



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 111 OF 2010

NICHOLAS KOMBE PEMBEPLAINTIFF

=VERSUS=

1. KENGA KOMBE

2. KALESO KOMBE

3. REGISTRAR OF LANDS-KILFI

4. ATTORNEY GENERAL.....DEFENDANTS

RULING

1. Before me is a Notice of Motion application dated and filed herein on 22nd July 2015. The Motion brought under Order 10 Rule 11 and Order 22 of the Civil Procedure Rules seeks inter alia the following:

-

(a)

(b) **THAT the execution of the Judgement dated 3rd July 2015 be stayed pending the hearing and determination of the application inter-partes.**

(c) **THAT after the hearing of the application inter-partes, the court be pleased to set aside the ex-parte Judgement dated 3rd July 2015.**

(d) **THAT after the hearing of this application inter-partes the court be pleased to declare the suit has abated as against the Defendants.**

2. The Application is supported by an affidavit sworn by Mr. Nyange Sharia Advocate sworn on 22nd July 2015 and is largely premised on the following main grounds: -

(i) That by the time Judgement was delivered herein on 3rd July 2015, both the 1st and 2nd Defendants were dead.

(ii) That the 2nd Defendant died on 2nd January 2011 and was substituted by the wife Kadzo Randu Kombe who also passed away on 24th January 2013.

(iii) That the 1st Defendant also passed away on 12th September 2014 and no Judgement should have been entered as both defendants were dead and had not been substituted.

(iv) That inspite of his knowledge that the defendants were dead as at the time Judgement was delivered, the Plaintiff was abusing the court process by proceeding to execute the decree arising from the Judgement delivered on 3rd July 2015.

3. On or about 29th September 2015, the plaintiffs Advocates on record Messrs Cootow & Associates filed Grounds of Objection to the application on three grounds, namely; that:

(i) The application is bad in law and abuse of the court process.

(ii) The application does not exist and therefore the Applicant's lawyer is purporting to act without instructions; and

(iii) The application has no merit.

4. When the matter came before me on 22nd February 2017, the parties made oral arguments both in support of and in opposition to the Application.

5. Mr. Nyange Advocate for the 2nd Defendant presented the court with the history of the matter and urged the court to allow the application. It was the 2nd Defendant's case that both the 2nd Defendant and his wife were long dead as at the time Judgment was delivered herein. Copies of the 2nd Defendant's Death Certificate as well as that of his wife Kadzo Randu Kombe are annexed to the application. It was the 2nd Defendant's Advocate's case that the Plaintiff is a relative of the 2nd Defendant and was aware of the death of his wife who had been substituted in his stead in this case but chose not to inform the court. The Application also had annexed to it the burial permit of the 1st Defendant who was said to have passed away on 12th September 2014 and it was counsel's submission that the court ought not to have entered Judgement against persons who were dead as the suit had abated upon their deaths.

6. Mr. Tsofo, Learned Counsel for the Plaintiff/Respondent on his part submitted that indeed the Plaintiffs were not disputing the fact that the 2nd Defendants and/or their legal representatives were dead. It was however their case that the Application before the court does not exist as Advocates can only act on a Client's instructions. Since it was admitted that both the 2nd Defendant and his wife had died, and no further substitution had been made thereafter, counsel had no locus to file the present application. It is the Plaintiff's position that the interests in the suit apply to the Estate of the Defendants and since no letters of administration have been issued to anyone, it was not open for Mr. Nyange and/or Kituo Cha Sheria which he represents to file an application two years after the demise of the 2nd Defendant's wife. Finally, the Plaintiff contended that the Judgement delivered on 3rd July 2015 subsists as counsel for the 2nd Defendant cannot appear for a dead client.

7. I have considered the rival submissions made before me. It is not in dispute that both defendants and/or their legal representative died before the Judgement of 3rd July 2015 was delivered. It is a common law rule that all suits and actions must be prosecuted by and against living parties. One of the parties' death can result in abatement of a suit, if there is no right of surviving interest on the heirs of the dead over the issue in dispute. However, a suit can be revived in specific instances if the heirs have a right of action over the dispute.

8. Order 24 Rule 1 of the Civil Procedure Rules makes it clear that the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues. Order 24 Rule 4 of the Civil Procedure Rules however provides as follows:

(a) Where one or two or more defendant dies and the cause of action does not survive or continue against the surviving defendant 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 and shall proceed with the suit.

(b)

(c) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

9. As I have observed hereabove, it is not contested that both the Defendants are dead. The Certificate of Death annexed to the Applicant's Supporting Affidavit marked as "NS3" indicates the date of death of the 2nd Defendant as 2nd January 2011. Annexure "NS7" of the same Supporting Affidavit indicates that the 2nd Defendant's wife Kadzo Randu Kombe who had been substituted as the legal representative upon his death also died on 24th January 2013. To-date, and as the time of the Judgement, no application had been made for the substitution of the said Kadzo Randu Kombe. Accordingly, in terms of Order 24 Rule 3 of the Civil Procedure Rules, the suit as against the 2nd Defendant had clearly abated by the time the Judgement was delivered on 3rd July 2015.

10. Unless revived, the effects of abatement of a suit are far reaching as provided under Rule (1) of Order 24. That Rule states that:

"Where a suit abates or is dismissed under this order no fresh suit shall be brought on the same cause of action."

11. The suit having abated as against the 2nd Defendant, the only remedy in law was for the parties to apply for revival of the same under Rule 7(2) of order 24 of the Civil Procedure Rules. In my view, once a suit has abated, there is no suit and there is really nothing to base any further proceedings upon, unless the suit itself be resuscitated to life first.

12. The suit herein revolves around the ownership of all that parcel of land known as Kaloleni/Vishakani/538 which was said to have been initially registered in the name of one Pembe Murogo Kithi. It is the Plaintiffs' claim that upon the death of the said Pembe Murogo Kithi in July 1985, the 1st and 2nd Defendants who are apparently his cousins unlawfully represented themselves as heirs of the deceased and fraudulently instituted a land case which led to the sub-division of the said Kaloleni/Vishakani/538 into plot numbers 876, 877 and 878. It is these new sub-divisions that the Plaintiff sought vide this suit to have cancelled. Arising from the foregoing, it is evident that the cause of action herein survives the death of the defendants hence the intent of the Plaintiff to proceed with execution of the decree resulting from the Judgement delivered on 3rd July 2015 and the concomitant push by persons so far unknown to stop the execution.

13. While it is not clear from the provisions of Order 24 Rule 7(2) of the Civil Procedure Rules whether a representative of the deceased defendant can also make an application to revive a suit, it is my view that in the present constitutional dispensation where locus standi has been substantially enlarged, a personal representative of any party in the suit who can show legitimate interest in the revival of the case may apply for the suit to be revived.

14. The application before me appears bent on preserving the respective estates of the 1st and 2nd Defendants on the basis that they are dead. In my view, the application seeks to preserve and enjoy the benefits accruing to the estates of the defendants as a result of the abatement of the suit while avoiding responsibility for any burdens associated with the intended course of action. This application was made more than two years after the death of the 2nd Defendant. It was not filed within one year as envisaged under Order 24 Rule 3 and is indeed not the application envisaged under Order 24 Rule 4 of the Civil Procedure Rules. It neither bears a prayer for the revival of the suit nor the reasons why it was not made until the time the Judgement was delivered and/or the Plaintiff moved to execute. As I have said, there is in my view nothing to prevent the Applicant from applying, for good reason, for the revival of the suit

after which, he may make any relevant application.

15. I think it is also proper for me to address myself to the Judgment. In the course of the submissions, it was the Plaintiff's case that the Judgement delivered by the Hon. Justice Angote on 3rd July 2015 subsists and that the decree extracted herein on 2nd September 2015 is proper and enforceable. With respect I do not think so. It is now evident that the Judgement was issued in error occasioned by the failure of the Plaintiff to disclose to the court the fact that the Defendants were both dead and that even the legal representative to the 2nd Defendant had at the time of the decision been dead for more than two years. It would appear there was material non-disclosure before the decision was made. Orders which are so obtained are irregular and are to be set aside *ex debito Justitiae*

16. In *Isaacs vs- Robertson (1984) 3 All ER 140*, it was held that:

“If (an order) is irregular, it can be set aside by the court that made it on application....to that court either under the rules of court dealing expressly with setting aside orders for irregularity or *ex debito justitiae*.”

17. In the Owners of *Lilian” S” vs- Caltex (Kenya) Ltd (1989) KLR 1 at 38* the court commenting on the need for candour and full disclosure in proceedings observed thus:

“It is axiomatic that in *ex-parte* proceedings, there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the *ex-parte* application, even though the facts were such that, with full disclosure, an order would have been justified.....:

18. In my considered view a party cannot be allowed to enjoy orders obtained through non-disclosure of material facts. The Judgement of the Honourable Angote J. delivered on 3rd July 2015 falls in this unfortunate category and I hereby, in the interest of Justice, set it aside.

19. The upshot of all this is that the application dated 22nd July 2015 is dismissed. The Judgement of Angote J. delivered on 3rd July 2015 and the resultant decree issued by this court on 2nd September 2015 is also hereby set aside.

20. Each party to bear their own costs.

Dated, signed and delivered in Malindi on 7th day of April 2017.

J.O. OLOLA

JUDGE