



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 285 OF 2014

LIBYA OIL KENYA LIMITED PLAINTIFF

- V E R S U S -

IRENE JULIET OTINGA 1ST DEFENDANT

ALEX SHIVATSI 2ND DEFENDANT

JAMES MICHAEL3RD DEFENDANT

HOROBA LIYAI 4TH DEFENDANT

CORNEL SHISANYA 5TH DEFENDANT

RULING

1. The court is considering a Preliminary Objection dated 28th October filed by Plaintiff against the 5th Defendant's application dated 27th April 2015. The objection is on the following grounds:
 - i. The 5th Defendant is not an administrator or an executor of the estate of the Deceased within the meaning of section 2 and 3 of the Succession Act.
 - ii. The 5th Defendant has no locus standi to file the Application and the Counterclaim on behalf of or over the estate of the Deceased in absence of Grant of Letters of Administration or Grant of Probate of written will and/or a limited grant for that purpose.
 - iii. The capacity to prosecute or file any suit on behalf of the estate of the Deceased inheres in the administrators duly appointed by the court.
 - iv. On the above grounds the court should strike out the Application and the Counterclaim filed by the 5th Defendant on behalf of the estate of the Deceased.
2. While canvassing the Preliminary Objection, Mr. Karega, learned counsel for the Plaintiff submitted that the 5th Defendant has a right to defend himself but not to ask for prayers that can be sought by the estate of the deceased. That the orders sought by the Plaintiff are all on account of the suit property, the owner of whom is deceased. That suits by or against a deceased person must be done by a legal representative. Mr. Karega prayed that the application and the counterclaim dated 27th November 2014 be struck out for being filed without *locus standi*.
3. Mr. Munyithya, learned counsel for the 1st Defendant submitted that there is no document placed before the court which places the 5th Defendant in the shoes of the deceased. Counsel supported the Objection by the Plaintiff and urged the court to strike out the application and the counterclaim.
4. Ms. Rajab, learned advocate for the 2nd and 3rd Defendants associated herself with the submissions of both Mr. Karega and Mr. Munyithya. Counsel also relied on the 2nd and 3rd

- Defendants' Grounds of Objection dated and filed on 4th November 2015 to the effect that the 5th Defendant's application is in contempt of the orders of the Court of Appeal made on 8th April 2014 in Civil Application No. 1 of 2014 between CORNEL SHISANYA -VS- IRENE JULIET OTINGA & 8 OTHERS which had stopped the 5th Defendant from intermeddling with the estate of the deceased. Counsel urged the court to allow the Objection.
5. The 5th Defendant, acting in person, submitted that he is an active party with the right to defend the action. He submitted that the objection has no merit as the issue of *locus standi* is not a question of law. The 5th Defendant stated that he has a limited grant from Succession Cause No. 826 of 2011 issued by the Kakamega High Court to the 4th Defendant. That the 4th Defendant donated to him, the 5th Defendant, the power of attorney on her behalf and on behalf of the deceased's estate.
 6. The 5th Defendant submitted further that since he has been sued, he cannot be silenced adding that he does not know why the Plaintiff brought the suit against him. The 5th Defendant urged that the Objection be dismissed and the matter be allowed to proceed for hearing on merit.
 7. In rejoinder, Mr. Karega submitted that the application is signed by the 5th Defendant without showing that it is signed on behalf of the 4th Defendant. That there is no Power of Attorney filed and that a grant issued to an administrator cannot be donated to a 3rd Party. Further that the grant in Succession Cause No. 826 of 2011 does not give any power to institute a suit.
 8. I have considered the issues as addressed by the submissions of the parties herein. It is not in dispute that the 5th Defendant has been sued by the Plaintiff in the claim before the court. In a rejoinder, the 5th Defendant filed an application seeking temporary orders of injunction against his co-defendants and the plaintiff. He also filed a defence and a counter-claim. The effect of the counter-claim is that he has brought a claim on behalf of the deceased estate. Does he have capacity to do so?
 9. In his submissions, he stated he cannot be silenced because he has been sued. Having been sued, he has a right under the law to defend himself. The question is; does this right extend to grant him locus to bring a counter-claim where he has no direct legal interest in the property? The suit plot no MN/I/7665 is registered in the name of Ezekiel Luyali-deceased. In both the application and the counter-claim, the 5th Defendant has not pleaded that he has brought the suit on behalf of the estate of the deceased. He has pleaded seeking direct orders to stop the Plaintiff and his co-defendants from dealing with the suit property. However, since he is not the proprietor of the land in dispute he cannot sustain the claim as pleaded.
 10. On whether he has letters of administration, the 5th Defendant avers that he has a power of attorney donated to him by the 4th Defendant. The 4th Defendant was issued with a limited grant in Kakamega Succession Cause no 826 of 2011. The grant annexed as C.L.S3 in the supporting affidavit specifies that it is limited **for purposes of signing a lease and drawing some monies from the bank**. It did not give capacity to the 4th defendant to file suit. The 5th Defendant relied on this grant to commence this proceeding. Yet on the face of it, the court did not grant such an order.
 11. The 5th Defendant submitted further that he was donated a power of attorney by the 4th Defendant. He did not annex a copy of the power of attorney as donated by the 4th Defendant. In any event, the 4th defendant can only donate powers in respect of what she has. If the Court did not grant her authority to file suit, then she cannot donate what she herself does not own/have. Secondly, the 4th Defendant can only donate power in respect of her property and not as relates to the deceased estate as she only derives her authority to administer the estate from the court. As submitted by Ms Rajab advocate, the 5th Defendant in bringing this application and the counter-claim is intermeddling with the deceased estate. He was aptly told as much by the Court of Appeal in civil appeal no 1 of 2014. By going against the finding of the Court of appeal he is acting in contempt of the orders of that court. His application as filed is an abuse of the court process.
 12. Consequently I find merit in the preliminary objection raised. The 5th Defendant has no locus to bring the application dated 27th April 2015 and the counter-claim dated 24th November 2015 both filed in court on 6th October 2015. The two documents are hereby struck out from the record with costs to the Plaintiff and the 1st 2nd and 3rd Defendants.

Ruling Dated & Delivered in Mombasa this 11th day of April 2016

A. OMOLLO

JUDGE