



Mwachiti & 7 others v Riga & 2 others; Mwakutwaa & 3 others (Interested Parties) (Environment & Land Case E010 of 2022) [2023] KEELC 21130 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21130 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E010 OF 2022**

AE DENA, J

OCTOBER 31, 2023

**IN THE MATTER OF .A CLAIM FOR ADVERSE
POSESSION**

=AND=

IN THE MATTER OF.....PLOT NO.

KWALE/MAWECHE/205,

206, 207 AND 208

FORMERLY KNOWN AS PLOT NO. KWALE/MAWECHE/186

BETWEEN

**NYAWA MWACHITI 1ST PLAINTIFF
BAKARI SULEIMAN MZUNGU 2ND PLAINTIFF
SAID NDARO 3RD PLAINTIFF
MOHAMED MENZA BEMRUWA 4TH PLAINTIFF
NDEGWA ALI MWAKIGAO 5TH PLAINTIFF
MBODZE ALI MWAKIGAO 6TH PLAINTIFF
MWAKIDUDU ALI MWAKIGAO 7TH PLAINTIFF
ATHMANI SULEIMAN TUNU 8TH PLAINTIFF**

AND

**HAMISI HAMADI RIGA 1ST DEFENDANT
SAIMU HAMADI MWAKUTWAA 2ND DEFENDANT
KASSIM ALI MWACHARO 3RD DEFENDANT**



AND

BAKARI SALIM MWAKUTWAA INTERESTED PARTY
ZAINAB NDABA KASSIM INTERESTED PARTY
MWANAFAKI HAMISI RIGA INTERESTED PARTY
SAID SALIM MWAKUTWAA INTERESTED PARTY

RULING

1. The plaintiffs have made an application dated 5/12/22 through their counsel for the following orders; -
 - i. That applicants herein, Bakari Salim Mwakutwaa, Said Salim Mwakutwaa, Zainab Ndaba Kassim and Mwanafaki Hamisi Riga be joined in this suit as an interested party forthwith before the inter-parties hearing of the Plaintiffs' Application dated 31st October 2022.
 - ii. That this application be heard ex-parte in the first instance on the ground that the Applicants presence before the Court are necessary at the inter parties hearing of the Plaintiffs' Application dated 31st October 2022 in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit.
 - iii. That in the application and plaint dated 31st October 2022 the Plaintiff/Applicants, sued dead people, hence they cannot respond to the claims brought before this Honourable court.
 - iv. That it is trite law, that one cannot bring a dead person to court, hence the matter is a nullity and cannot be entertained in this honourable court.
 - v. That this suit should be struck of, as the parties brought to court are not alive, hence they cannot defend the suit.
 - vi. That this application be heard on a priority basis given the Courts orders on 15th November, 2022 that the same be heard before the inter parties hearing of the Plaintiffs application dated 31st October 2022.
 - vii. That costs of this application be provided for.
2. The application is premised on the grounds on its face and is stated to be based on the affidavits of Bakari Salim Mwakutwaa, Zainab Ndaba Kassim, Mwanafaki Hamisi Riga and Said Salim Mwakutwaa all sworn on 5/12/22.
3. Said Salim Mwakutwaa states that he is the son of the 2nd defendant and who is one of the Registered Proprietors of parcel No. KWALE/MWAWECH/ 86 (hereinafter referred to as "the said property"). That the said defendant died on 25th April 2007 and cannot come to court to defend himself. It is stated that the suit is a nullity as a matter cannot be filed against a dead person. The deponent annexed copies of green card and Death Certificate and a chief letter proving the death in support thereof.
4. Zainab Ndaba Kassim depones that she is the daughter of Kassim Ali Mwacharo the 3rd defendant one of the proprietors of the suit property who died in July 2015. She reiterates the averments as made by Said Salim Mwakutwaa. The deponent annexed copies of green card and Death Certificate in support thereof.



5. Mwanafaki Hamisi Riga avers that he is the son of the 1st defendant Hamisi Hamadi Riga one of the proprietors of the suit property who died on 1st January 2022. He reiterates the averments as made by Said Salim Mwakutwaa. The deponent annexed a copy of green card.

Response

6. The application is opposed through the affidavit of Nyawa Mwachiti on behalf of the plaintiffs sworn on the 15/3/23. He depones that they filed the present suit following eviction threats by the defendant and upon service of the pleadings the defendants responded by filing the instant application. That the applicants have deponed that the defendants are deceased and that they are the legal representatives of the respective estates thereto. That having admitted under oath that they have full knowledge and capacity to respond to the issues, it is only fair that they be joined in these proceedings as Interested Parties to allow logical conclusion devoid of unnecessary legal technicalities. It is prayed that the parties be given time to regularize the proceedings by either filing and or executing Citation and or letters of administration by both the applicants and the Plaintiffs.

Submissions

7. The application was canvassed by way of written submissions.

Applicants Submissions

8. The applicant's submissions were filed on 24/4/23. Rehashing the dates of the defendants' deaths as deponed in the applicants three supporting affidavits herein and noting that the said deponents are children of the deceased, it is submitted that they should be joined to these proceedings as interested parties. The courts attention is also drawn to various court decisions where the judges were all in agreement that a suit filed against deceased persons is null and void and should be struck out. The court is urged to strike out the suit against the deceased defendants. On costs of the application and the main suit, citing the provisions of section 27 of the *Civil Procedure Act* it is urged that the court should exercise its unfettered discretion and award costs of the application to the applicants interested parties as well as the suit upon its being struck out.

The Plaintiffs submissions

9. The Plaintiffs submissions were filed on 29/5/23 the same reiterate the averments in the replying affidavit of Nyawa Mwachiti as stated hereinbefore. It is submitted that the Interested parties having confirmed they are appointed representatives of the deceased they ought to be substitutes as the defendants and file their defences. That they have a recognizable stake as the beneficiaries of the respective estates. The case of *Meme v Republic* (2004)1EA 124 which outlined the reasons for joinder of a person to a suit was cited to buttress this proposition. It is admitted that a suit filed against a deceased is a nullity. However, it is submitted that it was unknown to the deceased that the owners of the suit property were deceased. That it will cause immense prejudice to the applicants were the suit to be dismissed the plaintiffs having been in occupation for the last 50 years with no other place to call home. That the interested parties presented themselves as owners of the suit property.

The court is referred to section 54 of The Law of and paragraph 14 of the 5th schedule *Succession Act* which it is submitted enables the applicants herein to represent the deceased estate in the pending suit. Further that should the applicants be not desirable of proceeding then the suit is curable under the provisions of part IV of the *Probate & Administration Rules* on citation where a person who is entitled to administer the estate of a deceased may be cited by the court to accept or refuse a grant of letters of administration. On costs it is submitted that the case was triggered by the applicants who posed in



manner suggesting they were the registered owners and the applicants having not been aware of the death each party should bear its own costs.

Analysis And Determination

10. The issues that commend determination are; -
 - i. whether the applicants should be joined to the suit as interested parties
 - ii. Whether the suit should be strike out on account of being brought against deceased persons.
 - iii. Costs.
11. The application is premised on the provisions of Order 1 Rule 10 of the [Civil Procedure Rules 2010](#) and Section 3A of the [Civil Procedure Act](#). Order 1 Rule 10 is on substitution and addition of parties and provides as hereunder; -
 - (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.
 - (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
 - (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.
 - (4)

Whether the applicants should be joined to the suit as interested parties

12. The applicants pray that they be joined as Interested Parties. My understanding of this prayer is that it is made to enable the applicants who are the children/beneficiaries of the deceased to have audience before the court as it is their duty to inform the court that the defendants are deceased and of course the attendant consequences. Indeed, I recognise that they must be joined to this suit for this purpose. The other purpose would for them as beneficiaries to file a defence on behalf of the deceased estate and which is supported by the Plaintiffs. This has been discussed elsewhere in this ruling where it will become apparent that without grant of letters of administration they would lack capacity. Clearly however they are parties who ought to have been sued *abinitio* on behalf of the estate of the deceased defendants. I will therefore invoke the provisions of order Order 1 Rule 10 (2) of the [Civil Procedure Rules](#) and the inherent powers of the court and they shall be deemed as duly added as Interested Parties to these proceedings for purposes only of the application that is before this court.

Whether the suit should be struck out on account of being brought against deceased persons.

13. The Plaintiffs commenced this suit by way of Originating summons being a claim for adverse possession against the defendants. Having served the pleadings, the Interested parties filed the present application as children of the defendants seeking to be joined as interested parties as beneficiaries of



- the defendants who were all deceased. They further want the suit to be struck out for the reason that it is filed against deceased persons and therefore a nullity. They annexed death certificates in support thereto. The plaintiffs do not contest the death of the defendants.
14. My perusal of the death certificates reveals that the 1st defendant died on 1st January 2022 and the 2nd defendant on 25th April 2007. Through a letter from the Kwale County Civil Registrar the date of the 3rd defendant's death is given as 1/01/2000. The present suit was filed on 31/10/22. This therefore confirms that indeed as at the date of filing of this suit all the defendants were since deceased. What does it portend for the suit?
 15. The proposed Interested Parties contend that the suit is a nullity and should be struck out. The legal position as to suits filed against deceased persons has been a subject of various litigations most of which were cited by counsel for the applicants.
 16. It is trite that a suit cannot be filed against a deceased person. The law provides that it is the estate of the deceased through the legal representative of that particular estate that is sued in the event of any proceedings being brought against a deceased. See ELC Appeal No. 14 of 2021 *Peter Asituba & 3 Others v Olekia Mabindu Makunga & Ano and Virginia Edith Wambui Otieno v Joash Ochieng Ougo & Another* (1987) eKLR.
 17. In the case of *Viktar Maina Ngunjiri & 4 Others v Attorney General & 6 Others*, High Court at Nairobi Civil Suit No. 21 of 2016 (2018) eKLR Justice Mbogholi Msagha J (as he then was) reviewed various authorities on the cases filed against deceased persons and held that the suit as against the 7th Defendant who was dead when the case was filed was null and void ab initio.
 18. In the case of *Japhet Nzila Muangi v Hamisi Juma Malee* in Mombasa ELC No. 71 of 2016 (OS) Justice Sila Munyao cited the Court of Appeal decision on a similar issue in *Geeta Bharat Shah & 4 Others v Omar Said Mwatayari & Another*, Court of Appeal at Mombasa, Civil Appeal No. 46 of 2008 (2009) EKLK where the court held that the judgement could not be sustained as it was entered against a person who was already dead.
 19. The Plaintiffs admit that a suit filed against a deceased is a nullity. However, they contend that the present suit need not be dismissed but the court should allow the applicants to represent the deceased estate in the pending suit under the provisions of section 54 of The *Law of Succession Act* and paragraph 14 of the 5th schedule Succession Act. Section 54 of the Act is on powers of the court to issue a grant limited for specific or special purposes. These are set out in schedule 5. The said paragraph 14 provides as follows; -

Administration limited to suit

When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.
 20. My interpretation of paragraph 14 above is that it only applies to a pending suit, meaning the proceedings are envisaged to have been filed during the life of the property owner and not a suit that is filed after demise of the property owner. I have already determined that the present suit was filed when all the defendants were already deceased and which is admitted. There was no pending suit prior



to the death of the defendants by the plaintiffs herein. In any case issuance of the grant of letters of administration to the nominee is still expected whereas none has been issued under these provisions. It cannot be automatic I respectfully disagree with Mr. Mang'aro counsel for the plaintiffs. Paragraph 14 cannot be invoked to the aid of the Plaintiffs.

21. Applying the judicial decisions it follows that the present suit too is void ab initio. Let me state that a nullity is a nullity and nothing can come out of this suit. The present suit cannot not be resuscitated by infusing any remedy. It can only be struck out.
22. The upshot of the foregoing is that; -
 - i. The application dated 5th December 2022 is merited and is allowed. The Plaintiffs suit herein commenced by the Originating Summons on 31st October 2022 is hereby struck out.
 - ii. Noting that the Plaintiffs were not aware of the death of the defendants prior to commencement of this suit, the court directs that each party shall bear its costs.

DELIVERED AND DATED AT KWALE THIS 31ST DAY OF OCTOBER 2023

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Mang'aro for the Plaintiff / Respondent

Mr. Kamau for the Proposed Interested Parties

