



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
HCCA NO. 35 OF 1998

ASHA CHARIK HAMAD.....APPELLANT

VERSUS

ISMAIL LUNANI WAMBUTO.....1ST RESPONDENT

FRED N. OPILO2ND RESPONDENT

AND

FATUMA NJOHA HASAN..... 1ST INTERESTED PARTY

MWANARABU SHISIA HAMISI.....2ND INTERESTED PARTY

RULING

1. The notice of motion brought under Order 45 Rule 1 coming up for ruling is dated 30.10.13 seeking orders as follows;

a). That service of this application be dispensed with in the first instance.

b). That there be a temporary stay of the ruling of this court dated 17th September, 2013 and all or any orders made in pursuance thereof until this application is heard and determined interparties.

c). That this honourable court be pleased to review and set aside its ruling dated 17th September, 2013 and in the place thereof dismiss the Notice of Motion herein dated 13th March, 2013.

d). That costs of this application be paid by the Appellant.

2. The application is supported by the grounds listed on the face of it and on the affidavit sworn by Mwanarabu Shisia Hamisi. The application is opposed by the Appellant/Respondent and she has deponed to facts challenging the prayers/orders sought.

3. Before the application was heard the Respondent raised a preliminary objection. The advocates for the parties orally submitted for and against that preliminary objection. Mr. Waswa for the Respondent submitted that the preliminary objection is on the ground of want of capacity of the interested parties in filling the application. He argues that there has been no substitution of the deceased 1st Respondent. Mr. Wanyama for the Applicant in reply said the interested parties have joined the suit as persons living on and claiming the land. That order 45 rule 3 provides a manner in which an application for review can be granted/rejected. He urged the court to dismiss the preliminary objection. Mr. Waswa in reply

submitted that Counsel had not disclosed the party he represented. He urged the court to strike out the application with costs.

4. I have perused the record. On 3rd April 2013, the firm of J.S. Khakula filed an appearance on behalf of both the interested parties. The respondent also filed affidavit of service dated 18.5.2013 in which she served the said firm. In both the notices and affidavits of service, names of both Interested Parties are included as parties to the suit. All subsequent documents filed have included the names of the interested parties.

5. On 28.5.2013 when the Appellant appeared before me, Mr. Juma advocate appearing for the 1st Respondent indicated to the court that the 1st Respondent is dead and has not been substituted. The Appellant in response indicated she was not aware the 1st Respondent is dead. The 1st interested party was also in court. Apparently the

Respondent had served her with a hearing notice but not the application.

6. The Respondent having earlier served the interested parties with the previous pleadings cannot turn around and say they have no capacity. They entered appearance through their present advocates. They have not brought their application as administrators of Amina Hamisi or Ismael Lunani, (1st Respondent). Under Order 45 (I) begins "*any person considering himself aggrieved*" can apply for review. I do find that the preliminary objection is unfounded as J.S. Khakula & Co. had filed appearance for the Applicant. That memorandum of appearance has not been struck off from the record. I proceed to dismiss the preliminary objection with costs to the Applicants.

DATED, SIGNED and DELIVERED this 13th day of May 2014

A. OMOLLO

JUDGE.