



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Ngala & 2 others v Mwangi; Mwangi (As Legal Representative of the Estate of Alice Waithera Mwangi, Deceased) (Applicant) (Environment & Land Case 61 of 2018) [2023] KEELC 18314 (KLR) (26 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18314 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND CASE 61 OF 2018**

**SM KIBUNJA, J**

**JUNE 26, 2023**

**BETWEEN**

**KAULI BEJA NGALA ..... 1<sup>ST</sup> PLAINTIFF**

**ELIJAH BEJA NGALA ..... 2<sup>ND</sup> PLAINTIFF**

**SALOME MEDZA CHIRIMA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**ALICE WAITHERA MWANGI ..... DEFENDANT**

**AND**

**ROSABELL MUTHONI MWANGI (AS LEGAL REPRESENTATIVE OF THE ESTATE OF ALICE WAITHERA MWANGI, DECEASED) ..... APPLICANT**

**RULING**

Notice Of Motion Dated The October 24, 2022

1. The Applicant moved the court *vide* the notice of motion dated the October 24, 2022 seeking for *inter alia*;
  - a. The substitution of Alice Waithera Mwangi, the defendant, who is now deceased with Rosabell Muthoni Mwangi.
  - b. The suit be revived for hearing and determination on merits and pleadings be amended to join Rosabell Muthoni Mwangi, the legal representative of the estate of the estate of Alice Waithera Mwangi, deceased, as the defendant.
  - c. The *exparte* judgement entered in favour of the plaintiffs on the January 28, 2020 and all consequential orders and proceedings be set aside.



- d. That the court be pleased to grant any other relief it deems fit and necessary to grant to meet the ends of justice.
- e. The costs of the application be met by the plaintiffs.

The application is based on the nineteen (19) grounds on its face and supported by the affidavit sworn by Rosabell Muthoni Mwangi, the applicant, on the October 24, 2022. It is the applicant's case that the defendant, who was her mother, died on the November 24, 2009. That the defendant, now deceased, was the registered proprietor of Kwale/Mwanguda/57, measuring 11.6 hectares. That the defendant had purchased the suit property in 1994 and got registered as proprietor on the December 20, 1994. That the deceased had employed one John Karuga to act as caretaker on the said land. That John Karuga brought in another caretaker as a tenant paying him Kshs.500 per year, who came on to the land with his wife, the 3<sup>rd</sup> plaintiff, and their children, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs. That in 2018 or thereabouts, the applicant leased the suit property to Kwale International Sugar Company to grow sugarcane for Kshs 282,366 per year. After the death of the defendant, the plaintiffs continued staying on the suit property as caretakers after the husband to the 3<sup>rd</sup> plaintiff passed on. That the applicant and her siblings then filed a petition for letters of administration for their deceased mother's estate through the Public Trustee in September 2020, and while conducting a search over the suit property on the 18<sup>th</sup> June 2021 they discovered the plaintiffs had illegally acquired registration with the said land on the August 24, 2020 without their knowledge. That the applicant instructed their counsel to file a caution against the suit property's title. That the applicant did not know of this suit until after conducting the search. That as the defendant had died before the suit was filed, no service could have been effected on her, and the *ex parte* judgement herein had been obtained irregularly. That the registration of the plaintiffs as proprietors of the suit property and the issuing of the title thereof was also irregular, unlawful and unprocedural. That the plaintiffs have prevented the applicant and her siblings from accessing the suit property thereby hindering their enjoyment of the same.

2. The application is opposed by the plaintiffs through the replying affidavit sworn by Kauli Beja Ngala, the 1<sup>st</sup> plaintiff, on the December 15, 2022 deposing *inter alia* that the applicant has failed to establish any relationship between her and the defendant; that the suit property is their ancestral land and they have lived on it all their lives and do not know how the defendant acquired its ownership; he denied that they were caretakers on the suit land; that the suit papers were served upon the defendant through advertisement on the September 15, 2018; that they were registered as proprietors of the suit property through the court order and had not known of the death of the defendant; that the applicant has failed to disclose that another suit Kwale Senior Principal Magistrate's Court MC ELC NO E063 of 2021 was pending in court and she should choose which court she want the matter to be heard. That the application should be dismissed with costs.
3. The applicant filed a supplementary affidavit sworn on the February 10, 2023 responding to the new matters raised in the replying affidavit. She among others deposed that she has been appointed as the administrator of the estate of the defendant, deceased. That she has challenged the regularity of the judgement herein as there could not have been a proper service on a defendant who was deceased. That the court has the power to grant her application.
4. The learned counsel for the applicant and plaintiffs filed their submissions dated the February 10, 2023 and March 1, 2023 respectively, which the court has considered.
5. The following are the issues for the determination by the court;
  - a. Whether the has made a reasonable case to be substituted for the defendant.



- b. Whether the applicant has met the threshold for setting aside the *ex parte* judgement and the consequential orders.
  - c. What orders are fair and just to issue.
  - d. Who pays the costs of the application.
6. The court has carefully considered the grounds on the application, the affidavit evidence by both sides, submissions by the learned counsel, superior courts decisions cited thereon, the record and come to the following determinations:
- a. The record confirms that this suit was commenced through the originating summons dated the February 14, 2018 and filed on the March 15, 2018 through Ms Birir & Company Advocates, by the plaintiffs against the defendant seeking to be registered as proprietors of the suit property under adverse possession. The originating summons was filed together with the supporting and verifying affidavits sworn by Kauli Beja Mgala, the 1<sup>st</sup> plaintiff, on the February 14, 2018, his witness statement, unsigned authority to among others plead, list of witnesses, list of documents, and copy of green card for the suit property. The green card shows that the register was opened on the May 21, 1992 and the defendant became the registered proprietor of the suit property on the December 20, 1994. That vide the notice of motion dated the April 11, 2018 the plaintiffs applied to be allowed to serve the suit papers through registered post as efforts to trace her for personal service was unsuccessful. The plaintiffs were on the May 29, 2018 allowed to serve the defendant through registered post and advertisement in a newspaper. That as per the affidavit of service of Kipkurui Ng'eno Birir sworn on the 8<sup>th</sup> November 2018 and filed on the November 14, 2018 the advertisement was carried out in the Standard Newspaper of 15<sup>th</sup> September 2018. The plaintiffs filed a further list of documents annexing among others a certified true copy of the green card in respect of the suit property that confirms that the land was first registered in the name of John Mwangi Gakuru on the May 21, 1992. The defendant did not enter appearance or file a reply to the originating summons. The suit was then set down for hearing and heard on the October 17, 2019 with the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs testifying as PW1 and PW2 respectively. The court then delivered its judgement in favour of the plaintiffs on the January 28, 2020 and a decree was issued on the June 3, 2020.
  - b. That from the documents attached to the applicant's affidavit, it is apparent that the applicant applied for and obtained a Limited grant of letters of administration on August 20, 2021 through Mombasa CM Succession Cause NO E301 of 2021. It is also confirmed through the copy of certificate of death number 32159 that one Alice Waithira Mwangi, that the court takes to be the defendant, died on the November 24, 2009. It is further shown that the plaintiffs were on the June 18, 2021 registered as the proprietors of the suit property.
  - c. That though the plaintiffs in answer to the applicant's application have deposed that they did not know that the defendant had died, the inevitable conclusion from the certificate of death availed to the court by the applicant is that by the time this suit was filed in 2018 and service being effected through the Standard Newspaper advertisement later the same year, the defendant had been dead for about nine (9) years. The plaintiffs' have not provided evidence to challenge that presented by the applicant about the date of death of the defendant, or to show that the defendant was not dead by the time they filed and prosecuted their originating summons.
  - d. That in view of the finding above that the defendant had died about nine (9) years before the filing of this suit, it follows that the plaintiffs' originating summons, the proceedings that



ensued and the judgement of the January 28, 2020 were all against an already dead person who was incapable of being personally served and could not participate in person or through counsel in the proceedings that ensued and culminated in the said judgement now sought to be set aside. As submitted by counsel for the applicant, the judgement herein cannot be said to have been regularly obtained and the court has the jurisdiction to set it aside ones it is shown that a dead defendant had been sued, allegedly served through advertisement and judgement obtained her. See the case of *Patel versus East Africa Cargo Services Ltd* [1974] EA 75.

- e. The plaintiffs failed to ensure they had sued a proper defendant in their claim and instead sued a dead person as the defendant. That even where a living person is sued and later dies in the cause of the proceedings, such a suit is caught up with the abatement provisions under Order 24 of *Civil Procedure Rules* if no application to substitute the dead defendant is filed within one year of their death. The plaintiffs herein should have considered suing the defendant's legal representative to stand a chance to obtain orders that confer good title to them. A suit against a dead person is indeed a nullity as has been held by the superior courts including in the cases of *Mohamed Abushiri versus Suleiman Abdalla Hassan* (2012) eKLR, and *Latifa Yakk & 4 Others versus Abanshudin M Kassam* HCCC No 226 of 2000, cited by the learned counsel for the applicant.
  - f. That taking it that the plaintiffs did not know that the defendant had already passed on when they filed this suit against her, and as the applicant has expressed preparedness to be substituted for the deceased defendant, it is only fair that the applicant, as the administrator/ legal representative of the deceased estate, be given an opportunity to defend this suit. That is the only way that the estate of the defendant will be accorded an opportunity to participate in the proceedings and for the court to decide the case after a merit hearing.
  - g. That in view of the forgoing, the court is of the view that costs in the application abide the outcome of the suit, notwithstanding the provisions of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya.
7. That flowing from above, the court finds merit in the application dated the October 24, 2022 and orders as follows;
- a. That the applicant is hereby substituted as the defendant, in her capacity as the legal representative, in place of Alice Waithera Mwangi, deceased. That accordingly, the plaintiffs do file and serve amended originating summons incorporating the substitution hereof, list of witnesses, documents and statements within the next thirty (30) days from today.
  - b. That the proceedings, judgement delivered on the January 28, 2020, and the decree issued thereof were all nullities and are hereby set aside for having been against a defendant who had died about nine (9) years before the originating summons were filed.
  - c. That the registration of the plaintiffs as proprietors of the suit property on the June 18, 2021 is hereby declared null and void.
  - d. The relevant Land Registrar is hereby ordered to call for the title documents issued to the plaintiffs in respect of the suit property and to rectify the register of the said land by cancelling all the entries after entry number 4 to reinstate ownership thereof to Alice Waithera Mwangi, now deceased, as per entry number 3.
  - e. The costs in the application to abide the outcome of the suit.
- 8 It is so ordered.



**DATED AND VIRTUALLY DELIVERED THIS 26<sup>TH</sup> DAY OF JUNE 2023.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of;

Plaintiffs : Absent

Defendant: Absent

Applicant : Absent

Counsel : Mr. Birir for the Plaintiff

Mr Obonyo for the Defendant/Applicant.

Wilson – Court Assistant.

S. M. Kibunja, J.

Elc Mombasa.

