



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC CASE NO. 172 OF 2015**

**SAMWEL MAKANA.....PLAINTIFF**

**VERSUS**

**CHARLES MINARO NYAMBASO.....1<sup>ST</sup> DEFENDANT**

**JOMA MOKUA.....2<sup>ND</sup> DEFENDANT**

**HENRY MARITA OGOTI.....3<sup>RD</sup> DEFENDANT**

**AND**

**FLORENCE BOCHABERI JOHN.....APPLICANT**

**RULING**

**BACKGROUND**

1. The Plaintiff filed suit against the Defendants claiming that the Defendants had trespassed upon his land parcel number WEST KITUTU/BOKINGOINA/2668. In his Plaint dated 31.3.2015 the Plaintiff prayed for an order or permanent injunction to restrain the Defendants from interfering with his land parcel, mesne profits and an order of eviction.

2. Despite being served with Summons to enter appearance the Defendants neither entered appearance nor filed a defence. On 26.6.2015 the Plaintiff requested for interlocutory judgment against the Defendants under order 10 rule 4 of the Civil Procedure Rules. The court declined to grant the request and directed that the case be set down for hearing. The case was subsequently set down for hearing on 23.5.2017. On the said date the Plaintiff withdrew the claim against the 1<sup>st</sup> Defendant and proceeded with the suit against the 2<sup>nd</sup> Defendant. In his judgment dated 23.2.2018, Justice Mohammed Kullow granted a permanent injunction against the Defendants restraining them from interfering with the suit property. He also granted an order of eviction directing that the Defendants vacate the suit property within 60 days from the date of judgment failing which eviction would be carried out against him. The Plaintiff was awarded the costs of the suit.

3. Pursuant to the said judgment, the Plaintiff applied for execution on 15.2.2019 by way of Notice to show Cause why the Defendants should not be evicted from land parcel number WEST KITUTU/BOKINGOINA/2668

4. According to the Affidavit of Service of Daniel Mokua Otaro sworn on the 10<sup>th</sup> February 2019, he served the Notice to Show Cause on the 2<sup>nd</sup> Defendant's wife one Florence Bochaberi who informed him that the 2<sup>nd</sup> Defendant was deceased. Nonetheless, when the matter came up for the hearing of the Notice to show cause on 25.2.2019 Mr. Okemwa counsel for the Plaintiff informed the court that he had served the 2<sup>nd</sup> Defendant who was in occupation of the suit property as the 1<sup>st</sup> and 3<sup>rd</sup> Defendants had vacated the land. He therefore prayed that the Notice to Show Cause dated 1.2.2018 be allowed. The court then proceeded to issue an eviction order against the Defendants.

5. The Applicant who is the widow of the 2<sup>nd</sup> Defendant filed the instant application seeking the following orders:

a) Spent

b) That this Honourable court be pleased to grant an order of stay of execution of the judgment and all consequential orders entered herein against the 2<sup>nd</sup> Defendant pending hearing and determination of this application.

c) That this Honourable court be pleased to set aside the judgment entered herein, the proceedings and all consequential orders entered herein on such terms as it deems fit.

d) That this honourable court be pleased to grant an order granting leave to the applicant herein to file appearance and a statement of defence out of time stipulated by law.

e) Any other remedy this honourable court may deem fit to grant in the interest of justice.

f) That the costs of this application be costs in the cause.

6. The application is anchored on the grounds set forth in the Chamber Summons and the Applicant's Supporting Affidavit sworn on the 27<sup>th</sup> August 2019. In the said affidavit she depones that she is obtained Letters of Administration Ad Litem in respect of the estate of John Rioba Mokua –Deceased whose name was shown as Joma Mokua. The deceased constructed on and was in actual possession of the suit property and that is why he was sued by the Plaintiff. She depones that her husband died on 3<sup>rd</sup> August 2015 and the suit proceeded while he was already dead, a fact which was in the knowledge of the Plaintiff. That despite being aware that the 2<sup>nd</sup> Defendant was long dead, the Plaintiff obtained an ex-parte judgment against him and proceeded to execute the same by demolishing the deceased' commercial house on the suit property.

7. The application is opposed by the Plaintiff through his Replying Affidavit sworn on the 14<sup>th</sup> October 2019. He depones that the application is incompetent as the Applicant is not a party to the proceedings herein and is therefore incapable of seeking the prayers sought in the application. 8. He further depones that the Ad Litem grant issued to the Applicant is limited to the purposes of filing suit not defending the suit herein. He depones that the decree has already been executed and therefore there is nothing to stay. That the Applicant did not apply to be substituted in place of her late husband within a period of one year as contemplated by Order 24 Rule 4 of the Civil Procedure Rules and the suit against the 2<sup>nd</sup> Defendant has therefore abated by operation of the law. The Plaintiff depones that for a party to succeed in setting aside an ex-parte judgment, he must demonstrate that he has a plausible defence with triable issues which ought to be determined on the merits but the Applicant has not demonstrated that she has any defence.

9. By way of a rejoinder the Applicant filed a Further Affidavit sworn on 23<sup>rd</sup> October in which she depones that she applied for an Ad Litem Grant vide Kisii CM Succession Cause No. 406 of 2019 for purposes of defending Kisii ELC Case No. 272 of 2015 as per the copy of the Petition which she annexed to her affidavit but the court erroneously indicated that the grant was for purposes of filing suit. She depones that the Plaintiff 's conduct of this matter is fraught with malice, ill-will and mischief and that the court was misled into entering judgment and an eviction order against the 2<sup>nd</sup> Defendant (erroneously referred to as Joma Mokua) who had died in 2015. She avers that she only learnt of this suit at the time of execution. She contends that the Plaintiff's argument that the suit against the 2<sup>nd</sup> Defendant abated after one year means that the plaintiff should not have proceeded with the suit and execution against him. She therefore avers that the proceedings are marred with illegalities and irregularities intentionally committed by the Plaintiff to the disadvantage of the deceased and the same should be set aside in order to right the wrongs committed by the plaintiff.

10. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

#### **ISSUES FOR DETERMINATION:**

11. The following issues fall for determination:

1. Whether the application is competent
2. Whether the applicant is entitled to the orders sought.

#### **ANALYSIS AND DETERMINATION**

12. Learned counsel for the Applicant has submitted that the Applicant is properly before the court to right the disgraceful conduct of this matter against one Joma Mokua. He submitted that the issues of law brought forth by Respondent are misplaced and have no bearing on this matter.

13. Conversely, counsel for the Respondent contended that the application is incompetent as the Applicant is not a party to the proceedings herein and is therefore incapable of seeking the prayers sought. It is counsel's submission that Order 24 Rule 4 of the Civil Procedure Rules 2010 provides the procedure to be followed in the event of death of one or several Defendants. The said rule provides as follows:

Order 24 Rule 4

(1) *"Where one of two or more defendants dies and the cause of action does not survive or continue as 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 matter.*

(2) *Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant*

(3) *Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant".*

14. He submitted that the court has the discretion to extend the time for substitution of parties and to revive a suit that has abated if sufficient

cause is shown and if an application is made in that regard. In the instant suit no steps were taken by the Applicant to substitute the deceased within a period of one year after his death and no application has been made to extend time for substitution or revive the suit which abated by operation of the law. He therefore contends that there is no cause of action against the 2<sup>nd</sup> Defendant to be taken over by the Applicant. He cited the case of **Washington Namwaya Wasike v Dixon Jowe & 6 Others (2018) eKLR** for the proposition that non-substitution of a deceased party within a year of death where the cause of action survives such party leads to automatic abatement of the suit.

15. Counsel further faults the Ad Litem Grant that was issued to the Applicant as the same only grants her the power to file but not defend a suit.

In her affidavit, the Applicant explained that the Grant erroneously indicated that the Grant was for purposes of defending this suit and indeed the Petition annexed to her affidavit states as much. It is therefore clear that there was a clerical error at the time of issuing the said Grant by the court.

16. However, the more critical question is whether the Applicant can apply for setting aside of the ex-parte judgment without seeking to substitute the Defendant. Even though the Applicant obtained a Limited Grant which enables her to represent her deceased husband, the procedure for substitution of deceased parties laid out in the provisions of Order 24 of the Civil Procedure Rules cannot be overlooked. Unfortunately, the prayer for substitution was not included in her application. The other prayers sought cannot be granted before the Applicant is enjoined in the suit in place of her late husband. I am therefore constrained to agree with counsel for the Respondent that the application is incompetent. On this ground alone, I have no option but to strike out the application. Having said that, I will refrain from making any finding on the prayer for setting aside of the ex-parte judgment in case the Applicant opts to file a fresh application.

17. The upshot is that the application is incompetent and it is hereby struck out. Each party shall bear their own costs.

**Dated, signed and delivered at Kisii via video conference this 23<sup>rd</sup> day of September, 2020.**

**J.M ONYANGO**

**JUDGE.**