



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT**

**AT MERU**

**ELC CIVIL APPEAL NO. 34 OF 2009**

**JACKIM MURIUKI MBIJIWE.....APPELLANT**

**VERSUS**

**LUKAS KIMATHI.....RESPONDENT**

**JUDGMENT**

***(BEING AN APPEAL FROM THE ORDERS OF J. NDUBI, SRM (MERU) DELIVERED ON 2.4.2009 IN CMCC NO. 40/2008)***

This appeal arises from an order by the learned magistrate Hon. J. Ndubi SRM Meru issued on 2<sup>nd</sup> April 2009. The appellant had moved the court vide a chamber summons application dated 20.1.2009 under order XXIII Rule 4 Civil Procedure Rules, section 3 & 3A Civil Procedure Act seeking orders inter alia that;

(a) The court do appoint Jackim Muriuki Mbiyiwe as the legal representative of the defendant herein now deceased”

That application was premised on three grounds shown on the face of the said application as well as a supporting affidavit sworn on 20/1/2009. The application is also supported by a further affidavit sworn on 17/2/2009. The plaintiff who is the respondent in this appeal filed a replying affidavit on 26<sup>th</sup> January 2009 and on 27<sup>th</sup> January, he filed a notice of preliminary objection on points of law.

After the learned magistrate delivered her ruling on 2<sup>nd</sup> April, 2009, the appellant was dissatisfied and filed this appeal on the following two grounds:

(a) The learned senior resident magistrate erred in law on refusing the appellant to be enjoined in CMCC no. 40/2008 as a legal representative of the defendant (deceased) basing his refusal on the wrong principles of the law.

(b) The ruling of the senior resident magistrate is against the law.

**APPELLANT’S SUBMISSIONS**

The appellant through the firm of Mwangi E.G & Co. Advocates submitted that the appellant’s father who is now deceased was the defendant in CMCC No. 40/2008. The appellant’s father Alexander Mbiyiwe M’Itiabi had not defended that suit and the appellant had sworn an affidavit to the effect that the defendant (deceased) was on death bed when the summons were allegedly served upon him. The appellant submitted that if his late father was served with summons, he would have known since he was the one taking care of him. He stated that his father passed away on 13.12.2008 and on 13.1.2009, the respondent attempted to evict him and his siblings from their land. The appellant stated that he obtained limited grant of letters of administration for purposes of being joined in the said case where he learned interlocutory judgment had been entered against his late father. The appellant submitted that the lower court refused to allow him to be enjoined in the said suit hence this appeal. The applicant further submitted that the moment the lower court became aware of the death of the defendant no further action, application or proceedings should have been allowed to proceed on. The applicant cited order 24 Rule 4 Civil Procedure Rules section 33 (1) (2) (3) (4) & (5) of the land registration act no. 3 of 2012. The applicant submitted that the lower court refused to allow the appellant to be enjoined but allowed the respondent to continue making applications to which the court made orders exparte.

This was in total contravention of the law. That made setting aside the exparte judgment impossible and perpetrated an illegality where the respondent sold land to a 3<sup>rd</sup> party and disappeared.

**RESPONDENT’S SUBMISSIONS**

The respondent through the firm of Kiautha Arithi & co. Advocates submitted that the appellant was seeking the court to appoint him as the legal representative of the defendant Alexander Mbijiwe M'itiabi (deceased). The application was filed after the judgment had been executed thus the application had been overtaken by events. He submitted that order XXIII rule II barred any applications at the execution stage.

### **ANALYSIS AND DECISION**

I have perused the chamber summons dated 20<sup>th</sup> January 2009 together with the supporting affidavit, the further affidavit and the replying affidavit in opposition thereto. I have also considered the submissions by the parties. The appellant had moved the lower court vide an application dated 20<sup>th</sup> January 2009 seeking to be enjoined as a legal representative of the defendant whom he stated was sick and bed ridden. That application was brought under order XXIII rule 4 subsection 3 & 3A civil procedure Act. In a brief supporting affidavit the appellant had indicated that he was the son of the defendant who died on 13.12.2008 and annexed a copy of the death certificate as JMMC. The appellant also stated that he had obtained a grant to enable him represent his deceased father in that case and therefore sought the orders to be enjoined in that suit.

In his ruling delivered on 2.4.2009, learned magistrate stated as follows:-

**“..... Order XXIII rule II of the Civil Procedure says no order under order XXIII rule 4 can be obtained at the execution stage. The reasoning behind that rule (ii) is in my view that it will be useless for a court of law to issue orders for substitution when the subject suit has been finalized and execution carried out conclusively such that such orders if issued will be of no purpose. I have no reason, therefore to doubt Mr. Atheru's submissions that execution of the decree has been carried out and that hence application has by that process been overtaken..... I find that there is no suit so far pending that the applicant if joined will be defending. I say so because the decree herein is now 8 months old and execution has already been fully carried out.....”.**

Order 24 Rule 4 of the Civil Procedure Rules provides as follows:

**“24 (4) where one of two or more defendants dies and the cause of action does not survive or continues against the surviving defendants or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party shall proceed with the suit”.**

Though the appellant made that application through the wrong provisions of the law, the learned magistrate ought to have directed her mind to the applicable and grant the order sought. If the learned Magistrate was a stickler of procedure and saw that the court had been moved through the wrong provisions of the law then she should have struck out the application. I find that the learned magistrate misdirected herself in law by dismissing the application dated 9<sup>th</sup> January 2009 on wrong principles of law. In the upshot, I allow the appeal on the following terms:

1. The learned magistrates order issued on 2<sup>nd</sup> April 2009 dismissing the appellant's application dated 20<sup>th</sup> January 2009 be and is hereby set aside and/or vacated.
2. That the order dismissing the said application dated 20<sup>th</sup> January 2009 is replaced with an order allowing the same with costs in the cause.
3. The costs of this appeal shall be borne by the respondent.

**DATED AND SIGNED THIS 18<sup>TH</sup> DAY OF OCTOBER 2018 AT KERUGOYA**

**E.C CHERONO**

**ELC JUDGE – KERUGOYA**

**DELIVERED IN OPEN COURT THIS 31<sup>ST</sup> OCTOBER 2018**

**LUCY N. MBUGUA**

**ELC JUDGE - MERU**

**IN PRESENCE OF:**

Muthamia H/B for E.G Mwangi for appellant

C.P Mbaabu H/B for Mr. Mutegi for respondent

Appellant