



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 88 OF 2016(OS)**

**KANGWEI CHARO KARISA**

**SIDI KANGWEI**

**MARIAM CHARO & 65 OTHERS.....PLAINTIFFS**

**VERSUS**

**AHMED BIN HAJI BARAWA & OTHERS.....DEFENDANTS**

**RULING**

1. By a Notice of Motion dated 18<sup>th</sup> February, 2020 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 24 (4) and Order 51 Rule 1 of the Civil Procedure Rules the Defendants/Applicants seek orders that the suit be struck out as against all the defendants for being not sustainable in law and an abuse of the court process since it was filed against a dead defendant. The application is supported by the affidavit of Nyange Sharia sworn on 18<sup>th</sup> February 2020.

2. It is deposed that the plaintiffs filed this suit against the defendants on 25<sup>th</sup> April 2016. That the original defendant Ahmed Bin Haji Barawa who is the registered owner of the suit property died sometime in the year 1954 way before the commencement of this suit on 25<sup>th</sup> April 2016. It is the defendants contention that any suit filed against a dead person is a nullity and any enjoining of legal representative is also a nullity. A copy of a letter dated 18<sup>th</sup> September 2009 from the area Assistant Chief, Township Sub-Location, Kitui confirming that the deceased hailed from that area and that he died in 1954 has been annexed. The same is also confirmed by the plaintiffs through their Notice of Motion application dated 6<sup>th</sup> December, 2017 and filed on 13<sup>th</sup> December, 2017, a copy of which has also been exhibited.

3. The application is opposed by the plaintiffs through a replying affidavit sworn on 4<sup>th</sup> March, 2020 by Kangwei Charo Karisa, the 1<sup>st</sup> plaintiff. It is deposed inter alia, that the present case together with an application was filed on 26<sup>th</sup> April 2016 against Ahmed Bin Haji Barawa and upon service, M/s Selina Egesa and Company Advocates entered appearance for the defendant and filed a replying affidavit to the application. That in the said replying affidavit dated 7<sup>th</sup> September, 2016, the said firm of advocates introduced Mr. Abido Mohamed Ahmed as the appointed administrator of the Estate of Ahmed Bin Haji Barawa (deceased) who passed on sometime in the year 1954. That vide Notice of Motion application dated 19<sup>th</sup> September, 2016, the plaintiffs sought leave of court to amend the Originating Summons and enjoin Mr. Abdio Mahamed Ahmed and the said application was allowed by the court. That Mr. Abdio Mohamed Ahmed later passed on and following an application was substituted with Fatuma Ahmed Haji, Salim Ahmed Haji and Halima Ahmed Haji as co-defendants. The matter later proceeded to hearing before the present application was filed. It is the plaintiffs' contention that the defendants never raised any objection previously and therefore contend that the application is not merited, incompetent and calculated to delay the suit.

4. Sharia Nyange, advocate for the applicant submitted that there was no denial that the defendant was long dead before the suit was filed. He relied on the case of **Viktar Maina Ngunjiri & 4 Others –v- Attorney General & 6 Others (2018)eKLR** which cited the **Indian case of C. Muttu –v- Bharath Match Works AIR 1964 Kant 293** where the court observed as follows:

**“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 fides and in ignorance of the death of such a person.”**

5. It is therefore the applicants' case that the suit herein is a nullity and every proceeding which is founded on it is also bad and must be struck out. It is submitted that the arguments by the plaintiffs that counsel entered appearance and the court gave rulings on different

applications in the matter is not a defence against the present application. The applicants counsel also relied on the case of **Viktar Maina Ngunjiri & 4 Others (supra)** which again cited the Indian Case of **Pratap Chand Mehta –v- Chrisna Devi Menta AIR 1988 Delhi 267** where 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 7 cannot be availed of to bring about amendment.”**

The applicants' counsel also relied on the case of **Viktar Maina Ngunjiri & Others –v- Attorney General & Others (2018)eKLR**.

6. On their part, the plaintiffs' advocates submitted that the law governing registered land in Kenya is the Land Registration Act, 2012. Counsel cited Section 28 of the said Act which provides:

**“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without being noted on the register.**

**(h) Rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”**

7. The plaintiffs' counsel also cited Sections 37 and 38 of the Limitation of Actions Act and submitted that as at the time of instituting this suit, the plaintiffs did conduct a search which revealed that the registered owner of the suit land as Ahmed Bin Haji Barawa. The plaintiffs' counsel submitted that since the current application has revealed that the registered owner died in the year 1954 and the defendants slept on their right and never bothered to take out grant of letters of administration in respect of the estate of the deceased, it follows that their claim over the suit property is already time barred, the plaintiffs having occupied the property continuously for over thirty years. It was submitted that any purported transfer of the suit property by transmission should be declared null and void for reasons that the suit property was not available for distribution amongst the beneficiaries of the estate of the deceased since the title of the deceased as registered owner had been extinguished under Section 17 of the Limitation of Actions Act. The plaintiffs further submitted that the court is *functus officio* having rendered its ruling on two applications for leave to amend the original summons and enjoin the defendants herein. It was the plaintiffs submission that the application herein lacks merit and should be dismissed with costs.

8. I have considered all the issues raised in the application. In my view, the main issue for determination is whether or not the suit herein should be sustained by reason of the demise of the original defendant prior to the institution of the suit.

9. By the Originating Summons dated 25<sup>th</sup> April 2016 and filed on 26<sup>th</sup> April, 2016, the plaintiffs' instituted the suit against Ahmed Bin Haji Barawi, the original defendant and the registered owner of the suit property known as subdivision NUMBER 402 OF SECITON II MAINLAND NORTH MEASURING 5.96 acres registered as Number CR. 1032/1. It is the plaintiffs' claim that they have acquired the suit land by adverse possession, having lived thereon for over 12 years and therefore the title of the registered proprietor has been extinguished. It has now emerged that Ahmed Bin Haji Barawa, the original defendant and the registered owner of the suit property died sometime in 1954. The record shows that pursuant to an application, the summons were amended to substitute the deceased defendant with the legal representatives of his estate. As already stated, the main issue for consideration in this application is whether the suit which was filed against a dead person can be sustained.

10. In the case of **Geeta Bharant Shah & 4 Others –v- Omar Said Mwatayari & Another (2009)eKLR**, the Court of Appeal while considering an appeal over a matter in which the suit filed against a defendant who was dead at the time of filing suit stated as follows:

**“We have anxiously considered the appeal. This is a first appeal. We have no doubt whatsoever that the learned judge, in refusing to allow the application as in favour of the deceased against whom a suit was filed after his demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased's estate to urge the court to do so for once the respondent also admitted he sued a dead person, the court was duly bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed. In any event, because the person cited in the plaint as the first defendant was already dead by the time the suit was filed meant that the plaintiff (now first respondent) did not tell the truth when he said in his verifying affidavit that he had read the plaint and verified the facts therein for how could he say that against undisputed fact later discovered that by the time he was saying so, the first defendant was long dead....”**

11. The Court of Appeal in the above case went ahead and stated as follows:

**“.....it goes without saying that dead people cannot read advertisements and thus could not have been served.....”**

12. In this case, it is not in dispute that the original defendant, Ahmed Bin Haji Barawa died sometime in 1954. It is admitted that as the time of filing suit on 26<sup>th</sup> April, 2016, the defendant was long dead and therefore not capable of being served in any manner. And going by the decision of the Court of Appeal in the case of **Geeta Bharat Shah & 4 Others (supra)**, there was even no need for the administrators of the deceased's estate to urge the court to strike out the suit through the present application. Once the plaintiffs have admitted that they sued a dead person, and going by the Court of Appeal decision which is binding on this court, the court has no alternative other than to down its tools as the court has no jurisdiction to hear a suit filed against a person who was already dead by the time the suit was filed.

13. It follows therefore that the filing of the suit and any subsequent action including the filing of the responses filed and the application for amendment and substitution were a nullity. The rulings that were previously rendered by the court that resulted in the substitution of the defendant who was already dead at the time the suit was filed and the subsequent amendment of the Originating Summons, and indeed any proceedings undertaken hitherto were null and void. This is so because the suit was a nullity from inception. The estate of the deceased defendant could only take over proceedings against him if that defendant was alive at the time the suit was filed. As clearly stated in the Indian Case of C. Muthu (supra), *'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...'*

14. Going by the material on record, submissions by counsel and the authorities cited I am persuaded that the plaintiffs' suit herein cannot be sustained. The upshot is that the Notice of Motion dated 18<sup>th</sup> February, 2018 is merited and therefore the same is allowed. The suit is struck out for being incompetent, null and void.

15. It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 8<sup>th</sup> day of October 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**