



Ochilla & 2 others v Waititu & 4 others; Kiore (Interested Party) (Suing as the Administrator to the Estate of the Late sheila thompson & Anthony J Thompson, 4th and 5th Defendants) (Environment & Land Case 779 of 2012) [2025] KEELC 1308 (KLR) (14 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1308 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 779 OF 2012**

**MD MWANGI, J
MARCH 14, 2025**

BETWEEN

**RICHARD OCHILLA 1ST PLAINTIFF
DAVID OCHIENG 2ND PLAINTIFF
LAWRENCE MWANGI 3RD PLAINTIFF**

AND

**PETER KURIA WAITITU 1ST DEFENDANT
ROBERT WAIRIRI 2ND DEFENDANT
PETER WAIRIRI 3RD DEFENDANT
SHEILA THOMPSON 4TH DEFENDANT
ANTHONY J THOMPSON 5TH DEFENDANT**

AND

**SOLOMON NJOROGE KIORE INTERESTED PARTY
SUING AS THE ADMINISTRATOR TO THE ESTATE OF THE LATE SHEILA
THOMPSON & ANTHONY J THOMPSON, 4TH AND 5TH DEFENDANTS**

RULING

(on the validity of the Plaintiffs’ suit in view of the fact that the suit was filed against the 4th and 5th Defendants when they were already deceased)



Background

1. This suit was initiated by way of an Originating Summons (OS) dated 31st October 2012, initially filed in the High Court on 31st October 2012. The OS was filed against 5th Defendants. However, vide a notice of withdrawal dated 15th October 2024, the Plaintiffs withdrew the suit against the 1st, 2nd and 3rd Defendants leaving the 4th and 5th Defendants only. The Plaintiffs claim to be entitled to the suit property, a parcel of land known as L.R. No. 1012/47/2 situated at Roysambu in Kasarani within Nairobi, by way of adverse possession.
2. From my perusal of the court record, the 4th and 5th Defendants were purportedly served by way of substituted service by an advertisement in the Standard Newspaper pursuant to an application by the Plaintiffs made vide the chambers summons dated 4th February 2013. The service was confirmed by an affidavit of service sworn by one Edward Mwendwa Kathanju at Nairobi on 11th March 2013. Since then, a lot has happened in this matter. Numerous applications have been filed in this case the latest being the Plaintiffs' Notice of Motion dated 31st October 2024.
3. This court was in the process of considering three(3) earlier applications dated 19th September 2024, 12th October 2024 and 29th October 2024 when counsel representing the Interested Party in this matter and the 2nd proposed Interested party brought it to the attention of the court that the 4th and 5th Defendants died on 23/6/2006 and 23/6/2009 respectively; long before this suit was filed in court. That means that this suit was filed against dead persons. No wonder the Plaintiffs could not find them for purpose of service of the Originating Summons.
4. The fact of the death of the 4th and 5th Defendants on the dates put forth by Mr. Echesa Bwire, advocate for the Interested party is not disputed by the Plaintiffs. Mr. Kenyatta, advocate for the Plaintiffs in response stated that it was not the first time that the issue was being raised. He submitted that the issue was already comprehensively dealt with by Lady Justice Gitumbi (as she then was). Mr. Kenyatta submitted that the Interested Party who had been joined as such and as the administrator of the estates of the 4th and 5th Defendants was ordered by Lady Justice Gitumbi to sort out the challenges against him as an administrator in the succession causes at the High Court before this case could go on.
5. Mr. Bwire in rejoinder clarified that his issue was not with the succession causes rather on jurisdiction, on the basis that the Plaintiffs' suit had been filed against dead persons.

Issues for determination

6. The question for determination before the court is where the Plaintiffs' suit is valid and if it is not whether the court has the authority to take appropriate action.

Determination

7. The issue of whether or not this suit was filed against dead persons is a weighty and goes into the jurisdiction of the court to entertain the matter. It is an issue that must be determined at once.
8. The issue of a suit filed against a dead person is an issue that courts have already expressed themselves on. Mbogholi Msagha J (as he then was) was in the case of Viktar Maina Ngunjiri and 4 others –vs- Attorney General and 6 others (2018) eKLR cited with approval the decision in the Indian Case of C. Muttu –vs- Bharath Match Works AIR. 1964 Kant 293, where the court stated that;

“If he (Defendant) dies before the suit and a suit is brought against him in the name in which he carried business, the suit is against a dead man, and it is a nullity from its inception.”



9. The learned judge further cited another Indian Case of Prataap Chand Mehta –vs- Chrisna Devi Menta AIR 1988 Delhi 267, where the court observed that;-

“If a suit is filed against a dead person then it is a nullity and we cannot join any legal representative. You cannot even join any other party, because, it just as if no suit had been filed.”

10. The Court of Appeal of Kenya in Geeta Bharat Shah and 4 others –vs- Omar said Mwatayari and another (2009) eKLR, expressed itself on the issue in the following words,

“In the result, as Bharatkumar Nathalal Shah was already dead by the time the suit was filed, we hold the view that the suit was a nullity and Mr. Oddiaga is with respect right in conceding the appeal in respect of him on that score. We see no merit in directing that he be allowed to file defence as he is not there to do so and the administrators to his estate cannot in law take over the matter as it was filed after he was already dead.”

11. The above reasoning resonates with the holding of Lord Denning in the case of MC Foy –vs- United Africa Company Limited (1961) ALLER 1169, where he stated that;

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so, and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

12. I have carefully perused the directions issued by Lady Justice Gitumbi (as she then was). The Learned Judge did not address the issue of the suit having been filed against dead persons. Her directions were on the capacity of the Interested party as an administrator.

13. The truth of the matter is that the Plaintiffs filed this suit against the 4th and 5th Defendants when they were already deceased. Their suit is therefore a nullity. The Interested party, even if he had lawfully been appointed as a legal representative, which fact is under challenge, could not legally take over the suit on behalf of the 4th and 5th Defendants’ estate. The suit was non-existence. That is what Lord Denning meant when he stated that you cannot put something on nothing.

14. That said, the court declares that the Plaintiffs suit is a nullity, it is not only bad but incurably bad. It cannot be rescued. It is as if it was never filed.

15. I will leave it at that. This file will be closed forthwith.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 14TH DAY OF MARCH 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Omondi h/b for Mr. Kenyatta for the Plaintiffs

Mr. Bwire for the Interested Party



Court Assistant: Mpoye

M.D. MWANGI

JUDGE

