JULY 2016

OLGA SEWE

JUDGE