



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT KISUMU

ELC. NO. 892 OF 2015

(Formerly HCCC NO. 32 OF 2011)

WILLIAM OTIENDE DIDI (SUBSTITUTED LEONIDA

DONDE AMBUNO).....PLAINTIFF

-VERSUS-

JOASH AGENGO MIGUDI.....1ST DEFENDANT

FRANCIS AGENGO.....2ND DEFENDANT

OCHIENG AGENGO.....3RD DEFENDANT

RULING

1. William Otiende Didi, the plaintiff, vide the Notice of Motion dated 8th March, 2018 seeks for:-

- a) **The court to review and set aside the consent order dated 23rd April, 2013 and filed in court on the 29th April, 2013 and the consequent orders emanating therefrom.**
- b) **That the suit be deemed as abated by the death of the original plaintiff, and**
- c) **Costs be provided.**

2. The application is based on the six (6) grounds on its face and is supported by the affidavit sworn by Geoffrey O. Yogo, learned counsel for the defendants, on the 8th March, 2018 both summarized as follows:-

- a) **That the consent dated 23rd April, 2013 and filed with the court on the 29th April, 2013 compromising the 1st defendant's application dated 18th April, 2013 seeking to substitute William Didi as the plaintiff on the basis of a power of attorney he held from the original plaintiff, Leonida Donde, who had died during the pendency of the suit was executed by counsel on record in error as in law, the power of attorney does not exist beyond the life of its donor.**
- b) **That the consent is therefore illegal and hence untenable in law and should be set aside.**
- c) **That both parties were mistaken on the effect and import of the consent order and it is in the interest of justice that the consent order be reviewed.**

3. The application is opposed by the defendants through their four (4) grounds of opposition dated 12th March, 2018 summarized as follows:-

- a) **That the application does not meet the requirements of Order 45 of Civil Procedure Rules.**
- b) **That there has been unreasonable delay of about four years from the date of the consent to the date of filing the application.**
- c) **That erroneous conclusion of law or evidence is in law not a ground for review as held in Nairobi C. A.A.A No. 275 of 2010 in Pancras T. Swai –Vs- Kenya Breweries Limited.**

4. The learned counsel for the plaintiff and defendants filed their written submissions dated 19th September, 2018 and 6th September, 2018 respectively.

5. The following are the issues for determination:-

a) Whether William Otiende Didi was substituted for the deceased plaintiff on the basis of the power of attorney donated to him by the deceased.

b) Whether the consent to substitute William Otiende Didi is based on an illegality and or misrepresentation of fact.

c) Who pays the cost of the application.

6. The court has carefully considered the grounds on the application, grounds of opposition, affidavit evidence, written submissions by counsel, the record and come to the following determinations:-

a) That this suit was commenced by Leonida Donde Ambuno against Joash Agengo Migudi, Francis Agengo and Ochieng Agengo, through the plaint dated 15th March, 2011. The suit seeks for injunction orders over Kisumu/Nyahera/227 and costs. That the defendants opposed the plaintiff's claim through their statement of defence and counterclaim dated 28th March, 2011 seeking for the plaintiff's suit to be dismissed with costs. They also seek judgement be entered in their favour declaring that the transfer of the suit land from the 1st defendant to the plaintiff was procured through fraud and illegality; order compelling the plaintiff to retransfer the land to the 1st defendant and in default the said documents be executed by an officer appointed by the court; permanent injunction restraining the plaintiff by himself or agents from trespassing or interfering with the defendants use of the said land and costs of the suit.

b) That the 1st defendant filed the notice of motion dated 18th April, 2013 pursuant to **Order 1 Rule 14 of Civil Procedure Rules** among others seeking to have William Otiende Didi substituted as the plaintiff for reasons that the plaintiff had passed on; that he is the real beneficiary of the irregular and illegal seizure of the suit land from 1st defendant; and that he was the one in possession of the said land where he has been farming. That the application was served upon counsel for the plaintiff as confirmed in the affidavit of service sworn by Daniel Roro Ochieng Nyangwara and filed on the 29th April, 2013.

c) That the 1st defendant's application dated 18th April, 2013 was on the 19th April, 2013 fixed for hearing on the 2nd July, 2013 which is the date on the copy served upon counsel for the plaintiff. That William Otiende Didi do not appear to have been served with the said notice of motion at any time, but vide letter of consent dated the 23rd April, 2013, signed by counsel on record for the plaintiff and defendants was filed on the 29th April, 2013 and on the same date adopted by the court. That consequently the amended plaint dated 20th June, 2013 with William Otiendi Didi as the plaintiff was filed on the 26th June, 2013. That in the amended plaint, William Otiende Didi is described as the personal representative of Leonida Donde Ambuno, deceased.

d) That contrary to the claim by the plaintiff that he was substituted for the original plaintiff, now deceased, on the strength or basis of a power of attorney donated to him, that had not been alluded to in the notice of motion dated the 18th April, 2013, its supporting affidavit, or the letter of consent dated 23rd April, 2013. That accordingly, the legality or otherwise of the power of attorney cannot be the basis of deciding whether the consent should be reviewed and or set aside.

e) That the foregoing notwithstanding, the failure to serve William Otiende Didi with the notice of motion dated the 18th April, 2013 and the fact that there was nothing on record to confirm that he had appointed the firm of Otieno, Yogo, Ojuro & Co. Advocates to receive the application and to enter into a consent on his behalf leaves the consent impugned, and its legality questionable. That this is especially so when the nature of the orders sought in the counterclaim are considered, as if granted they would divest the suit land from the estate of the late Leonida Donde Ambuno who is the registered proprietor.

f) That as there is no evidence tendered that William Otiende Didi is the legal representative of the estate of the late Leonida Donde Ambuno, and in the absence of clear indication from him that he had accepted to be substituted for the original plaintiff now deceased, the consent order dated the 23rd April, 2013 and filed on the 29th April, 2013 which it was entered as a court order stands on shaky grounds and for that reason, the same is hereby set aside. That the subsequent process and pleadings filed with William Otiende Didi as the plaintiff are also hereby expunged from the court record. That the prayer for the suit to be marked as abated for reason of death of the original plaintiff is not reasonable at this stage, as William Otiende Didi has been the substituted plaintiff, until now. That it is only fair that both sides be given reasonable opportunity to take the steps to substitute the late Leonida Donde Ambuno, the plaintiff, failure to which appropriate orders would be given.

7. That flowing from the foregoing, the court partly finds merit in the notice of motion dated 8th March, 2018 and is allowed in terms of prayer 2 with costs in the cause. That the parties are given three (3) months to take steps towards substituting the deceased original plaintiff, namely Leonida Donde Ambuno, failure to which her suit may be declared abated. It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 21ST DAY OF NOVEMBER 2018

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel Mr. Mweisigwa for the Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE