



Mwavumbani & 85 others v Msambweni Development Company Limited (Environment & Land Case 99 of 2014) [2023] KEELC 16464 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16464 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 99 OF 2014**

**SM KIBUNJA, J
MARCH 22, 2023**

BETWEEN

MOHAMED ABDALLA MWAVUMBANI & 85 OTHERS PLAINTIFF

AND

MSAMBWENI DEVELOPMENT COMPANY LIMITED DEFENDANT

RULING

1. When this matter came up for mention on the March 6, 2023, Mr Arunga for Otuoma, Mr Akanga, Mr Ngombo and Mr Nyange advocates addressed the court on which counsel is on record for the petitioners/applicants and the status of the petition. That after hearing the submissions by the learned counsel, the court indicated that it would need time to peruse the record and reserved its ruling/directions for today. I have after carefully perusing the court record and giving due considerations to the submissions by all counsel come to following findings;
 - a. That this suit was commenced through the originating summons filed through Ms Musyoki Mogaka & Co Advocates on the May 5, 2014. An authority to act in favour of Mohamed Abdalla Mwavumbani was also filed with the pleadings.
 - b. The respondents entered appearance through the memorandum filed by Ms Akanga Alera & Associates Advocates dated the May 9, 2014.
 - c. Ms Kemosi Mogaka & Co Advocates came on record for the applicants through the notice of change of advocates dated the February 16, 2015.
 - d. The 1st applicant filed the notice to act in person on behalf of the applicants dated the November 23, 2018.
 - e. The applicants then appointed Mr Nyange Sharia advocate of Kituo cha Sheria who filed the notice of appointment dated the February 27, 2019.



- f. Through the notice of change of advocates dated the October 6, 2020, Ms Steve Kithi & Co Advocates came on record for the plaintiffs [applicants] in place of Kituo Cha Sheria.
- g. That on the October 14, 2020, Mr Nyange, Kithi and Akanga advocates addressed the court about a consent settling this suit and others. The court directed that the issue of the applicants representation as between Mr Nyange and Kithi be settled first and that Mr Nyange be served with a copy of the consent. There followed the mention of January 27, 2021 but only Mr Nyange was present. During the subsequent mention of March 9, 2021, Mr Nyange and Akanga advocates were present and the court *inter alia* directed as follows;

“ ... So far there is no challenge to the notice of change of advocates filed by Ms Steve Kithi & Co I will thus take it that it is Mr Kithi acting for the plaintiffs and not Mr Nyange.

On the consent, I see no problem with it. It is hereby adopted as an order and decree of the court and the same may be executed. Pursuant thereto, this case is marked settled by consent. The file be closed orders accordingly.”

- h. Mohamed Abdalla Mwavumbani, the 1st applicant, filed the notice to act in person for the applicants dated the July 2, 2021. He also filed a notice of motion of even date and later amended notice of motion dated the July 8, 2021. The court directed on the September 23, 2021 that as there was already a judgement in the case, the applicant was to comply with order 9 rule 9 of the Civil Procedure Rules first. It would appear the applicant, Mr Mohamed Abdalla Mwavumbani passed on before prosecuting the application and or complying with the court’s directions.
- i. Hassani Rashidi Shee, filed the notice of motion under certificate of urgency dated the March 15, 2022 seeking for leave to substitute Mohamed Abdalla Mwavumbani, who had died on the January 5, 2022, and proceed with the suit. He indicated among others that the other applicants had authorized him to act for them during the meeting of March 5, 2022. The duty court directed on the March 16, 2022 that the application was not urgent and that it be served for *inter partes* hearing on the April 5, 2022. However, on that date Mr Shee, applicant, disclosed that he had not served, and the application was rescheduled to the June 13, 2022. On that date though Mr Akanga for the respondent was present, the application was again adjourned to the July 11, 2022 and Mr Shee directed to ensure Mr Nyange and Kithi advocates were served. The application was heard on the September 29, 2022 and dismissed with no orders as to costs *vide* the ruling delivered on the November 11, 2022.
- j. That a consent dated the November 16, 2022 between Mr. Nyange Sharia advocate of Kiuo cha Sheria and Mr Hassani Rashidi Shee was filed on the November 17, 2022 authorizing Mr Hassani to taken over the conduct of the suit. There is on record another consent dated the November 16, 2022 between Mr Hassani and Ms Steve Kithi & Co Advocates, but it does not appear to have been formally filed as it has no court stamp.
- k. On the November 21, 2022 Mr Hassan Rashidi Shee fixed the matter for mention for directions on the January 25, 2023. On that date, he appeared before me and indicated that he is the 20th applicant and that he had not served a mention notice upon the respondent. The matter was rescheduled for the March 6, 2023 with directions to serve. It is on that date that the various counsel addressed the court and sought for directions, subject matter of this ruling.



- i. That *vide* the notice of appointment of advocates dated the March 3, 2023, Ms Okore Otuoma & Co Advocates came on record for Mohamed Abdalla Mwavumbani, the applicant.
 - i. That from the forgoing, the court directs that;
 - ii. This suit was settled through the order issued on the March 9, 2021 adopting the consent and marking the suit settled. That order has not been reviewed, set aside or successfully appealed against.
 - iii. That the issue of the applicants' legal representation as of that date as between Mr Nyange and Mr Kithi was settled on the March 9, 2021 by the court confirming that the notice of change of advocates dated the October 6, 2020 by Ms Steve Kithi & Co Advocates had not been challenged. That there is no record of Mr Ngombo coming on record for the applicants after Mr Nyange or at any other time before or after. It follows therefore that Mr Nyange and Mr Ngombo advocates not being on record for any of the parties herein, have no right of audience, unless and until after being formally appointed. The court however thanks the two counsel for helping to bring out the issues of applicants' legal representation and the suit being settled by consent. I take their submissions to have been given in their capacity as officers of the court.
 - iv. That the court subsequently gave its directions *vide* the ruling of November 11, 2022, on what Mr Hassan Rashidi Shee or any other applicant need to do to lead the other applicants now that Mr Mwavumbani has passed on. That direction has not been complied with.
 - v. That as there is no dispute that Mr Mohamed Abdalla Mwavumbani, 1st applicant died on the January 5, 2022, then he could not have been the one who instructed Ms Okore Otuoma & Co Advocates to file the notice of appointment of advocates dated March 3, 2023, to come on record for him. A person who died more than a year ago is incapable of instructing counsel, unless through a legal representative. The notice of appointment of advocates dated and filed on March 3, 2023 is therefore hereby struck out.
 - vi. That the parties herein should consider having the decree issued for subsequent execution in accordance with the court order of March 9, 2021.

2 It is so directed.

DATED AND VIRTUALLY DELIVERED THIS 22ND DAY OF MARCH 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of;

Applicants: Absent

Respondents: Absent

Counsel : Mr. Akanga for Respondents.

Mr. Nyange, Ngombo and Mr. Arunga for Otuoma for Plaintiff

Wilson – Court Assistant.

S. M. Kibunja, J.



Elc Mombasa.

