



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 28 OF 2018**

**1. ALI NASSOR MWAFUMBI**

**2. KILLIAN MWANDORI.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**ELIUD SIMON MBILU.....DEFENDANT**

**JULIE SYOMITI MBILU.....INTERESTED PARTY**

**RULING**

1. This suit was filed on 6<sup>th</sup> February, 2018 vide a plaint dated 6<sup>th</sup> February, 2018. The plaintiff had sued the defendant claiming a permanent injunction against the defendant from evicting, demolishing, harassing and/or interfering with the plaintiffs' occupation of **PLOT NO.628/I/MN** in Kongowea, Maweni in the County of Mombasa.

2. At the time of filing the suit, the plaintiffs also filed a notice of motion dated same date seeking temporary orders of injunction pending hearing and determination of the said application and the suit. When the said application came up before me under certificate of urgency on 6<sup>th</sup> February 2018, I declined to grant any interim orders and directed the applicants to serve the respondents and fix the application for inter-parties hearing on a date to be given at the registry.

3. The application came up for hearing on 12<sup>th</sup> July 2018 when only the applicants' counsel attended court. On perusal of the affidavits of service sworn by Shem Otieno Abudho, a process server on 11<sup>th</sup> July 2018 which indicated that the defendant was served on 22<sup>nd</sup> June 2018 and had not filed a response to the application nor attended court on 12<sup>th</sup> July 2018, the court allowed the application as prayed.

4. On 4<sup>th</sup> September, 2018 the Interested Party through Ms. Lewa & Associates filed the Notice of Motion dated 3<sup>rd</sup> September 2018 seeking inter alia to have the orders of temporary injunction made on 12<sup>th</sup> July 2018 vacated and to strike out the suit for the reason that the same is a nullity in law and or void *ab initio*, the defendant having passed away on 30<sup>th</sup> April 2017, about a year before the suit against him was filed. The motion dated 3<sup>rd</sup> September 2018 is the subject of this ruling.

5. The motion is supported by the affidavit of Julie Syomiti Mbilu, the Interested Party/Applicant and is based on the following grounds:

**a) That Julie Syomiti Mbilu is a daughter to Eliud Simon Mbilu, the defendant herein who is deceased,**

**b) That Eliud Simon Mbilu (deceased), the defendant herein, passed away on the 30<sup>th</sup> April 2017 at M. P. Shah Hospital Nairobi.**

**c) That by the 6<sup>th</sup> day of February, 2018 when this suit was filed, the defendant was already deceased and as such the suit herein is a nullity in law and or void *ab initio*.**

**d) That the injunction order made on the 12<sup>th</sup> day of July, 2018 was therefore obtained fraudulently as there is no way the deceased herein could have been served with court process as was alleged by the plaintiffs.**

**e) That armed with the fraudulently obtained injunctive order, the plaintiffs and/or their authorized agents and employees and or representatives, have trespassed into PLOT NUMBER 628/I/MN (ORIGINAL NO.1110/9) (hereafter 'suit parcel of land') divided it amongst themselves and are constructing structures, felling trees and committing other acts of waste**

therein.

**f) That the suit parcel of land herein forms part of the estate of the deceased defendant herein and as such the said estate risks being wasted and the intended Interested Party and other beneficiaries of the said estate stand to suffer irreparable loss if the orders being sought herein are not granted.**

**g) That it is in the interest of justice that the application herein is granted.**

6. In the affidavit in support of the application, the applicant annexed copies of her certificate of birth, certificate of death which confirms that the deceased died on April 2017 at M. P. Shah Hospital, Certificate of title of the suit property in the name of the deceased among other documents including photographs of structures allegedly erected by the plaintiffs on the suit land.

7. The plaintiffs opposed the application and filed a replying affidavit sworn by Ali Nasser Mwafumbi, the 1<sup>st</sup> Plaintiff on 14<sup>th</sup> December, 2018 in which he denied obtaining orders fraudulently, arguing that the court cannot strike the suit without a full hearing. He therefore seeks to have the status quo on the ground maintained pending hearing and determination of the main suit. He deponed that the Interested Party has not taken out letters of administration and therefore has no capacity to sue and/or obtain orders from this court.

8. I have considered the application, the rival affidavits and the submissions made. It is common ground that the defendant was not alive when the suit was filed against him. It is also inconceivable how a party who is deceased was served with court documents when he was already dead a year earlier. It is obvious that the affidavit of service filed was false and the orders herein were obtained fraudulently. It follows therefore any action including the filing of the plaint, the extraction of summons and the filing of the notice of motion dated 6<sup>th</sup> February 2018 were a nullity.

9. In the case of **Benjamin Leonard MC Foy –v- United Africa Company Limited (1961) 3 ALL ER 1169** which was cited by the applicant's counsel, the court stated as follows:

***“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 more ado, though it is sometimes convenient to have the court 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.”***

10. This is exactly what the interested Party is attempting to do. In the words of the cited case above this an attempt to place something on nothing and expect it to retain ground. This cannot happen.

11. The estate of the deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to court. What is annexed to the affidavit in support of the application herein is a citation not a grant of representation. Moreover, in the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity.

12. In the **Indian case of C. Muttu –v- Bharath Match Works Air 1964 Kant 293** the court observed,

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

13. In yet another Indian case of **Pratap chand Mehta –v- Chrisna Devi Menta AIR 1988 Delhi 267** the court citing another decisions 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 not suit had been filed....”***

14. Going by the material on record, the application by the intended interested Party cannot be sustained. Similarly, the suit herein and the notice of motion dated 6<sup>th</sup> February 2018 and subsequent orders are declared incompetent, null and void as they are founded on proceedings that were also null and void *ab inito*.

15. In the result, the suit herein is struck out with no order as to costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 29<sup>th</sup> day of January, 2019.**

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**C. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Kirui holding brief for Lewa for Interested Party

Owino for Plaintiff

No appearance for Defendant. –deceased.

Yumna Court Assistant

**C.K. YANO**

**JUDGE**

**28/1/19**