



REPUBLIC OF KENYA



Anyango v Amuom & another; Amuom (Applicant) (Environmental and Land Originating Summons 14 of 2021) [2023] KEELC 20177 (KLR) (27 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20177 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 14 OF 2021
GMA ONGONDO, J
SEPTEMBER 27, 2023**

BETWEEN

CAREN AKINYI ANYANGO PLAINTIFF

AND

ONYANGO AMUOM 1ST DEFENDANT

SARAH W/O ONYANGO 2ND DEFENDANT

AND

PETER AMUOM APPLICANT

RULING

1. This ruling is in respect of a Notice of Motion application dated January 16, 2023 and filed on January 19, 2023 (the application herein) by one Peter Amuom, heir to the estates of the defendants who are both deceased.
2. The said Peter Amuom (applicant) is represented by the firm of Julius Juma and Company Advocates. The plaintiff/respondent is represented by Nyakwamba & Company Advocates.
3. The instant application was lodged under Section 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya 2010, Order 12 Rule 7 and Order 40 Rule 1 of the *Civil Procedure Rules, 2010* seeking the orders infra:
 - a. Spent
 - b. Spent
 - c. That at the inter-partes hearing hereof, this honourable court be pleased to issue orders of prohibitory injunction barring the respondent whether in person or through anybody acting



under her instructions from harvesting sand, cultivating or in any other manner whatsoever interfering with the current state of the suit property (*infra*).

- d. That this honourable court be pleased to set aside its judgment in this matter delivered on November 21, 2022 and hear the representation of the applicant herein before making a final decision.
4. The application is anchored on the supporting affidavit sworn by the applicant's counsel on even date.
5. In the supporting affidavit, counsel avers that Onyango Amuom and Sarah wife of Onyango, who were the defendants/respondents in the original main suit died more than 30 years ago. That the initial suit was fatally defective as it was lodged against deceased persons. That the respondent herein who was the plaintiff in the initial suit did not effect service on the defendants, contrary to her assertions as the subject persons were deceased. That therefore, the respondent herein who was the plaintiff in the initial suit obtained judgment in the matter through fraudulent non-disclosure of material facts. Thus, counsel urged the court to set aside its judgment delivered on November 21, 2022 and prohibit the respondent from conducting sand harvesting on the suit land.
6. The respondent opposed the application by way of a replying affidavit sworn on February 15, 2023. The respondent deposed, *inter alia*, that counsel representing the applicant had been served on several occasions but chose not to defend the initial suit. That the instant application is defective as there is no draft defence or reply attached thereto. That therefore, the instant application ought to be dismissed with costs.
7. On March 14, 2023, the court ordered and directed that the application be heard by way of written submissions in the spirit of Article 159 (2) (b) of the [Constitution of Kenya, 2010](#) and Order 51 Rule 16 of the [Civil Procedure Rules, 2010](#).
8. Accordingly, the applicant's counsel filed submissions dated May 31, 2023 on June 16, 2023, in support of the application. Counsel gave a background of the matter and identified five issues for determination to wit: nature of the court's jurisdiction, whether the defendants' advocate was served, whether service of a hearing notice on the eve of a hearing is sufficient service, whether failure to file a defense is fatal where a party has filed a preliminary objection and what orders should the court grant?
9. Briefly, learned counsel submitted, *inter alia*, that the applicant filed a Notice of preliminary objection dated April 19, 2021 together with a replying affidavit in opposition to the plaintiff's claim, wherein the plaintiff sought a declaration that she had acquired, by way of adverse possession, L.R No. East Karachuonyo/Kobala/2776 (the suit property). That the objection was based on the legal principle that a suit cannot be brought against a deceased person. That therefore, the matter ought not to have proceeded *ex parte* and judgment entered in favour of the plaintiff herein.
10. Further, counsel noted that the replying affidavit filed by the respondent herein and dated February 15, 2023 was not sworn by the deponent and ought to be struck out. To buttress the submissions, counsel relied on the case of [Gideon Sitelu Konchellah –vs- Julius Lekakeny Ole Sunkuli and 2 others](#) (2018) eKLR, among other authoritative pronouncements.
11. On the part of the respondent, her counsel filed submissions dated March 25, 2023 on April 24, 2023 and identified a single issue for determination thus; whether the honourable court should set aside its judgment delivered on November 21, 2022 and hear the representatives of the applicant before making a final decision. Counsel submitted that the *ex parte* judgment was regularly entered. That the instant application lacks merit and ought to be dismissed with costs. Reliance was placed on various authorities including the case of [James Kanyiita Nderitu and Another –vs- Marios Philotas Ghikas and another](#) (2016) eKLR, in support of the submissions.



12. I have duly considered the application, the response thereto and the parties' respective submissions. So, do the issues arise for determination are thus:
 - a. Whether the defendants have capacity to be sued herein;
 - b. Is the application merited?
 - c. Who should bear the costs of the instant application?
13. In the case of *Alfred Njau –Vs- City Council of Nairobi* [1983] KLR 625 the Court of Appeal, held inter alia that:

“...Locus standi” literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”
14. It is settled law that a litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in case of intestate succession; see *Rajesh Pranjivan Chudasama-vs-Sailesh Pranjivan Chudasama* (2014) eKLR.
15. The applicant avers that he filed a notice of preliminary objection dated April 19, 2021 together with a Replying Affidavit of even date, wherein he stated that it is legally untenable to sustain a claim for adverse possession against a deceased person.
16. Notably, the said applicant is not a party to the initial suit. Further, no grant of letters of administration has been availed in this court to prove that he is the legal representative or an administrator of the estates of the deceased defendants herein. According to a certificate of official search adduced by the plaintiff/respondent herein and dated August 17, 2020, the suit land is still registered in the name of the deceased defendants.
17. Be that as it may, it is trite that a party retains a right to file suit against such party that they deem a right or relief exists or flows from. Among the prayers sought by the plaintiff in her originating summons dated March 16, 2021 and duly lodged in court on 19th March 2021, is a declaration that the plaintiff has acquired the suit land adversely and she is therefore entitled to be registered as the absolute owner. This, in my view, is a substantial prayer that concerns title of deceased persons.
18. The *Law of Succession Act*, Chapter 160 Laws of Kenya, protects property that is registered in the name of a deceased person. Section 45 (1) of the *Law of Succession Act* (supra) provides as follows:

Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
19. Suits against the estate of a deceased person is brought by or against the legal representative of the estate. Section 2 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya defines the term ‘legal representative’ as “a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.
20. In the instant case, it has emerged that the suit land vests in the estate of the deceased defendants. That administration of their estates has not yet occurred.



21. It must be noted that a default judgment was entered in the suit by this court on November 21, 2022. In the case of James Kanyiita Nderitu (supra), the Court of Appeal made a distinction between a default judgment that is regularly entered and one which is irregularly entered. The court stated in part:

“ ... In a regular default judgment, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit....

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion...” (Emphasis added)

22. In the instant case, the plaintiff/ respondent herein avers that the defendants were duly served with among others, the originating summons. In an affidavit for service sworn on March 26, 2021 by one Edwin Omondi Otieno, a licensed process server, and duly filed in court on May 25, 2021, the process server alleges to have served the 1st defendant in person. At paragraphs three and four of the affidavit, the said process server depones:

“...That on March 25, 2021, I proceeded to Kiserwa Kobnala Sub Location and found Onyango Amuom at his home and his younger brother at their home. That I explained to him my purpose of me being there and in did (sic) lawfully served them with the documents...”

23. It is noteworthy that the defendants died more than 30 years ago. This assertion has not been disputed by the plaintiff herein. How, then, could service have been effected on the deceased defendants? Clearly, the plaintiff/respondent misled the honourable court and failed to disclose material facts.

24. In light of the foregoing, it is my considered view that the default judgment entered by this court on November 21, 2022, is irregular. The same is hereby set aside.

25. Each party to bear his or her own costs in this application.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 27TH DAY OF SEPTEMBER 2023.

G.M.A ONG'ONDO

JUDGE

Present

Mr. Nyakwamba, learned counsel for the plaintiff/respondent

