



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE 88 OF 2017

FAIZA PARVEEN MUGHAL.....DEFENDANT/RESPONDENT

VERSUS

MOHAMMED JAMIL MUGHAL.....PLAINTIFF/RESPONDENT

AND

MOHAMMED ULIAS NIAZ.....DEFENDANT

AND

RAZIA BEGUM SHERALLY.....APPLICANT

RULING

1. This is the notice of motion dated 18th August 2015 brought under section 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, and order 57 of the Civil Procedure Rules 2010.

2. It seeks orders

(1) Spent.

(2) Spent.

(3) Spent.

(4) Spent.

(5) That the consent order dated 14th April, 2015 be set aside in its entirety.

(6) That the orders issued on 31st December, 2015 be vacated;

(7) That the court file in succession cause No. 580 of 2015 in the matter of the Estate of Mohammed Elias Mughal alias Mohamed Ulias Nias (Deceased) be brought before the Honourable court; and

(8) That the plaintiff/respondent be ordered to pay costs of this application.

3. The application is supported by the affidavit of Razia Begum Sherally, the applicant herein sworn on the 18th August 2015 and a further affidavit sworn on the 4/4/2016.

4. The application is opposed. There is a replying affidavit sworn by Faiza Parveen Mughal, daughter of deceased defendant, sworn on the 15th February 2016.

5. The plaintiff filed a notice of preliminary objection dated 29th January 2016.

6. On the 12th May 2017, the court directed that the preliminary objection and the application be canvassed by way of written submissions.

The Applicant's submissions

7. The preliminary objection does not qualify to be a preliminary objection within the meaning of in the case of **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd [1969] EA 696**. The question of whether a person is a legal representative of an estate is a question of fact and not a pure point of law. The applicant Razia Begum Shirally is as executor in the last will of Mohammed Uliazi Naiz (the deceased defendant). The authority of an executor to act begins at the death of the testator. Section 80 (1) of the Law of Succession Act states that the executor starts to act even before the grant of probate is given, it validates all his actions since death of the testator. She has put forward the cases of **Ganijee Glass Mart Ltd & 2 Others vs First American Bank Ltd [2007] eKLR**. In **Re Estate of Jane Wambui Gatonye [2014] eKLR**.

8. There is no affidavit disputing the fact that the applicant is an executor of the will of the deceased defendant. She is therefore properly before court and the application is competent.

9. There is already a consent judgment. Order 1 of the Civil Procedure Rules, 2010 only deals with parties before a judgment is entered. It deals with parties to a suit. The order complained of is on the court record. Failure to attach it to this application is not fatal to the applicant's case. Article 159(2) (d) provides that justice shall be administered without undue regard to technicalities. The preliminary objection has no merit and ought to be dismissed.

10. The applicant being the widow of the deceased had priority to obtain any grant of letters of administration. The consent order dated 14th April 2015 was obtained fraudulently by misrepresentation and concealment of material facts.

11. The grounds upon which a consent order can be set aside are now well settled since the case of **Flora N Wasike vs Destimo Wamboka [1988] eKLR**. In the case of **Board of Trustees, National Social Security Fund vs Michael Mwala [2015] eKLR** the Civil Appeal restated the position. The plaintiff and Faiza Parveen Mughal perpetuated fraud against the applicant. Faiza obtained letters of administration ad litem without indicating that the applicant was a beneficiary of the estate of deceased defendant. She obtained a substitution in which she compromised a suit whose subject was land that the applicant had been living on with the deceased husband since 1971.

12. The consent order was adopted by this Honourable court as the facts were misrepresented. No consent signed by the beneficiaries was attached to the affidavit of Faiza Parveen Mughal. The plaintiff and Faiza made the court believe that the beneficiaries had agreed to have the suit compromised. This was not the case. The consent was obtained through collusion of Faiza and the plaintiff. The plaintiff was under an obligation to disclose to the court that the person who was living on the suit property was the deceased's wife and did not come to live in the property after death of the husband. They colluded to say the property in question was occupied by third parties and/or strangers. The plaintiff and Faiza parveen Mughal ought to be condemned to pay costs. The consent order ought to be set aside and the widow of the deceased be reinstated in her matrimonial home.

The plaintiff's submissions

13. Faiza Parveen is the legal representative of the estate of Mohammed Ulias Niaz (deceased) as granted and ordered in Succession Cause No. 580 of 2015 by the High Court at Nairobi on 12th March 2015. Unless revoked by the court the letters of administration *ad litem* issued to Faiza Parveen Mughal shall remain valid and in force.

14. Razia Begum Sherally (applicant) is not a legal representative in respect of the estate of the Mohammed Ulias Niaz (deceased). She is therefore a stranger and has no locus standi to bring this application. The application is incompetent as it offends order 24 rule 4 of the Civil Procedure Rules. The applicant has not made any application to this court seeking to be substituted as a defendant on behalf of the deceased defendant.

15. This application offends order 24 rule 4 of the Civil Procedure Rules. The applicant confirms that her interest is that of a beneficiary and not a defendant. This contention can only be a subject of a succession cause which is within the jurisdiction of the high court, family division. He prays that her application be dismissed with costs.

The Defendant's submissions

16. Razia Begum Sharally has no locus standi without making an application to be substituted as a defendant and/or to be made a party to the suit. There is no suit before court and the application ought to be dismissed with costs. The parties ought to proceed in the succession causes pending before the family division so that the issues can be resolved. The applicant has not filed any application before this court to be substituted as a party in any capacity. She is a stranger to the suit and has not *locus standi*. She prays that the application be dismissed with costs.

17. I have considered the notice of motion and, the affidavit in support. I have considered the preliminary objection and the replying affidavit, the written submissions together with the oral highlights and the authorities cited. The issues for determination are:-

(i) Whether the preliminary objection is merited.

(ii) Whether the application herein has satisfied the grounds for setting aside a consent order.

(iii) Who should bear costs?

18. I have gone through the court record. The two suits were consolidated on 2nd October 2009 by the Honourable Justice Onyancha who directed ELC 88 of 2007 to be the lead file. On the 13th November 2013, the suits were dismissed for non attendance by Hon. Lady Justice Gitumbi in the presence of Mr. Munyalo for the defendant and in the absence of the plaintiff and his advocate. By a notice of Motion dated 19th November 2013, to reinstate the suits Hon. Justice Mutungi found that the plaintiff was ready to prosecute the suit. The parties were given sixty (60) days to comply with order 11 of the Civil Procedure Rules and pre trial set for 28th September 2018. The suits were therefore reinstated.

19. Upon being served with this application, the plaintiff filed a notice of preliminary objection dated 29th January 2016 the grounds are:-

a. That the entire application is incompetent as it offends the provisions of order 24 rule 4 and 5 of the Civil Procedure Rules. The applicant is not a legal representative of the deceased defendant.

b. That the applicant has no locus standi and is not a party to this suit. The application is in violation of order 1 of the Civil Procedure Rules.

c. That the application is incompetent and fatally defective since the order being sought to be set aside is not attached to the application as required by law and the rules of procedure.

20. The applicant submitted that the preliminary objection does not qualify to be a preliminary objection as the question of whether a person is a legal representative of an estate is question of facts and not a pure point of law. I disagree with this position.

21. Order 24 rule 4 (1) of the Civil Procedure Rules provides that”-

“Where one of two of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or sole defendant or sole surviving defendant dies another cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit;

Subsection (2) provides that:-

“Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant”.

22. It is not in doubt that the applicant Razia Begum Sherally has not made any application to this court seeking to be substituted as a defendant on behalf of the deceased’s defendant Mohammed Ulias Niaz. In my view, this is a question of law.

23. The applicant is not a legal representative of the deceased defendant. No letters of administration or executrix have been granted to her in respect of estate of Mohammed Ulias Niaz. She therefore has no locus standi to make his application. On the other hand, Faiza Parveen Mughal applied and was granted letters of administration *ad litem* for purposes of defending, this suit. On the 14th April 2015, shows as substituted as the defendant in this suit. The said letters of administration have not been revoked and are in force. I agree with plaintiff’s submissions that question of who between Faiza Parveen Mughal and Razia Begum Sherally is entitled to be substituted as the defendant. In this matter, is an issue to be canvassed in Nairobi High Court Succession Cause No. 580 of 2015. I therefore find merit in the preliminary objection and the same upheld. Having stated so, I will go ahead and briefly evaluate whether the application meets the requirements for setting aside a consent order. In the case of *Flora N Wasike vs Destimo Wamboko [1988] eKLR* the Court of Appeal held that:-

“it is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out, see the decision of this court in J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeal No. 28 of 1982 and 69 of 1983, in Purcell vs FC Trigell Ltd [1970] 2ALL ER 671, Winn LJ Said at 576;

“It seems to me that if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matter is by legal competent persons and I see no suggestion here that any matter that occurred would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract”.

24. Faiza Parveen Mughal was granted letters of administration to defend this suit on 12th March 2018. On the 14th April 2018 she was substituted as the defendant. She therefore entered into the consent as the legal representative of the deceased defendant, Mohammed Ulias Niaz. I have considered the grounds put forth for setting the consent judgment of 14th April 2014 and I find that none is merited. I find that the consent judgment was entered into by parties who had the legal capacity to do so at the time.

25. In conclusion I find merit in the preliminary objection dated 29th January 2016 and the same is upheld. The upshot of the matter is that I

find no merit in this application and the same is dismissed. Each party do bear own costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 5th day of December 2019.

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Githumbi for the Applicant

No appearance for the Plaintiff

No appearance for the Defendant

Kajuju – court assistant