



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 214 OF 2016(OS)**

**NICHOLUS ODERA SUMBA (Suing as the legal representative of the**

**Estate of Bonface Sumba Oracha).....PLAINTIFF/APPLICANT**

**VERSUS**

**SALEH BIN SALIM ALI EL-EYYAN.....DEFENDANT/RESPONDENT**

**RULING**

1. For determination is the Preliminary Objection dated 9<sup>th</sup> March 2018 filed by Khatib & Co. Advocates stating that this suit should be dismissed because it was instituted against a dead person. The plaintiff also filed a motion dated 23<sup>rd</sup> August 2018 seeking the following orders;

**(a) That the memorandum of appearance dated 14<sup>th</sup> March 2017 filed by Khatib & Company Advocates be expunged from the court record and the said advocates be barred from purporting to continue to represent a deceased person in the matter.**

**(b) That Khatib & Company Advocates be condemned personally to pay the costs of the proceedings so far incurred in this matter (including the application herein).**

2. The application was opposed by a replying affidavit sworn by Mohamed Faki Khatib advocate who deposed that he is acting on behalf of the legal representative of the Estate of Saleh Bin Salim Ali EL-Eyyan to protect their interest in the property known as Plot 1414/VI/MN. He deposed that the plaintiff served the Originating Summons by advertisement for not being able to trace the defendant because the defendant is dead. That the name Swaleh can also be spelt as Saleh and the title deeds annexed in the plaintiffs affidavit were issued in 1958 well before the identity cards were issued while “Bin” means “Son of” therefore Saleh Salim Bin Ali El-Yyan is the same as Saleh Salim Ali El-Yyan.

3. Mr Ngonze advocate appearing for plaintiff submitted that the deceased as per the death certificate provided is different from the defendant in their case. That the advocate has sworn a replying affidavit on contentious issues which is improper. That paragraph 4 & 5 of the replying affidavit does not disclose who the legal representative is and their nexus to the deceased. He therefore urged the court to strike out the memorandum of appearance and Preliminary Objection filed by Mr Khatib. The plaintiff relied on the list of case law filed to support their submissions.

4. Mr Khatib in replying submissions stated that the reason the plaintiff could not trace the defendant for personal service is because he is dead. That they have explained the difference in name in the death certificate provided. That a suit against a dead person is incompetent. Lastly that the plaintiff has not asked them to disclose the name of the legal representative. He urged the court to dismiss the application and allow the preliminary objection.

5. There are two issues raised for the court’s determination. First is whether the death certificate provided refers to the death of the party sued as the defendant making the suit as filed incompetent. The second issue is whether the firm of Khatib & Company Advocates should be barred from participating in these proceedings for failure to disclose the name of the instructing client/legal representative of the estate of the deceased defendant.

6. The name of the defendant is given as Saleh Bin Salim Ali El-Eyyan. The name of the deceased as per the death certificate provided is Swaleh Salim El-Eyyan. The certificate of postal search gives name of registered owner as **Saleh Bin Salim Ali El-Eyyan**. Mr Khatib in explaining the differences in the names stated that the name Saleh can also be spelt as Swaleh and “bin” means son of. What Mr Khatib has not explained to the court is the additional name of “Ali” appearing in the postal search and the defendant as sued.

7. This difference in the names appearing in the death certificate and the plaintiff's documents cannot be explained without factual evidence being introduced. In the renowned case of **Mukisa Biscuit Manufacturing Co. Ltd –versus- West End Distributors Ltd** stated that a preliminary objection cannot be raised if any fact has to be ascertained by way of evidence. My view and I so hold that the preliminary objection raised by Mr Khatib is not ascertainable on the face of the death certificate only. Therefore I dismiss it.

8. The second limb is whether or not to grant the orders being sought in the plaintiff's application of 23<sup>rd</sup> August 2018. The firm of Khatib & Co. Advocates have through the replying affidavit filed stated that they are acting for the legal representative of the Estate of the deceased defendant. That they have not disclosed the name of their client because the plaintiff has not asked them to do so. This court finds that the filing of the application by the plaintiff in itself is a demand made for disclosure on who the legal representative is.

9. Why is it important for Mr Khatib to disclose the name of the person who he is acting for? It would assist the court to know that indeed the instructing client indeed has capacity to give such instructions under Section 82 of the Law of Succession Act. Mr Khatib himself has pleaded that the defendant is deceased. He cannot therefore be instructed by a party who has not been duly appointed by the court to represent the estate of a deceased. Further, since counsel is not a party to these proceedings, while swearing an affidavit, the law requires him to disclose the source of his information. The legal representative perse without any name disclosed does not in my view constitute a legal person in law.

10. Consequently in the absence of disclosure of the name of the person who Mr Khatib represents, I find the pleadings filed by him to be brought by a person who is a stranger to the proceedings. I am therefore satisfied that there is merit in the motion dated 23<sup>rd</sup> August 2018. Accordingly I allow it as per prayer (1) of the motion. Costs of the application and the dismissed preliminary objection awarded to the plaintiff.

**Dated, Signed and Delivered at Mombasa this 19<sup>th</sup> day of July 2019.**

**A. OMOLLO**

**JUDGE**