



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 3859 OF 1979

ESTHER WANGARI KIHARA.....PLAINTIFF

VERSUS

SAMUEL NDIBA SENIOR.....1ST DEFENDANT

SAMUEL NDIBA JUNIOR (Administrators of the estate of Peter Kihara Gathoga)...2ND DEFENDANT

RULING

On 11th May 2012, the defendants herein filed a Notice of Motion expressed to be brought under the provisions of Order 24 Rule 1, 3(1), Order 8 Rule 3 and 5 of the Civil Procedure Rules and sections 1A, 1B, 2 and 3A of the Civil Procedure Act primarily seeking the order that **John Gachoka Kihara, Josephat Gathoga Kihara and David Mburu Kihara** (hereinafter referred to as the respondents) be substituted as Plaintiffs in this matter in place of **Esther Wangari Kihara** (Deceased) who died on 13th August 2011 and that the defendants be granted leave to amend their Notice of Motion dated 4th November 2010 as well as an order for provision for costs. The said application is based on the grounds that following the death of the plaintiff the respondents who are the children and beneficiaries of the deceased's estate have held themselves out as the deceased's administrators and have encroached onto the land belonging to the beneficiaries of the late **Peter Kihara Gathoga** outside the land that was adjudged for the Plaintiff in this suit and that they have taken the law into their own hands. Further it is contended that new developments have taken place after the death of the deceased that necessitate the amendment of the motion.

The application was supported by an affidavit sworn by **Samuel Ndiba Senior**, the 1st defendant. According to the deponent, there is a motion dated 4th November 2010 seeking stay of the execution of the judgement delivered herein pending the hearing and determination of an appeal against the same being Civil Appeal No. 172 of 2011. On 4th November 2010 orders of stay were granted but the plaintiff passed away on 14th August 2011 giving rise to a fresh dispute in respect of her burial in which the respondents were defendants. Following the determination of the said burial dispute, the deponent contends that the said respondents have relocated to the suit land from the parcel originally occupied by the deceased and in the course of doing so destroyed crops and other developments belonging to other people who were in occupation thereof by violence means. Unless restrained, it is averred that the said actions constitute a state of lawlessness notwithstanding the pendency of the said appeal.

In response the respondents swore an affidavit through **Josphat Gachoka Kihara**, one of the respondents on 15th May 2012. According to the deponent the respondents are not the executors of the will of the deceased hence are not the deceased's legal representatives and cannot be substituted in the suit. According to him the deceased is the registered owner of land parcel No. Githunguri/Githiga/1121 pursuant to the judgement herein which judgement has been executed hence there is nothing to be stayed. He, however denies encroaching on the late Peter Kihara Gathoga's land and avers that the orders of stay alluded to by the applicants lapsed on 19th November 2010. Accordingly the amendments sought to the application will prejudice the dependants of the deceased plaintiff residing on the suit land since it would amount to an eviction. The other averments are, in my view, not relevant to the present application.

Suffice it to mention that the defendants filed a supplementary affidavit on 13th June 2012 whose contents apart from reiterating the contents of the earlier affidavits were directed at the averments which I have said were not really relevant for the purposes of this application.

In his oral submissions, **Mr Kingara**, learned counsel for the applicants submitted that under Order 24 of the Civil Procedure Rules, the Court has power to decide whether a person is a legal representative of a deceased person based on the conduct of the person. Since the respondents herein defended the said burial dispute on behalf of the deceased plaintiff's estate, they conducted themselves as if they were the legal representatives and should therefore be joined in the suit. With respect to the prayer for amendment it was submitted that the same is necessitated by the substitution and the pendency of the appeal.

On his part **Mr Chebii**, learned counsel for the respondents submitted that the respondents are not personal representatives of the deceased plaintiff but are just beneficiaries of the deceased's estate. In the said burial dispute, it is contended that the respondent were mere members of the burial committee. Accordingly, it is submitted that the defendants ought to have proceeded by way of citation under the Law of Succession Act. Without grant of letters of administration, the respondents have no capacity to be joined in the suit, it was submitted. It is further submitted that the judgement has been executed and the dependants are already living on the suit land hence the Court cannot grant the orders in vain. It is further submitted that the issue raised herein have already been canvassed in the decision of the **Hon. Lady Justice Ang'awa**. According to counsel there is concealment of material and the orders sought amounts to overturning the decisions already made.

In a rejoinder, **Mr Kingara** submitted that the decision of **Lady Justice Ang'awa** did not address the issue of legal representation.

I have considered the application, the affidavit both in support of and in opposition to the application as well as the rivaling submissions made.

I have gone through the decision of the Hon. Lady Justice Ang'awa made on 28th March 2012 and I agree with the respondents that in that decision the learned Judge did

not deal with the issue of legal representation. It is also clear from the submissions of both parties that the respondents are not the legal representatives of the estate of the deceased. The only reason why they are sought to be substituted in this matter is that by their conduct in the said burial dispute they held themselves as the legal representatives of the deceased. It must however, be noted that in the original burial dispute, the respondents were the defendants. They were hauled to Court as it were by the applicants herein. In the premises they had no otherwise but to defend themselves. It would be the height of hypocrisy for the Court to condemn them for defending themselves. Apart from the foregoing it must be emphasised that in burial disputes the issue of legal representatives is usually not the criteria on which the issue of locus standi is determined. In *Charles Onyango Oduke & Another vs. Samwel Onindo Wambi Kisumu HCCS No. 143 of 2009* when called upon to deal with the issue, Mwera, J citing *Otieno vs. Ougo & Another [1987] KLR 371, 384*, expressed himself as follows:

“This court is satisfied that the dispute before court is about the burial place of the deceased – a matter covered by personal/customary law and not statute. That dispute should be seen as separate and distinct from any proceedings that may relate to the rights, interests etc connected with the estate of the deceased. These must be governed by the Law of Succession (Cap 160) where grants etc need to feature as giving a party capacity to sue. Burial and Succession are two very different things and here the court is concerned with the former – burial, where it is not necessary to hold a grant of probate or administration to sue...On that basis alone the court would be inclined to reject the preliminary point. The court is equally prepared to accept that the plaintiffs did not need any more capacity than that of relatives of the deceased to be so and as a fact pleaded this court assumes for now that it is true. And being relatives naturally interested in the burial of the deceased with attendant expenses, the plaintiffs cannot be denied the right to be before the court in the manner they did”.

Order 24 rule 5 of the Civil Procedure Rules provides as follows:

“Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such question shall be determined by the court”.

Rule 3(1) cited above, provides as follows:

“Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit”.

On the other hand under section 2 of the Civil Procedure Act:

“legal representative” means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

Who then in law represents the estate of a deceased person? In *Panayotis Nicolaus Catravas vs. Khanubhai Mohamed Ali Harji Bhanji Civil Appeal [1957] EA 234* the Court while dealing with a similar provision in the Tanzania Civil Procedure Code stated:

Under section 2(11) of the code of Civil Procedure “Legal representative” means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased.

It follows therefore that if the respondents are truly intermeddling in the deceased’s estate, without obtaining letters of administration or probate, they may for the purposes of Order 24 rule 5 aforesaid be deemed as legal representatives of the deceased and be substituted for the deceased. The Court, however, should not invoke the said provisions where clearly there is a legal representative duly appointed under the Law of Succession Act.

In this case the existence of an administrator or a person entitled to take out letters of administration or probate had been alluded to but no express mention has been made of that person. If such a person exists, it is the respondents who would be better placed to point out to the Court who that person is. To do so, however, may not be in the best interest of the respondents who have shown an intent to oppose any further challenge to the judgement which was delivered in favour of the deceased. Without substitution of the deceased, the application pending herein as well as the pending appeal is likely to come a cropper.

Whether or not the applicants’ application has any merits cannot be decided at this stage. Similarly the issues raised by the respondent touching on the consequences of granting the said application cannot be determined in this application. The respondents will be entitled to raise the same at the opportune moment. However, to stall proceedings and thereby deny a party of the opportunity to pursue his case to the next stage especially where there is a right of appeal would, in my view, occasion a miscarriage of justice.

In *Trouistik Union International And Anor. vs. Mrs. Jane Mbeyu and Anor Civil Appeal No. 145 of 1990 [1993] KLR 230*, the Court of Appeal held:

“The common law is that “action *personalis moritur cum persona*”, that is, a personal action dies with the person. This rule was, however, to a large extent, supplanted by the Law Reform Act, which Act keeps alive, with few exceptions, causes of action which vest in a person since deceased. Accordingly, to determine who is empowered to enforce that chose in action, for what purposes, and when in point of time, one must look at that Act and allied relevant legislation. One such enactment is the Law of Succession Act, Cap 160. Section 2 of that Act provides in mandatory terms, that unless any other written law provides otherwise, the provisions of the Act “shall constitute the law in Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of the Act”. The Act came into force on the 1st July, 1981 and the person whose death gave rise to this suit died on 10th April 1984...To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82(a) of the Law of Succession Act, which confers that power on personal representatives and on them alone. As to who are the personal representatives within the contemplation of the Act, Section 3, the interpretative section provides an all-inclusive answer. It says “personal representative means executor or administrator of a deceased person”. It is common ground that the deceased in this case did not die intestate and therefore, the only person who can answer the description of a personal representative is the administrator of the estate of the deceased. The next inquiry must answer the question, who is an administrator within the true meaning and intent of the Act? Section 3 says “administrator means a person to whom grant of letters of administration has been made under this Act”...At common law, death by itself automatically divests the deceased of his chose in action and the reason for this is because in law, the dead have no rights. But no legal right is without an owner so it must be vested in a person or entity. According to the English law before the Judicature Act, 1873, the personal property of an intestate in the interval between death and the grant of letters of administration was deemed to be vested in the judge of the Court of Probate and since, 1925, by the provision of the Administration of Estates Act of that year, the property of an intestate before the grant vests in the President of the Probate, Divorce and Admiralty Division. In some Commonwealth jurisdictions, such right is vested in the Chief Justice or some other statutory designated body or entity. Our law of Succession Act, Cap 160, did not provide for the vesting of an intestate’s property between the date of death and the grant of letters in any entity. So the suggestion that it will be vested in the courts conforms with the common law notions of the transmission of an intestate’s right or estate. It ought to be remembered that all these temporary custodians of an intestate’s rights are bare trustees only. But as soon as a grant is obtained, the right or estates vests automatically and by force of the grant in the administrator”.

In the premises doing the best I can taking into consideration the provisions of Article 159(2)(d) of the Constitution, whereas I decline to grant the orders sought in the application, I direct that Public Trustee be substituted for the plaintiff in this case. I also grant leave to the applicants to amend the pleadings accordingly. The said substitution and amendment to be effected within 21 days from the date hereof. For avoidance of doubt in the event that letters of administration or probate are taken in respect of the estate of the deceased, the administrator or executor will be at liberty to be substituted for the Public Trustee.

In the circumstances of this case, there will be no order as to costs.

Ruling read, signed and delivered in Court this 10th day of July 2012

G.V. ODUNGA

JUDGE

In the presence of:

Mr. King'ara for the applicants

Mr. Chebii for the respondents