



**Ali & another v Gure & 9 others (Environment & Land Case
32 of 2020) [2023] KEELC 19202 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19202 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 32 OF 2020**

**CK NZILI, J
JULY 24, 2023**

BETWEEN

ABDIKARIN MOHAMED ALI 1ST PLAINTIFF

SHEIKH HASSAN SHEIKH ALIGELI 2ND PLAINTIFF

AND

ALI DIGALE GURE 1ST RESPONDENT

MOHAMED ABDI MAOW 2ND RESPONDENT

HASSAN ABDI MAOW 3RD RESPONDENT

NOOR GEDI ELMI 4TH RESPONDENT

DIHISON MOHAMED ELMI 5TH RESPONDENT

ADOW SALAT DAGANE 6TH RESPONDENT

OMAR JELLE ADAN 7TH RESPONDENT

ISSE IDLE ADAN 8TH RESPONDENT

ABDULLAHI ADAN ELMI 9TH RESPONDENT

SHOBOW MOHAMED ELMI 10TH RESPONDENT

RULING

A. Introduction

1. This matter has had a chequered history. It started at the Chief Magistrate Court Garissa, Garissa PMCC No. 55 of 2010. Through High Court of Garissa Misc. Application No. 7 of 2012, the suit was transferred to High Court Garissa. It became High Court Garissa Civil Suit No. 26 of 2012. Further,



and given that there was no ELC High Court Garissa at the time, Hon. Dulu, J, by an order dated 21.7.2015, transferred the suit to the nearest ELC court, Kerugoya Law Courts.

2. The suit became Kerugoya ELC No. 89 of 2015. Hon. Justice Boaz Oloo had, during his handling of the matter by a ruling dated 3.6.2016, issued injunctive orders pending the hearing and determination of the suit.
3. Following the establishment of an ELC at Garissa, the file by an order dated 23.2.2017 was forwarded to Garissa Law Courts as ELC No. 1 of 2017. The suit was substantially heard until Cheron J 26.6.2020, recused himself from hearing the case on 26.6.2020.
4. By directions dated 15.7.2020, S. Okongo J, the then presiding Judge ELC Kenya, transferred this file to this court for hearing and disposal. The Deputy Registrar Garissa, by an order dated 13.8.2020, transmitted the file to this court under the directions of the Presiding Judge, where it acquired the current suit number. By an order dated 28.1.2021, parties agreed to start the matter de novo based on the pleadings already filed, exhibits previously produced were returned to the parties, and the matter was slated for a pretrial conference on 4.3.2021.
5. On 4.3.2021, the court was informed that the 1st plaintiff had died in April 2014. The 2nd plaintiff opted to proceed with the suit. Directions were given to the effect that the 2nd plaintiff would rely on a bundle filed on 17.5.2018. The matter was fixed for a mention to confirm compliance. Both parties filed paginated bundles of documents dated 7.12.2021 and 7.2.2022 respectively in which the 2nd plaintiff filed a plaint dated 17.12.2021. The defendants also filed a defence dated 7.2.2022. All these new pleadings were filed without leave of the court and with total disregard of the law on the amendment of pleadings.

B. Pleadings

6. The plaintiffs approached the court with a plaint dated 15.12.2010. They claimed to be the legal owners of all that parcel of land known as Fikir Farm No. 29, registered with the County Council of Garissa in 1986, situated at the shores of Tana River in Garissa county, where they had been paying land rates. Further, the plaintiffs averred that the farm was registered with the Ministry of Agriculture on 16.8.1998 and is a business name on 29.10.1998.
7. The claim was that the defendants had trespassed into their land without any color of right or justification. They termed the acts of trespass as illegal and amounting to conversion of private property without their consent. Despite interventions by the local and provincial administration, the defendants were adamant, necessitating the filing of this suit. The plaintiffs sought eviction orders and permanent injunctions barring and restraining the defendants, their servants, employees, or agents from trespassing into or in any way whatsoever interfering with the plaintiff's quiet use, possession, and ownership of Fikir Farm No.29. The plaint was accompanied by a verifying affidavit by Abdikarim Mohamed Ali and Sheikh Hassan Sheikh Aligeli, sworn on 15.12.2010.
8. Additionally the plaintiff's filed witness statements and a list of documents dated 16.5.2018. By a defence dated 17.1.2011, the defendants averred that their farm known as Jarivot Farm was a group farm with a membership of over 100 people. The defendants further stated that the parcel of land comprised in their farm was registered by the County Council and shared a common boundary with another farm known as Fikir Farm whose ownership, registration number and date of registration by any government agency they could not make admission in respect of. They denied any alleged trespass or illegalities thereof.



9. Further the defendants averred that the plaintiffs' complaints in the suit were vague, baseless, without foundation and should be struck out for being an abuse of the court process. The defendants also denied that the court had jurisdiction to determine the suit. The defence was accompanied by witness statements dated 7.7.2018 and 17.6.2021.

C. Testimonies

10. At the trial, Sheikh Hassan Ali Geli testified as PW 1 and adopted his witness statement dated 11.12.2021 as his evidence in chief. He told the court that with his co-plaintiff, they had started Fikir Farm in 1978, but he passed on in 2017. His evidence was that Fikir Farm is situated in Jaricot village Jaricot location formerly in the Bouralgi Location of Garissa District. He said that after establishing the farm, they registered it with the then Garissa County Council District Agricultural Office at the division of farm ownership while involving the area assistant chief, the chief district officer and the divisional agricultural extension officer who allocated the farm as No. 29, following which they paid the requisite registration fees. Later, PW 1 told the court that they registered the farm as a business name in 1998.
11. PW 1 testified that the farm covered about 200 acres of land with distinct, known and undisputed boundaries within Jaricot village. He also told the court that the defendants should be prevented from invading, interfering with, or taking over the farm from them. PW 1 produced a copy of his ID card as P. Exh No. (1) Misc income receipt No.9963313 from the defunct County Council of Garissa dated 29.10.1986 in the name of the 1st plaintiff as P. Exh No. (2), Misc. receipt No. JS77874 dated 9.2.1986 from the defunct County Council of Garissa in the name of the 1st plaintiff as P. Exh No. (3), Division farm ownership form signed by the D.O. on 16.8.1989 as P. Exh No. (4), business registration certificate dated 29.10.1998 as P. Exh No. (5), payment receipt dated 29.10.1998 as P. Exh No. (6), peace and development committee minutes for Bouralgi Location as P. Exh No. (7), chief's letter dated 5.4.2003 as P. Exh No. (8), Provincial Commissioners letter dated 19.9.2003 to DC Garissa as P. Exh No. (9), District Commissioners, summons to the parties dated 11.11.2003, 13.11.2003, and 25.9.2003 as P. Exh No. (10) – (12), minutes for the meeting at D.C's board room on 24.10.2007 as P. Exh No. (13), letter by PW 1 to the D.C Garissa as P. Exh No. (14), letter by PW 1 to the provincial irrigation officer dated 9.2.2016 as P. Exh No. (15) and lastly, a letter dated 18.9.2015 by PW 1 to the D.C Garissa as P. Exh No. (16).
12. PW 1 denied that the land he claimed or occupied belonged to the two farms since Jaricot Farm did not exist. He said that even though the 1st plaintiff passed on in 2017, he was a genuine plaintiff despite his ID card, death certificate, and witness statement lacking before the court.
13. In Addition PW 1 admitted that though his name was missing in P. Exh No. 3, he was a business partner with the 1st plaintiff as per P. Exh No. (5), hence making him entitled to the farmland. PW 1 confirmed that a land surveyor's report indicating the farm's size, acreage, and locality was missing before the court. He was, however, confident that before the 1st plaintiff passed on, he had made complaints relating to the farmland. PW 1 also told the court that the 1st plaintiff had surviving children, nine sons who were not part of his witness lineup before the court. He said that his late brother, the 1st plaintiff, had authorized him to proceed with the case despite all his children being above 18 years.
14. PW 1 admitted that his name appeared for the first time in 1998 as per P. Exh No. (5). He also clarified that he had not produced any document where the 1st plaintiff acknowledged that both of them owned the suit land. The 2nd plaintiff denied the suggestion by the defendant's counsel that he lacked the capacity, right, or interest to sustain the suit or claim the land, given that the 1st plaintiff, a cousin to him, commonly owned the property. He denied that the foundation of his claim was both false and



- faulty. Further, PW 1 rejected a suggestion that he included the names of the 1st plaintiff in the suit without any basis since the law allowed him to proceed with the case on his behalf, notwithstanding the death of the 1st plaintiff.
15. In re-examination, PW 1 told the court that the suit land was yet to be demarcated or registered and all that he had to prove ownership was P. Exh No. 4, which had been authenticated by known government officials, unlike the defendants who had produced no rival documents. Asked why the children of the 1st plaintiff had not joined the suit, PW 1 told the court that they trusted him. Further, PW 1 told the court that after registering the business name in 1998, the land belonged to both of them as per P. Exh No's. 8 & 13, where the provincial administration directed them to move to court since the defendants had failed to produce ownership documents for the farm.
 16. PW 2 was Isaack Kasim Aden. He adopted his witness statement dated 17.12.2021 as his evidence in chief and confirmed that Jaricot Farm belonging to the 2nd plaintiff was located at Jaricot village, measuring approximately 200 acres and with known boundaries. He denied that the land belonged to the defendants. In cross-examination, PW 2 told the court that he had seen the 2nd plaintiff working on the land for over 40 years. PW 2 confirmed that he used to know the 1st plaintiff and his wife, Khadija Hitole Mohammed.
 17. Dihison Mohamed Elmi testified as DW 1. He adopted his witness statement dated 7.2.2022 as his evidence in chief. His evidence was that he was a member of the Jaricot Farm, which had a long-running dispute with the 2nd plaintiff, who was unknown to the area until he was welcomed to it by the 1st plaintiff. His testimony was that the land was first known as Hodan Farm, belonging to Egal clan members, unlike the 2nd plaintiff, who belonged to the Abdalla clan, whose land was known as Wathajir Farm with distinct boundaries. DW 1 told the court that the owners of the two farms lived peacefully until PW 1 came to the scene and became known as Fikir and Jaricot farms.
 18. DW 1 told the court that PW 1 came without a family and married a lady who was a daughter of the 1st plaintiff's cousin one Abdi Alio known as Ebla and started trespassing into Jaricot Farm and alleged that there was nothing in existence known as Jaricot farm and eventually took up the dispute to the provincial administration, later on to court even after efforts to settle the dispute amicably were made at the two clan leaders meeting in the presence of the area chief and to donate a reached portion of their farm to PW 1. He termed the 2nd plaintiff as quarrelsome and uncompromising.
 19. In cross-examination, DW 1 told the court that the current location used to belong to the former Bouralgi location, which was split into two, the new one becoming Jaricot Location.
 20. Noor Gedi Elmi, the 4th defendant in the suit, testified as DW2. He adopted the witness statement dated 17.6.2021 as his evidence in chief. He traced his occupation of the Jaricot Farm back to 1978 when he received news of the deaths of the founding president of Kenya, which was then a grazing area during the dry season when other sites had no pasture or water, initially occupied by Egal clan members followed by Abdalla clan and eventually Abduwak clan each with its known boundaries.
 21. DW 2 said that the peaceful co-existence was shattered when the 2nd plaintiff came to the area with no family or possession but found refuge with the 1st plaintiff, a senior and respected member of the Abdalla clan. Further, DW 2 told the court that the 2nd plaintiff married Ebla Abdi Alio and started raising land ownership complaints with the provincial administration, whose efforts to resolve the dispute through the area chief amicably were resisted by the 2nd plaintiff.
 22. DW 2 produced a receipt serial No.9633/3 dated 29.10.1986 as D. Exh No. (1) Receipt No. J577874 dated 9.2.1988 as D. Exh No. (2), Receipt No. K308503 dated 10.2.1989 as D. Exh No. (3), Fikir



Farm Registration Certificate No.290091 dated 29.10.1988 as D. Exh No. (4) minutes for the meeting dated 3.6.2004 as D. Exh No. (5), letter dated 16.10.2007 as D. Exh No. (6), letter dated 16.10.2007 by the county council of Garissa as D. Exh No. (7), Certificate of registration of Jaricot Farm No. CD/21/2155 as D. Exh No. (8), outpatient treatment notes for Bollow Mohamed dated 16.10.2016 as P. Exh No. (9), charge sheet in Garissa Chief Magistrates Cr. Case No. 837/2016, Republic vs. Noor Gedi & another as D. Exh No. (11) bundle of pleadings filed in 2015 s D. Exh No. (12), minutes for a meeting for Jaricot farm as D. Exh No. (13), ruling by Hon. Justice Olao as D. Exh No. (14), a letter dated 9.2.2010 by the 2nd plaintiff as D. Exh No. (15), and lastly, a letter by the district agricultural officer dated 7.10.1993 as D. Exh No. (16). In cross-examination, DW 2 clarified that he was a member of the Jaricot Farm located at Jaricot Location, initially known as Hodhan Farm, which spread across the three locations as per D. Exh No. 16. Concerning P. Exh No. 4, DW 2 told the court that the document was written before Jaricot Location was established.

23. DW 3 was Hassan Abdi Maow. He adopted his witness statement dated 7.2.2022 as his evidence-in-chief. As a member of Jaricot Farm, he echoed the evidence of DW 1 and DW 2. DW 4 was Hussein Bule Adan, a retired police officer, KWS officer, and a former senior assistant chief for the Gababa Location. He told the court that he attended a meeting called by the then area chief Ahmed Hussein Affey at his residence between elders of Abdalla and Egal clans to resolve the land dispute falsely brought up by the 2nd plaintiff. DW 4 told the court that he was also a member of the Jaricot farm, which the 2nd plaintiff was unjustly claiming as belonging to the Fikir farm. As chair of the meeting, DW 4, told the court that no resolution was arrived at since the 2nd plaintiff caused chaos when he allegedly started claiming the entire land as his and that despite an offer to be given a portion of the land, the 2nd plaintiff declined the offer and moved to court.

D. Written Submissions

24. At the close of the defense, parties were directed to file written submissions by 30.6.2023. The plaintiffs, by written submissions dated 6.6.2023, took the view that the plaintiffs were the legal owners of land known as Fikir Farm No. 29 since 1986 as per P. Exh No. 2, 3, 4, 5 issued by Garissa County Council, District Agricultural Officer and by the business registration bureau, which the defendants have trespassed into, leading to complaints as per P. Exh No's. 5, 7, 8 & 13.
25. The 2nd plaintiff submitted that his right to ownership and protection was assured under Articles 40 & 60 of *the Constitution*. On the evidence tendered, the plaintiffs submitted that PW 2 was clear that the land belonged to him and that he could proceed with the claim even after the 1st plaintiff passed on as a co-owner as per P. Exh No's (5), (8), and (13). Further, the 2nd plaintiff submitted that his evidence was consistent, coherent and corroborated by PW1 to sustain his claim. The 2nd plaintiff submitted that the entire defense testimony was incoherent, inconsistent, and overly doubtful, coming from dishonest and greedy persons out to expand their land to what legitimately belongs to other people.
26. The 2nd plaintiff submitted that though the land ownership documents on both sides were not pure legal documents, the court should determine the dispute on the strength of the said documents since no third party had come up with superior documents to claim the land.
27. The defendants, by written submissions dated 13.6.2023, took the view that the dispute between the parties has been long and expensive, moving from Garissa, Embu, Kerugoya, Garissa, Nairobi, and finally to Meru Law Courts, with each side calling PW 1 and PW 2 and DW's 1 -4. As to the evidence of PW 1, the defendants submitted that no evidence was tendered to the effect that the 2nd plaintiff jointly owned the land with the 1st plaintiff and neither attempts were made to prove the land's size by way of land survey documents.



28. The defendants submitted that P. Exh No's. 2, 3 & 4 all bore the names of the 1st plaintiff, yet the 2nd plaintiff had failed to tender any evidence of the date, manner, or the method by which he allegedly became a joint proprietor of Fikir Farm more so given the serious doubts raised by DW 1, DW 2 & DW 3 on his lack of footprints in Jaricot area between 1986/87 to 1998. As to the 1st plaintiff, the defendants termed him as the invisible man who appeared in this case but remained hidden until the end, yet P. Exh No's. (1), (2) & (3) bore his name, and P. Exh No. (4) was in the name of the Fikir group farm.
29. The defendants submitted that items No's. 2 & (3) of P. Exh No. (4) were not supplied to the court; which should have contained the names and identification cards of the owners and members of the Fikir Farm. The defendants submitted that such an omission or production of an incomplete exhibit could not have been accidental but was deliberate, yet in the plaint, the plaintiffs had pleaded that the Fikir Farm was registered on 16.8.1989. Still on P. Exh No. (4), the defendants submitted that the document had a different date, 16.8.1989, yet it was allegedly received by the District Agricultural Officers ten years later on 12.3.1998.
30. Further, the defendants submitted that P. Exh No's. 4, 5, 6, & 8 had dates of 1.2.2003, 5.4.2003, 19.9.2003, and 11.11.2003, yet P. Exh No. (8) had missing dates. Therefore, the defendants submitted that looking at the dates in P. exhibit No's. 4 – 11, ranging between 1.2.2003 and 2.11.2007, it was clear that P. Exh No. (4), missing list overleaf would not have included the names of PW 2, since he was not a resident of Jaricot area at the time and therefore, in the absence of any authority from the 1st plaintiff authorizing him to act on his behalf, or a letter where he had complained over the suit land, the inference was that the 2nd plaintiff was a liar who could not represent the family or interest of the 1st plaintiff.
31. The defendants submitted that it was the 2nd plaintiff who was in the driving seat claiming that the Fikir Farm was his yet the exhibits omitted his names leaving one with doubts why he would be sidelining the 1st plaintiff from laying the claim. The defendants submitted that the only inference to be drawn was that the 2nd plaintiff was on a mission to grab the farm from the 1st plaintiff's estate by not involving the nine sons of the 1st plaintiff said to be adults in the suit.
32. On the credibility of the 2nd plaintiff, the defendants submitted that, in contrast, a good reputation was worthy fighting, yet the 2nd plaintiff had been silent to explain himself even after questions had been raised by DW 1 – DW 4 on;- where he was before he started laying land rights at Jaricot area, whether he was hosted by the 1st plaintiff and married to his niece and lastly on the manner or method by which he became a co-owner of the farm.
33. The defendants submitted that the total silence of the 2nd plaintiff showed that he was a man in a severe crisis of credibility out to hide his personal history, life, and claim over the Fikir Farm.
34. The defendants submitted that there was no dispute that PW 2's footprints were nowhere between 1986 and 1998 in Jaricot village, yet he was unable to substantiate his allegations that Jaricot Farm never existed in the first instance.
35. The defendants submitted that human migration and settlement would often result from many factors, among them famine, overpopulation, disease epidemics, civil strikes, war, persecutions, politics and search for economic opportunities, water, and pasture. Given the evidence of DW 3, the defendants submitted that if Jaricot Farm had never existed as the 2nd plaintiff wanted the court to believe, then one would wonder what had happened to the lands settled on by the Egal clan before other clans came over. The defendants submitted that the only answer was that a fallacy was being peddled



- out of the 2nd plaintiff out of unrestricted arrogance and uncredited expansionist mindset tied to the acquisition of more and more land, beyond the known boundaries of Fikir Farm, as testified by DW 1.
36. On the size of the Fikir Farm, the defendants submitted that P. Exh No. 4, which was incomplete, omitted vital information at item No. 5., especially on the acreage and therefore the 2nd plaintiff had no basis to allege that the land belonging to Fikir Farm was 200 acres. The defendants submitted that their witnesses were credible and gave detailed information, including key facts and issues such as the entry into the area by the 2nd plaintiff, his marriage to the 1st plaintiff's niece and the locality of their farm which issues or facts the 2nd plaintiff did not cross-examine them on, for obvious reasons.
 37. Regarding the testimony of DW 4, the defendants submitted that he was their star witness who explained the attempts made to resolve the matter at his home, where the 1st plaintiff was missing for the obvious reasons that he had no issues with Jaricot Farm.
 38. The defendants urged the court to find that instead of counsel for the 2nd plaintiff's cross-examining them on material issues, he dwelt on the locality of Jaricot Farm yet their evidence was clear that Jaricot and Fikir Farm were separate and distinct whose owners personally knew each other, and especially the 1st plaintiff who was well known, liked, peaceful, non-controversial with no claims over the land and who never accused them of any trespass into, or had any reason to trespass into Jaricot Farm. The defendants submitted that this suit should never have been filed in the first instance because there was no land dispute in the first instance between Fikir Farm, the 1st plaintiff, and the defendants. Similarly, the defendants took the view that they hoped that the 2nd plaintiff had learned that intransigence, dismissiveness and arrogance did not amount to evidence for he had failed to prove co-ownership of Fikir Farm and or provide any note, letter or memorandum showing any intention of co-ownership of the farm, save for the business registration certificate which had no probative value.
 39. Therefore, the defendants urged the court to find that the 2nd plaintiff had no locus to claim co-ownership of Fikir Farm, which should devolve as part of the estate of the 1st plaintiff. Lastly, the defendants submitted that the 2nd plaintiff should have sorted out any stake over the suit land with the family of the 1st plaintiff.

E. Issues for determination

40. The court has carefully reviewed the pleadings, evidence tendered, and submissions. The following issues call for the court's determination:
 - i. What are the critical pleadings in the suit?
 - ii. If any leave was sought and obtained to file the plaint and statement of defence in 2021 respectively.
 - iii. If the claim by the 2nd plaintiff was sustainable following the reported death of the 1st plaintiff in April 2014 or 2017.
 - iv. If the plaintiffs jointly acquired the Fikir Farm.
 - v. If the two farms are separate, distinct, and belong to different parties.
 - vi. If the 2nd plaintiff has been able to define the particulars of Fikir farm and the extent of its boundaries both on paper and on the ground.
 - vii. If the 2nd plaintiff was able to prove trespass on Fikir Farm by the defendants
 - viii. If the defendants were justified in trespassing onto Fikir Farm.



ix. If the 2nd plaintiff is entitled to the reliefs ought.

41. The primary pleadings by the parties are the plaint dated 15.12.2010 and a defence dated 17.1.2011
42. There is no evidence that leave was ever sought and were granted for the plaintiffs to amend the original plaint. This suit had gone up to the defence stage before Hon. Justice Cheronu recused himself. When directions were given on 28.1.2021 to hear the matter denovo, there was no specific request made by the parties or directions given to file any fresh pleadings. Even if that were to be so, then there is a clear procedure for the amendment of pleadings.
43. In *Eastern Radio Service & another vs. RJ Patel t/a Tiny Tots & another* [1962] E. A, the court observed that it would be inconceivable to hold that the amendment would automatically treat the previous pleading as if it had never existed. The court said that logic and common sense required that an amendment should not automatically be treated as if nothing else ever existed.
44. In *Phoebe Wangui v James Kamore Njomo* NRB HC Civil Suit, No. 367 of 2010, the court observed that an amended pleading should be legible and must not to be obliterated and that Order 8 Rule 2 of the Civil Procedure Rules empowered the court to strike out or disallow an amended pleading if the same was improperly done.
45. In the case of *John Kamunyu & another v John Nyingi Muchiri & others* [2015] eKLR, among the issues was whether the further amended plaint had been endorsed by the trial court and filed in compliance with Order 1 Rule 10 (4) of the Civil Procedure Rules. The court observed that a party who acted in contravention of a court order could not be allowed to benefit from his wrong. Further, the court cited with approval *Galaxy Paints Co. Ltd v Falcon Guard Ltd* [2000 2 E.A 385 that issues for determination in a suit generally flow from the pleadings unless as per *Odd Jobs v Mubia* [1970] E. A 419, a point was left for the court's determination after it had been canvassed before the court through evidence and or parties' submissions.
46. On the issue of regularity of proceedings arising after the demise of a party, the court held that the correct procedure that the 1st respondent should have taken was under Rules 12, 14 & 16 of the 5th Schedule of the *Law of Succession Act*, as read together with Order 23 Rule 4 (1) (2) & (3) of the Civil Procedure Rules. The court cited with approval *Macfoy Limited Africa Co. Ltd* (1961) E ALL ER 11169, on the proposition of law that if an act it was void, then in law was a nullity.
47. In this suit, it was the 2nd plaintiff who brought to the court's attention that the 1st plaintiff had passed on. He, however, opted that he would proceed with the claim, notwithstanding the death of the 1st plaintiff. The 2nd plaintiff allegedly filed a fresh plaint dated 17.12.2021. The name of the 1st plaintiff was never deleted from the suit or the proceedings by way of any amendments. The subsequent plaint and defence, therefore, remain nullities in law.
48. The third issue is whether the claim by the 2nd plaintiff could be sustained upon the death of the 1st plaintiff. In paragraphs 3, 4, 5, 6, 7 & 9 of the plaint dated 15.12.2010, the plaintiffs are jointly described. The reliefs sought are on behalf of the two plaintiffs. P. Exh No's. 1, 2, & 3 were in the names of the 1st plaintiff. P. Exh No. 4 was issued to the two plaintiffs under the *Registration of Business Names Act* (Cap 499) Laws of Kenya.
49. A partner's death under Section 37 (1) of the Partnership Act Cap 29 Laws of Kenya automatically dissolves a partnership. Any interests acquired or which were in the process of being acquired by the partners are governed by Section 15 of Cap 499. The surviving partner may continue the business while the deceased partner's estate is entitled to a share of the profits.



50. In *Sultanali P. Molu & another v Kenya Railway Corporation and another* (2002) eKLR, the court had been urged asked to make an entry in the proceedings that the 2nd plaintiff had passed on and that the cause of action survived or could continue with the surviving plaintiff. Leave had also been sought to amend the plaint so that the surviving plaintiff could continue with the suit. A certificate of change of registration of particulars as the sole proprietor by the surviving partner had been annexed, together with a statutory declaration by the sole executor of the estate of the deceased 2nd plaintiff showing that he had relinquished his interests in interest in the business to be carried out by the surviving partner. The court, guided by Order 23 Rule 2 of the Civil Procedure Rules, made an entry on the record for the suit to proceed against the living party or to continue being prosecuted by the living party. The court allowed the amendment of the plaint.
51. In this suit, the 2nd plaintiff brought to the court's attention the death of the 1st plaintiff almost six years after it had taken place. Order 24 Rules 1, 2 & 7 of the Civil Procedure Rules provides that if a cause of action survives a deceased party, a substitution has to be undertaken within one year. Regarding partners carrying out business other than in their individual names, Order 30 Rules 1 & 5 of the Civil Procedure Rules governs suits by partners individually sued. In *Sultanali* (supra), the court held that a surviving partner could continue pursuing a case involving a transaction on property that had started during the partnership.
52. In *Virgian Wangui Mathenge vs. Agnes Wairimu Njoroge & another* (2013) eKLR, the court observed that even though the death of a partner dissolves a partnership, the deceased partner's interests in the partnership's assets formed part of his estate under Sections 32 and 37 (1) of the Partnership Act (Cap 29).
53. Further, in *Agrey Swaka Waswa v Patrick Omonge Khaemba* [2020] eKLR, at issue was an abatement of a suit under Order 24 Rule 4 (4) of the Civil Procedure Rules. The court cited with approval said *Sweilem Gheithan Saanum v Commissioner of Lands* [2015] eKLR, on the proposition that as a general rule, the death of a plaintiff could not cause the suit to abate, where a cause of action survived. So long as an application was made within a year for the legal representative of the deceased plaintiff to be made a party or an extension of time sought for the revival thereof, absence of which the claim ceased to exist in the eyes of the law.
54. In *Titus Kiragu v Jackson Mugo Mathai* [2015] eKLR, the court held that it was not an act of the court declaring the suit as abated but the operation of the law.
55. As to what cause of action survives, in *Karl Wehner Claasen vs. Commissioner of Land and 4 others* (2019) eKLR, the court observed that a cause of action of a personal nature could not survive for the benefit of a deceased estate, since a personal action dies with the person. The court observed further, that a chose in action included the right to bring proceedings in a court for recovery of monies or damages out of an infliction of a wrong or a non-performance of a contract.
56. Additionally, the court observed that a right to own property under Article 40 of *the Constitution* was a cause of action vested in a party would, which survive for the benefit of the estate of the deceased under Section 2 (1) of the *Law Reform Act* and could be continued by a legal representative.
57. Applying case law and the principles enunciated, above suit there is no dispute that the plaintiffs filed this suit in their individual capacities. The plaintiffs never described themselves as joint partners in Fikir Farm. All that was pleaded is that the farm was registered with the relevant ministries and the defunct County Council of Garissa. The 2nd plaintiff's exhibits before the court point out that the suit land was solely acquired and registered in the name of the 1st plaintiff. The 2nd plaintiff has endeavored to advance the interests of the deceased 1st plaintiff and, by extension, to derive benefits or interests from



the exhibits issued to the 1st plaintiff. He cannot do so without the requisite legal capacity under the Law of Succession Act Cap 160 Laws of Kenya.

58. Similarly, once the 1st plaintiff passed on either in 2014 or 2017, the cause of action could only survive and vest with the legal representative of his estate if, and only where a legal representative invoked had Order 24 of the Civil Procedure Rules, and sought to be joined in the suit before one year after the death, otherwise the cause of action for the estate would abate by operation of law.
59. Moreover, if a partnership existed between the two plaintiffs, the surviving partner-in-law should have sought an entry on record that he was proceeding with the suit as a surviving partner since the transaction occurred during the partnership. The 2nd plaintiff had to follow the law relating to partnerships and change of particulars once a partner passed on.
60. In this suit, the ownership of the Fikir Farm, as per the 2nd plaintiff's exhibits, was in the name of the 1st plaintiff before the business name was registered later in 1998. PW2 did not produce a partnership deed showing that the farm was surrendered to the partnership and or subsequently registered under the joint names of the 1st and 2nd plaintiffs. In the absence of an amendment of the certificate of registration and a statutory affidavit by the legal representative of the estate of the 1st plaintiff, authorizing the 2nd plaintiff to sue for the rights and interests of the 1st plaintiff in so far as Fikir Farm is concerned, my finding is that the 2nd plaintiff estate lacks the locus standi to proceed with the suit in its current format. No amendments were sought and granted to delete or abandon the interests or rights of the 1st plaintiff from the suit and or for the 2nd plaintiff to take over those rights or interests for and on behalf of the estate of the 1st plaintiff. Therefore, the 2nd plaintiff cannot purport to act for the estate of the 1st plaintiff without the requisite capacity to sue or defend for or on behalf of the estate of the 1st plaintiff in the partnership. See *Rebecca Mijide Mungole and another v KPLC & others* [2017] eKLR.
61. Exh No's 2 & 3 were issued in the name of the 1st plaintiff. The 2nd plaintiff cannot benefit from the said exhibits unless he was representing the estate of the 1st plaintiff. P. Exh No. 4 was issued in the name of the Fikir Group Farm. The document was not endorsed or signed by the Divisional Agricultural Extension Officer. The ID number and name of the 2nd plaintiff was missing from that document. There was no indication of the 2nd plaintiff as one of that group's members. No list of group members said to be overleaf of the exhibit was tendered before this court, indicating that the 2nd plaintiff was one of the members or the officials. If the 2nd plaintiff's name was missing on the face of the documents, what basis can he say that the land belongs to him? Nothing was tendered before this court to show that the 2nd plaintiff had been authorized by the members of Fikir Group Farm, among them the 1st plaintiff, to represent them and advance the case on their behalf. P. Exh No. 4 was never certified by the issuing officers or produced by one of its makers. Further, no evidence was tendered to confirm whether Fikir Group Farm and Fikir Farm appearing in P. Exh No. 4 & (5) refer to the same thing. Regarding P. Exh No. 7, the documents were not signed or certified by the officer who allegedly generated the minutes. P. Exh No's. 5, 8, 9-13 were not certified by the officer who generated them or produced by their makers. More importantly, P. Exh No's. 9-13 did not originate from the government bodies or agencies which had registered the respective farms in 1986, among them the defunct County Council of Garissa, the Ministry of Agriculture, and the Registrar of Companies.
62. The contents of the 2nd plaintiff's exhibits did not establish the nexus between the P. Exh No's. 2, 3 & 4 and what had alleged occurred on the suit land. Counsel for the 2nd plaintiff submitted that the various authoritative government officers made the aforesaid exhibits which spoke volumes and for themselves. Further, counsel strangely submitted that as much as the land ownership documents were not pure legal ownership documents on both sides, the 2nd plaintiff's side was more believable, since no



- third party was claiming and or holding a better title over the suit land. Learned counsel also invoked Articles 40 and 60 of *the Constitution* on the right to own access and protection on the property.
63. On the other hand, learned counsel for the defendants urged this court to find that no nexus was established between the claim by the 2nd plaintiff alongside the 1st plaintiff over Fikir Farm in so far as 200 acres of land allegedly trespassed into by his clients, to grant the reliefs sought.
 64. In *Stephen Mule Mutinda v IEBC* [2014] eKLR, the court held that parties were bound by their pleadings. Similarly, in *Raila Odinga vs. IEBC* [2017] eKLR, the court observed that in an adversarial system, the burden of proof was a party who stood to lose if some specific facts were not established, and evidence tendered as provided under Section 107 of the *Evidence Act*.
 65. This suit falls on who has a better title over the suit land to enjoy the protection of the law to the subject land between the 2nd plaintiff and the defendants. Therefore, the origin, nature, particulars, parameters, sizes, and locality of the subject land becomes material.
 66. Sections 107, 108, and 109 of the *Evidence Act* state that whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts asserted must prove that those facts exist. Proof of the abovementioned particulars or matters rested with the 2nd plaintiff, which under Section 3 of the *Evidence Act*, must connect the 2nd plaintiff with the suit land, other than those matters that the court can take judicial notice of under Section 60 of the *Evidence Act*, the law requires that all facts in issue must be proved or disproved, as the case may either by way of affidavits, oral and documentary evidence as held in *Douglas Odhiambo Apel & another vs. Telkom (K) Ltd* (2014) eKLR.
 67. In this suit, the 2nd plaintiff endeavored to rely on the 1st plaintiff's documents to prove ownership or entitlement to the subject land. The 2nd plaintiff has failed in the description or the particulars of the suit land and how it was connected to him. Other than *the Constitution*, land ownership in Kenya is governed, inter alia, by the *Land Act*, *Land Registration Act*, *Law of Contract Act*, *Land Adjudication Act*, *Land Consolidation Act*, and the *Law of Succession Act*. Any party attending the court must produce the best evidence to prove or disapprove the existence of land ownership as a matter of fact under Sections 35, 66, 67, 68, 69 & 70 of the *Evidence Act*. In the absence of original documents, a party or a witness is duty bound to lay the basis to the satisfaction of the court why he was producing photocopies and not certified copies under Sections 66-68 of the *Evidence Act*. The adduction of documents in court does not amount to its proof. Proving or disproving a document occurs when the court applies its judicial mind to determine its contents, relevance and veracity. In so doing, the court is duty-bound to look at the particular document(s) alongside all the other facts, pleadings, and evidence before it. See *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR.
 68. In this suit, both parties rely on farm numbers allegedly issued by the defunct County Council of Garissa and the Ministry of Agriculture. None of the parties have given the court the history of the suit land as to whether it was ancestral, clan, government, or trust land.
 69. In *Redcliffe Holdings Ltd v Registrar of Titles and others* [2017] eKLR, the court observed that there is a constitutional underpinning that a property right is protected and that a registered proprietor of title to land could not be arbitrarily deprived of his land.
 70. In this suit, whereas the defunct county councils could allocate trust land or community land under the retired Constitution and the Trust *Land Act*, none of the parties herein have letters of allotment accompanied by the relevant part development plans. The issuing authorities of the farm numbers were not called to shed light on the circumstances under which those farm numbers were issued and under what law of the land. Whether the 2nd plaintiff or the defendants were the genuine allottees of the



farm numbers remains unclear. None of the parties produced the original or certified farm registration book. The origin of farm numbers remains unsubstantiated. The custodians of the farm records were not called to testify and prove or disapprove not only the allocation, sizes, particulars and owners but also the exact locality of the two farms. Additionally, no independent witness was called by the 2nd plaintiff to prove possession or occupation of the alleged 200 acres of land at the Jaricot Location or any other locality.

71. Exh No's. 2, 3, 4 & 5 lacked the exact acreage of the suit land. How and why PW's 1 & 2 claim and the plaint allege 200 acres, have not been proved by way of any land survey maps or through documentary evidence from the issuing authority in terms of a full council meeting minutes, town planning committee minutes and or sub-district committee minutes. The minutes produced as P. Exh No. 9, 13 did not amount to a full council or District Council Committee minutes. See Abdullahi Hareta Maalim & 4 others v County Government of Tana River [2014] eKLR.
72. In the case of Hussein Mohamed Kula & others vs. Barias shina Ergata & 197 others [2022], eKLR, at issue was whether Kher Guyo Farm was excised from the Dololo Farm allegedly belonging to the Ergate family and whether the due process had been followed in excising or setting apart the suit premises. On the first issue, the court held that the claim could not be proved without a site visit or evidence of the land's location. On the 2nd issue, the court held that Section 13 of the Trust Land Act (repealed) provided the procedure of setting apart land by the defunct county councils for the benefit of residents. The court cited with approval Funzi Island Development Ltd and 2 others v County Council of Kwale & 2 others (2014) eKLR, on the proposition that the council held the trust land for the benefit of residents and that the statutory procedural safeguard including a duty to notify the person(s) affected to hear their representation(s), and ultimately the approval by the county council by a resolution went to the jurisdiction to set apart trust land.
73. In this suit, the 2nd plaintiff failed to establish the steps which were taken to set apart the suit premises and allocate farm number 29 to him by the defunct County Council of Garissa and the Ministry of Agriculture. The minutes and documents produced before this court were not in line with Sections 4, 7, 8, 9, 10, 11 & 13 of the repealed Trust Land Act as read together with Sections 117 (1) of the retired Constitution.
74. In the case of Daudi Kiptugen v Commissioner of Land & 4 others (2015) eKLR, the court observed that the acquisition of title could not be construed as the end result since the acquisition process was also material. The 2nd plaintiff has relied on documents that the 1st plaintiff acquired before the registration of their business name. Without a clear paper trail on how, the criteria, locality, size, features, and boundaries of farm number 29, this court is unable to find the claim established or proved.
75. My finding is that the 2nd plaintiff (posthumously) failed to establish any proprietary interest or right to the suit land for any protection under Order 40 of the Civil Procedure Rules, the Trespass Act, and Articles 40 & 60 of the Constitution. The same applies to the defendants for they have failed to show any justification or evidence that they possess superior title documents over Jaricot Farm allegedly bordering Fikir Farm and said to be owned by over 100 members. The upshot is that I find the suit lacking merits. It is hereby dismissed with no order as to costs, guided by case of Jasbir Singh & 3 others Rai vs. Tarlochan Singh Rai & 4 others (2014) eKLR.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 24TH DAY OF JULY 2023

In presence of

C.A John Paul



Kimakia for the 2nd plaintiff posthumously

Mr. Mwirigi holding brief for C.P Onono for the defendants

2nd plaintiffs' family

HON. CK NZILI

ELC JUDGE

