



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

E & L CASE NO. 352 OF 1990

SAMUEL OGADA YUGI.....PLAINTIFF

VERSUS

YASON OYIEKE OGWENO(DECEASED).....1ST DEFENDANT

MALAKI YUGI ADERO.....2ND DEFENDANT

ADERO BUORO.....3RD DEFENDANT

STANLAUS ORUKO MOLO.....4TH DEFENDANT

AND

JOEL OYIEKE OYIEKE suing as the Legal Administrator of the
Estate

of YASON OYIEKE OGWENO.....1ST INTERESTED PARTY

AND

ALBERT ADAMS YUGI.....2ND INTERESTED PARTY

RULING

1. The 1st interested party, **Joel Oyieke Oyieke** has filed two applications in this suit. The first application was filed on 27th July, 2011 by way of Notice of Motion of the same date. In the said application, the 1st interested party sought orders for; stay of execution of the judgment and/or decree of this court issued on 22nd October, 1996, the construction of a skeleton file in respect of this suit, the joinder of the 1st Interested party in this suit in place of the 1st defendant, the setting aside of the judgment and decree of this court made on 22nd October, 1996, the recall and nullification of the said judgment and/or decree, a declaration that the said decree is invalid null and void *ab initio* and the striking out of this suit. The 1st interested party's second application was filed on 5th December, 2011. The same was also brought by way of a Notice of Motion of the same date. In this application, the 1st interested party sought an order for the stay of execution of the judgment and/or decree issued by this court on 22nd October, 1996, an injunction restraining the 2nd interested party from trespassing into and/or interfering with the 1st interested party's rights over all that parcel of land known as **L.R. NO. West Karachuonyo/Kibiri/Kanyipir/616**

(hereinafter referred to as “**the suit property**”) and the consolidation of this application with the earlier application dated 27th July, 2011.

2. The two applications were supported by the affidavit of the 1st interested party sworn on 27th July, 2011 and 5th December, 2011 respectively. In the said affidavits, the 1st interested party stated that; he is the legal administrator of the estate of the 1st defendant. The 1st defendant who was his father died on 7th May, 1989. At all material times, the 1st defendant owned the suit property on which he lived with his entire family for the rest of his life. On 18th March, 2011, he received a letter from the District Land Registrar-Rachuonyo District (hereinafter referred to only as “the Land Registrar”) addressed to the 1st defendant asking him to surrender the title deed for the suit property for cancellation. On receipt of this letter, he went to see the said land registrar to get more details on the Kisii High Court Case No. 352 of 1990 (the suit herein) that was referred to in the said letter as the basis on which the surrender of the said title deed was demanded. The land registrar furnished him with a copy of the decree that was issued in this suit (Kisii Hcc.No. 352 of 1990) on 25th August, 1997. He then instructed his advocates on record to confirm whether the said decree was genuine. His advocates aforesaid failed to verify the validity of the said decree because the court file could not be traced. While he was still trying to verify the legality of the said decree, the plaintiff or his agents were putting pressure upon the land registrar aforesaid to nullify the 1st defendant’s title over the suit property and the land registrar proceeded to issue a notice in the Kenya Gazette of his intention to deem the 1st defendant’s title over the suit property as cancelled. The 1st interested party contended that this suit is invalid and a nullity in that the same was filed in 1990 after the death of the 1st defendant. The 1st interested party contended further that the decree which is sought to be executed by the plaintiff or his agents is time barred the same having been issued more than 12 years ago. While the 1st interested party’s first application was pending, the 2nd interested party is alleged to have encroached upon a portion of the suit property and in the process, interfered with the activities of the 1st interested party thereon. This necessitated the filing of the second application referred to hereinabove which sought an order of injunction against the 2nd interested party.
3. The 1st interested party’s applications aforesaid were served upon the 2nd interested party. The 2nd interested party is a brother to the plaintiff herein who is also deceased. The plaintiff died on 31st December, 1997. The 2nd interested party

filed a replying affidavit and Notice of Preliminary objection to the 1st interested party’s two (2) applications. In his replying affidavit, the 2nd interested party denied the 1st interested party’s allegation that the 1st defendant died on 7th May, 1989. The 2nd interested party claimed that the 1st defendant attended the burial of the 2nd interested party’s mother in October, 1992 and the burial of the 2nd interested party’s sister in-law in October, 1995. In the circumstances, the 1st defendant could not have died in 1989 as claimed by the 1st interested party. The 2nd interested party claimed that the alleged death of the 1st defendant in 1989 is tailor made to meet the purposes of this suit. The 2nd interested party contended that when this suit was filed, 1st defendant was alive and that the court could not have proceeded with the hearing of this case unless the court was satisfied that the 1st defendant was served. The 2nd interested party contended that no cause has been shown for opening a skeleton file as no efforts have been made to obtain the original file. The 2nd interested party contended that the decree issued herein was lodged with the land registrar for enforcement within time and as such the plaintiff cannot be blamed for the delays occasioned by the office of the land registrar. In his notice of preliminary objection, the 2nd interested party objected to the 1st interested party’s two applications on several grounds namely:-

- i. **That the 1st interested party cannot be joined in this suit in place of the 1st defendant because such substitution would be contrary to order 24 of the civil procedure rules, 2010;**

- ii. **That the right to apply to set aside judgment entered against the 1st defendant has abated.**
- iii. **That the 1st interested party's application is misconceived as it seeks to set aside a decree whose holder is deceased and with respect to whose estate no grant of letters of administration has been issued.**
- iv. **That the 2nd interested party is a stranger to this suit and cannot be bound by the orders sought.**

- v. **That the 1st interested party has no *locus standi* to disturb the decree issued herein.**
- vi. **The 1st interested party's application is time barred.**

4. On 28th May, 2012, the advocates for the parties agreed to dispose of the preliminary objection raised by the 2nd interested party first before going into the merit of the application. They agreed further that the said objection be argued by way of written submissions. The 2nd interested party filed his submissions on 8th June, 2012 while the 1st interested party filed his submissions on 16th January, 2013. In his submission, the 2nd interested party contended that the court file has not been sufficiently constructed to justify the granting of the substantive reliefs sought by the 1st interested party. The 2nd interested party submitted further that the decree holder in this suit is deceased and no grant of letters of administration with respect to his estate has been issued to anyone. In the circumstances, the orders sought by the 1st interested party cannot issue as they would in effect be issued against a deceased person. The 2nd interested party submitted further that under order 24 of the Civil Procedure Rules only a party to a suit can be substituted. The 2nd interested party submitted that, since the 1st defendant is alleged to have died before the suit was filed, he was not a party to this suit and as such the 1st interested party cannot seek to substitute him. The 2nd interested party submitted further that in any event, substitution is supposed to be done within one year of the death of a party failure to which the suit abates as against the party. The 2nd interested party submitted that the application for substitution of the 1st defendant is time barred in the circumstances. Finally, the 2nd interested party submitted that the interested party's application is time barred under section 4(4) of the Limitation of Actions Act, Cap. 22 Laws of Kenya. The 2nd interested party submitted that judgment passed 15 years ago cannot be disturbed.
5. In his submission in reply, the 1st interested party submitted that the issue of sufficiency or otherwise of the skeleton file opened herein is res-judicata as the Deputy Registrar had heard and allowed the 1st interested party's application to open a skeleton file on 8th August, 2011. The 1st interested party added that the issue of sufficiency of the court file is a matter of fact that cannot be a basis for preliminary objection. On the issue as to whether the orders sought can issue without the joinder of the estate of the plaintiff in the proceedings, the 1st interested party submitted that the two applications were served upon the 2nd interested party who accepted the same, appointed an advocate to represent him and proceeded to file a replying affidavit. The 1st interested party submitted that the 2nd interested party is a representative of estate of the plaintiff.
6. On his prayer to be substituted as a party to this suit in place of the 1st defendant, the 1st interested party submitted that he has the necessary *locus standi* to protect the estate of the 1st defendant being the appointed legal representative of the 1st defendant. The 1st interested party submitted further that the issue of time bar does not arise since the 1st defendant died before the suit was filed against him and as such the 1st interested party's joinder must be considered in the context of the wider interest of justice as it is necessary for the purposes of setting aside a nullity. Finally, on the issue of the execution of the judgment delivered on 22nd October, 1996, the 1st interested party submitted that the same could not be executed after the lapse of 12 years in accordance with the provisions of section 4(4) of the Limitation of Actions Act, Cap. 22 Laws of Kenya. The 1st interested party submitted further that the said section 4(4) of the Limitation of Actions Act, Cap. 22 Laws of Kenya does not apply to the applications before the court which are seeking to set aside judgment.

7. I have considered the two applications by the 1st interested party and the opposition thereto by the 2nd interested party. What I have been called upon to determine at this stage is not the merit of the applications but their competence. The two applications were consolidated and as such for the purposes of this ruling they will be considered together. The issues that call for determination at this stage are the following:-

- i. **Whether the 1st interested party can be joined and/or substituted in this suit in place of the 1st defendant?**
- ii. **Whether the other orders sought in the applications dated 27th July, 2011 and 5th December, 2011 are available to the 1st interested party as against the plaintiff who is deceased and with respect to whose estate no grant of letters of administration has been issued?**
- iii. **If the answer to issue (ii) is in the affirmative whether the application to set aside the judgment entered on 22nd October, 1996 and the decree arising therefrom is time barred?**

8. Issue No.I

The 1st interested party's prayer to be joined in this suit has been brought under the provisions of Order 24 rule 4 of the Civil Procedure Rules. This rule provides for the substitution of a deceased defendant by his legal representative in a case where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant(s) alone. This rule envisages the death of a defendant in the course of a suit. Sub-rule 3 of this rule provides that the application for substitution must be made within one (1) year of the death of a defendant who is sought to be substituted failure to which the suit shall abate as against the deceased defendant. The 1st interested party has contended that the 1st defendant died on 7th May, 1989. The 2nd interested party's argument is that, if the 1st interested party's contention that the 1st defendant died on 7th May, 1989 is true then the 1st defendant was not a party to this suit which was filed in 1990 and as a non party to the suit, the 1st interested party cannot purport to substitute the 1st defendant under order 24 rule 4 of the Civil Procedure Rules which only allow substitution of parties dying in the course of the suit. The 2nd interested party has also argued that the 1st interested party should have made the application for substitution within one year of the death of the 1st defendant in accordance with the requirements of Order 24 rule 3 of the Civil Procedure Rules. He contended that the present application which was made after 22 years of the death of the 1st defendant was therefore out of time. The 1st interested party's response to these arguments by the 2nd interested party was that he is the duly appointed legal administrator of the estate of the 1st defendant and among the assets of the estate of the 1st defendant is the suit property whose title is threatened with cancellation pursuant to the judgment and decree issued in this suit. In the circumstances he has a right to be joined in this suit in place of the 1st defendant who is deceased with a view to protect the interest of the deceased. On the issue of the application having been filed out of time, the 1st interested party's response was that the suit was filed after the death of the 1st defendant and that he only became aware of the proceedings on 18th March, 2011. He contended therefore that the one year period can only be reckoned from 18th March, 2011 and not earlier. In the alternative, the 1st interested party argued that the 1st defendant having died before the suit was filed; the issue of lapse of time within which he should have been substituted does not arise. He contended that this application was informed by wider interest of justice. My view on this issue is as follows:- I am in agreement with the submission by the 2nd interested party that if this suit was filed against the 1st defendant when he was already dead then in law no suit existed against him. If no suit existed against the 1st defendant then there is no suit which the 1st interested party can seek to be joined in as the legal representative of the estate of the 1st defendant. A suit against a deceased person is a nullity and amounts to nothing. There is nothing therefore to join. In the case of **Macfoy-vs-United Africa Co. Ltd.(1961) 3 All E.R 1169**, Lord Denning stated as follows concerning an act which is a nullity at page 1172;

“if an act is void, then it is in law a nullity. It is not only bad but

incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

It is clear from the foregoing that you cannot put something on nothing. It will surely come to nothing. The 1st interested party cannot seek to join a suit that never was. I am further in agreement with the submission by the 2nd interested party that Order 24 rule 4 of the Civil Procedure Rules is not applicable to the circumstances of this case. At this point, I would wish to pose a question that has also disturbed my mind as I pondered over these novel arguments by counsel namely, what is the remedy available to the 1st interested party in the circumstances? Is he supposed just to sit back and see the title of the suit property which belongs to the deceased being cancelled through a decree which has been irregularly obtained as he claims? In my view, in the circumstances of this case, the 1st interested party does not need to be joined in this suit so as to protect the interest of the 1st defendant. The 1st interested party can simply apply to this court in his capacity as the legal representative of the estate of the 1st defendant for the setting aside of the judgment and decree issued herein on the ground that the suit herein was lodged after the death of the 1st defendant and as such the judgment and decree issued herein against the 1st defendant are null and void as against the 1st defendant. It is not necessary in the circumstances of this case for the 1st interested party to join this suit before seeking such relief. I am also of the view that in a case such as this one where the plaintiff who filed the suit is also deceased and it is claimed that no legal representative has been appointed with respect to his estate, it would also be open to the 1st interested party to file another suit against whoever is seeking to execute the purported judgment and decree entered against a deceased person and seek a declaration that the suit did not lie and that the judgment, the decree and the whole execution process is a nullity. Due to the foregoing, I have to answer issue No. I in the negative.

9. Issue No. II.

Order 24 rule 5 provides that where a question arises whether a person is or is not the legal representative of a deceased plaintiff or a deceased defendant such question shall be determined by the court. In this case, there is no dispute that the plaintiff is deceased. The plaintiff died on 31st December, 1997. The 2nd interested party is the Plaintiff's brother. When the 1st interested party filed the applications herein, the same were served upon the 2nd interested party. It is not clear on what basis the 2nd interested party was served. The 2nd interested party has denied that he is the legal representative of the plaintiff. The 2nd interested party has claimed that he only responded to the 1st interested party's applications first, because he was served with the same and secondly out of family obligation as the only responsible person who can protect the interest of the deceased plaintiff. The 1st interested party has not placed any material before the court in proof of the fact that the 2nd interested party is the legal representative of the estate of the plaintiff. The 1st interested party's argument that, the 2nd interested party's appointment of an advocate to defend the applications herein is a manifestation of his role as the representative of the estate of the plaintiff has no basis in law. One cannot appoint himself an administrator of an estate of a deceased person neither can one be assumed as such administrator through conduct. A legal administrator is appointed by the court which confirms such appointment by issuing a grant which may be full or limited for a particular purpose. The 2nd interested party has denied being a legal representative of the deceased plaintiff and no grant has been placed before the court in proof of his appointment to that office of trust. It is my finding therefore that the 2nd interested party is not a legal representative of the estate of the plaintiff. This finding brings me to the second question namely, whether the orders sought herein by the 1st interested party can be granted against a deceased plaintiff with respect to whose estate there is no administrator. As I have already stated above with regard to the

1st defendant, an order issued against a deceased person would be a nullity. If the court was to grant the orders sought herein, the same would be directed against a deceased person. Such orders would be in vain as dead people do not take command even from the court. The 2nd interested party cannot also be bound by the orders made against the plaintiff as he is not clothed with the legal capacity to be so bound. It is therefore my finding that in the absence of a duly appointed legal representative of the estate of the deceased plaintiff in this suit, the orders sought by the 1st interested party save for the one for opening a skeleton file which has already been granted cannot issue. I therefore have to answer issue No. II also in the negative.

10. Issue No. III.

Having answered issue No. II in the negative this issue does not fall for consideration. I would like to say however that if I was to determine the issue, I would find in the negative. I agree with the submission by the advocates for the 1st interested party that the provisions of Section 4(4) of the Limitation of Actions Act, cap. 22 Laws of Kenya do not apply to an application to set aside judgment.

11. Conclusion:

Arising from the foregoing, it is my finding that the 2nd interested party's preliminary objection is well taken. The 1st interested party's applications dated 27th July, 2011 and 5th December, 2011 are hereby struck out as concerns all prayers sought therein save for prayer 3 in the application dated 27th July, 2011 that was granted by the Deputy Registrar on 8th August, 2011. Since the 2nd interested party was not under any legal obligation to defend the 1st interested party's applications herein as he is not the plaintiff's legal representative, each party shall bear its own cost of the two applications.

Dated and delivered at Kisii this 8th day of November, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Oguttu for the 1st interested party

Mr. Nyamwange h/brief for Bana for the 2nd interested party

No appearance for the 2nd, 3rd, and 4th defendants

Mobisa Court Clerk

S. OKONG'O,

JUDGE.