



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT
AT MOMBASA
CIVIL CASE NO. 110 OF 2013

1. HASSAN ATHMAN KIBWANA

2. BIMVUA JAFU ABDALLA (Suing on behalf of themselves and on behalf of other trusteesPLAINTIFF

- V E R S U S -

MWIZAGU MWIJAKA 1ST DEFENDANT

SALAMA M. MWINYIFAKI 2ND DEFENDANT

BIHINDI MWIJAKA M 3RD DEFENDANT

ABDALLA SALIM 4TH DEFENDANT

RULING

A Preliminary Objection was raised in this case by the respondents that the applicants in this case have no locus standi to bring this suit in that the plaintiffs have no letters of administration for the estate of the deceased under the law of Succession Act Cap. 160. Further that under Order 1 rule 13 (1) and (2) and rule 13 (2) authority so to act must be in writing. That the authority to act dated 27th June, 2013 is defective in that one trustee Kibwana has signed for another person without a power of Attorney.

The applicants opposed this application. They annexed an order dated 17th February, 2010 showing that they were appointed additional trustees to the WAKF created by the deceased who was a proprietor (½) of the interest of the plots subject matter to this suit. The applicant argued that a trustee has locus and authority to file suit on behalf of the estate of a deceased person. The applicant argued that a defect in form should be convassed in Court and not be raised as Preliminary Objection. The applicant further argues that although one trustee signed for another who is out of jurisdiction this is not fatal to the case since Order 31 (2) allows a trustee not in Kenya not to be included.

It is not in dispute that Hassan Athman Kibwana, Bimvua Jaffu Abdalla Mohamed Omar Kibwana and Kibwana Abdalla Athman were appointed as additional trustees to the Wakf created by Kibwana Bin Jaffu dated 16th June 1944 on 8th February, 2010 by this Court and to that effect was issued on 11th February, 2010.

In the authority to Act in this suit Hassan Athman Kibwana signed for Mohamed Omar Kibwana.

However the said Hassan Athman Kibwana, Bimvua Jaffu Addalla filed this suit in their own right as trustee pursuant to the aforesaid order granted by the Court.

The Court was not told what prejudice will be suffered by the defendants arising from the fact that one trustee signed for another who is out of the country. This suit relates to land parcel No. 2324 IV MN. I do not think this suit should be dismissed because of a mere technicality of procedure that does not go to the root of the subject matter. The Constitution of Kenya Article 159 (d) requires that justice shall be administered without undue regard to procedural technicalities. I find this a mere technicality. The real issue between the parties should be canvassed so that the ends of justice should not be defeated. I find the Preliminary Objection without merit and dismiss it with costs.

Dated and delivered in open Court at Mombasa this 18th day of October, 2013.

S.N. MUKUNYA

JUDGE

18.10.2013

In the presence of:

Umalla Advocate for Keyatta Advocate the plaintiffs

Koeh Advocate for Chebkoka Advocate for the defendants