



**Hubesi v Osundwa & another (Environment & Land Case
7 of 2016) [2023] KEELC 16237 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16237 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 7 OF 2016
DO OHUNGO, J
MARCH 20, 2023**

BETWEEN

GRACE NAKHUMICHA HUBESI PLAINTIFF

AND

MARIAM AMAROBÉ OSUNDWA 1ST DEFENDANT

SAIDA OGOYA OSUNDWA 2ND DEFENDANT

RULING

1. The plaintiff filed this matter on January 26, 2016, through her plaint of the same date. She prayed for judgment against the defendants for eviction from land parcel number Butso/223 and a permanent injunction restraining the defendants, their representatives and assigns from trespassing on the said parcel.
2. Together with her plaint, the plaintiff filed a witness statement signed by Hussein Hubesi Andama. Later, the plaintiff filed a witness statement signed by Ann Kusa Olunga on November 23, 2016.
3. Hearing of the matter commenced on February 1, 2023. The plaintiff testified as PW1. She stated that Hussein Hubesi Andama was her husband and that he passed away on February 21, 2020. She added that Ann Kusa Olunga also passed away on December 16, 2022. She urged the court to accept the witness statements of the two deceased witnesses as evidence.
4. Mr Mukabwa, learned counsel for the plaintiff, relied on Section 33 of the *Evidence Act* and Section 19 of the *Environment and Land Court Act* and submitted that the witness statements should be admitted as evidence since the witnesses are deceased and cannot testify.
5. Ms Rauto, learned counsel for the defendants, opposed the application and argued that the reasons advanced are not sufficient and do not meet the conditions under the law cited. She argued that the mere reason that the two persons are dead is not enough and that the defendants will be deprived of



the right of cross-examination if the application is allowed. Thus, she urged the court to dismiss the application.

6. I have considered the application and the submissions. The entry point of the applicant's case is that Hussein Hubesi Andama and Ann Kusa Olunga are both deceased. Beyond the allegation of death, nothing has been availed to support the claim of death. Considering that the two were to be the plaintiff's witnesses hence well known to her, nothing would have been easier than to avail copies of certificates of death or burial permits. No explanation was offered as to the failure to provide documentary evidence of death.
7. As Ms Rauto correctly argued, merely because a witness is deceased is not enough reason to warrant admitting his statement, hence depriving the opposite party the right of cross-examination. Indeed, Section 33 of the *Evidence Act* lays down conditions to be met before such a statement is admitted and circumstances in which such a statement can be admitted. The plaintiff has neither fulfilled those conditions nor placed herself within the established circumstances. Even the requirement at Section 19 of the *Environment and Land Court Act* that the court acts expeditiously without undue regard to procedural technicalities does not come to the aid of the plaintiff in view of her failure to satisfy the requirements of Section 33 of the *Evidence Act*.
8. In view of the foregoing, I find no merit in the application and I therefore dismiss it with costs to the defendants.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF MARCH 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Mukabwa for the plaintiff

Ms Rauto for the defendants

Court Assistant: E. Juma

