



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 241 OF 2016

SAID KARAMA SALIM.....PLAINTIFF

VERSUS

KOKAS M. NAKOLO.....DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated 8th November 2018. By the said application, four individuals calling themselves Aggrieved Parties pray for orders that: -

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4. The Judgment and decree of the Court dated 6th December 2017 and 7th December 2017 respectively be reviewed and set aside in their entirety for being obtained through fraud and without jurisdiction.

5. The Plaintiffs suit contained in the Originating Summons dated 14th September 2016 be struck out and dismissed for being a nullity ab initio.

6. The Land Registrar, Kilifi District Land Registry, be ordered to cancel the Title Deed issued to Said Karama Salim and to cancel all entries made on the register of Title No. Kilifi/Mtwapa/1050 pursuant to the Judgment and decree issued by the Honourable Court on 6th and 7th December 2017 respectively.

7. That Land Registrar, Kilifi District Land Registry, be ordered to restore the entries on the register for Title No. Kilifi/Mtwapa/1050 to reflect Amina Warsame Dagane, Joab Wasikhongo Nakolo, Miriam Milka Nakolo and Yusuf Meshak Nakolo as the registered proprietors.

8. In the alternative to Prayer 5, 6 and 7 above, the Aggrieved Parties be granted unconditional leave to defend the Originating Summons dated 14th September 2016, or as may be amended, in their own capacity and on behalf of the Estate of Kokas M. Nakolo(deceased).

9. The costs of this application be awarded to the 1st to 4th Aggrieved Parties while those of the struck out suit, to the 1st Aggrieved Party.

2. The said application is supported by an affidavit sworn by the 2nd Aggrieved Party Joab Wasikhongo Nakolo and is anchored on the grounds that: -

i) The 1st Aggrieved Party is the Administrator of the Estate of Kokas M. Nakolo(Defendant) having been issued with a Grant of Letters of Administration Intestate dated 7th February 2013 and Certificate of Confirmation of Grant on 10th September 2013;

ii) The 1st to 4th Aggrieved Parties were at all times, prior to the Judgment of this Court, the registered owners of the suit property the same having been transferred to them jointly as beneficiaries of the Estate of Kokas M. Nakolo (the Defendant);

iii) The 1st Aggrieved Party brings this application on behalf of the Estate of Kokas M. Nakolo(deceased) as well as on her own behalf as a joint registered owner of the suit property;

iv) The 2nd to 4th Aggrieved Parties bring this application in their own name as registered owners of the suit property jointly with the 1st Aggrieved Party;

v) The Defendant herein died on 12th February 2009. He was the registered owner of all that parcel of land known as Title No. Kilifi/Mtwapa/1050 prior to his death;

vi) The 2nd Aggrieved Party has received a letter dated 25th September 2018 from the Plaintiff demanding that the Aggrieved Parties vacate the suit property on account of this suit which the Aggrieved Parties were previously unaware of;

vii) The suit was filed on 15th September 2016 against the Defendant who had long passed away on 12th February 2009, a fact that was known to the Plaintiff.

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 28th January 2019, Said Karama Salim (the Plaintiff/Respondent) avers that he has had a home on the suit property since 1986 and that the Aggrieved Parties are total strangers to him as he has never seen them on the suit property.

4. The Plaintiff avers that he is not aware that the Defendant is deceased and he is a stranger to the Certificate of Confirmation of Grant and Application for registration as proprietor of the land by transmission as annexed to the Aggrieved Parties Affidavit.

5. The Plaintiff further denies that he concealed any information from the Court and/or that he obtained the Judgment and decree herein by fraud as alleged by the Aggrieved Parties or at all. He urges the Court to dismiss the application for being a non-starter, misconceived, bad in law, mischievous and lacking in merit.

6. I have perused and considered the application and the response thereto. I have also considered the oral submissions made before me by the Learned Advocates for the parties.

7. From a perusal of the record herein, it is evident that this Originating Summons was filed by the Plaintiff against Kokas M. Nakolo on 15th September 2016. By an application dated 23rd September 2016, the Plaintiff sought orders to serve the Defendant by way of Substituted Service through an advertisement in a local newspaper. In a Supporting Affidavit sworn by Peter Omwenga Advocate on behalf of the Plaintiff, Counsel stated that the physical whereabouts of the Defendant were unknown.

8. That application was allowed by the Honourable Justice Said Chitembwe then seized of the matter on 23rd September 2016 and the Plaintiff proceeded to place an advert on the Star Newspaper of Saturday/Sunday October 1-2, 2016. On the basis of the said service, and given that the Defendant never entered appearance, this matter proceeded ex-parte culminating in the Judgment of this Court delivered on 6th December 2017.

9. From the annexures attached to this Application by the Aggrieved Parties, it is also evident that Kokas Meshaka Nakolo passed away on 12th February 2009, long before the Plaintiff filed this suit against him.

10. While the Plaintiff claims not to have been aware of this fact, it is apparent that he attempted to execute the decree emanating from the said Judgment not against the Defendant he had sued but against the 2nd Aggrieved Party herein. That is what prompted the application before me.

11. From the material placed before me, the four Aggrieved Parties are presently the registered owners of Land Title No. Kilifi/Mtwapa/1050 the same having been transferred to them jointly as beneficiaries of the Estate of the late Kokas M. Nakolo who was sued as the Defendant herein. As such beneficiaries and given that the 1st Aggrieved Party was confirmed as the Administrator of the Estate of the Deceased on 10th September 2013, they are properly before this Court.

12. As it were, the Plaintiff's suit was brought and served against a person who was long dead and buried. Such a suit was itself dead on arrival as no suit can be filed or served upon a deceased person. It did not matter that the Plaintiff believed him to be alive. As was stated in the old case of *Dawson (Bradford) Ltd and Others- vs- Doke and Another (1071)1QB 330*: -

“..... Where a suit had been served on a deceased defendant at a time when the Plaintiff bona fide believed him to be alive... (the rules) did not empower the Court to substitute the executors as defendants as it would not be said that the Plaintiffs' mistake was merely one of misnomer.”

13. That being the case, the resultant proceedings and Judgment delivered herein on 6th December 2017 were a nullity in law. In the circumstances, I find merit in the application by the Aggrieved Parties. The same is allowed in terms of Prayers 4, 5, 6 and 7 thereof.

14. The Aggrieved Parties will also have the costs of this application.

Dated, signed and delivered at Malindi this 8th day of October, 2019.

J.O. OLOLA

JUDGE