



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

HCCC NO.7 OF 2008

NAOMI MICHELLE LEVY.....PLAINTIFF/APPLICANT

=VERSUS=

GIUSEPPE BOLZONI.....DEFENDANT/RESPONDENT

R U L I N G

1. On 8th July 2015, this court dismissed, for the second time, the Plaintiff's suit for non-attendance and proceeded to hear the Defendant's Counter-claim. The matter is awaiting the delivery of Judgment.
2. The Plaintiff has now filed an Application dated 31st August, 2015 seeking for the following orders:
 - (a) **THAT the ex-parte hearing and proceedings and judgment ordered to be delivered on notice be set aside and stayed respectively.**
 - (b) **THAT the affidavit sworn by SYLVIA BOLZONI On the 29th April 2015 and the subsequent oral testimony in its support be struck out/expunged from record.**
 - (c) **THAT cost be in the cause.**
3. The Application is premised on the ground that the letter of administration in respect of the Estate of the deceased was issued to Laura Bolzoni on 21st May 2010; that the said Laura Bolzoni has never appeared in court; that for a party to be substituted, an Application ought to be made to court and that Silvia Bolzoni is not a competent party to be substituted as a Defendant for lack of capacity.
4. On those grounds alone, the Plaintiff is seeking to set aside the proceedings of this court.
5. The Defendant's advocate filed a Replying affidavit in which he deponed that Silvia Bolzoni obtained limited grant on 15th December, 2010; that on 28th March 2011, the parties agreed to have Silvia Bolzoni to be enjoined in the suit as a party and that the consent of the parties on the substitution of the Defendant was adopted by the court.
6. The Defendant's advocate deponed that when the Plaintiff's advocate raised the issue of the locus standi of Silvia Bolzoni by way of an Application dated 11th February, 2011, the court dismissed the Application.
7. As I have already stated, the Plaintiff's suit was dismissed for non-attendance and the court proceeded to hear the Defendant's counterclaim. The Plaintiff is seeking to set aside the dismissal of her suit and setting aside the proceedings of this court on the ground that the witness who gave

- evidence in respect to the Counter-claim, Silvia Bolzoni, is not a competent party.
8. The issue of whether Silvia Bolzoni, DW1, is a competent witness or not could only have been raised by the Plaintiff at trial. The Plaintiff cannot raise that issue by way of an Application to set aside the proceedings of 8th July, 2015 in which she never participated.
 9. In any event, the record shows that Silvia Bolzoni was enjoined in this suit by the consent of both parties after obtaining limited letters of administration. The said consent was adopted as an order of the court. Consequently, that issue cannot be raised at this stage.
 10. For those reasons, I dismiss with costs the Application dated 3rd September 2015.

Dated and delivered in Malindi this **2nd** day of **October** 2015.

O. A. Angote

Judge