



REPUBLIC OF KENYA



**KENYA LAW**  
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**Juma v Juma; Omar (Respondent) (Environment and Land Appeal  
33 of 2022) [2023] KEELC 21916 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21916 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL 33 OF 2022  
NA MATHEKA, J  
NOVEMBER 28, 2023**

**BETWEEN**

**AZIZA KHAMISI JUMA ..... APPELLANT**

**AND**

**KHAMIS JUMA ..... DEFENDANT**

**AND**

**ABDULRAHMAN MOHAMED OMAR ..... RESPONDENT**

*(An appeal from the Judgment of the Chief Magistrate Court  
at Mombasa (Mr. Joseph Burudi Kalo) dated 4th August 2022)*

**JUDGMENT**

1. The Appellant Appeals to the Environment and Land Court at Mombasa against the Ruling of the Honourable Mr. Joseph Burudi Kalo, Chief Magistrate, Mombasa, delivered on 4<sup>th</sup> August 2022 on the following grounds;
  - 1) The Learned Magistrate erred in Law and in fact in failing to strike out the suit filed against the deceased Defendant despite establishing that the suit was already filed after the Defendant had passed away.
  - 2) The Learned Magistrate erred in law in fact and in failing to appreciate and adequately evaluate the Appellant's application and the submissions and judicial authorities put before him by the Appellant's Advocate thereby wrongly dismissing the Appellant's/Applicant's prayer seeking to strike out the Plaintiff's suit.
  - 3) That the Learned Trial Magistrate erred in law and fact in issuing the order against the Interested Party's application on the ground that there was no disclosure of the death of the



Defendant during the proceedings by counsel on record while the suit was actually filed after the demise of the Defendant and therefore was bad in law.

- 4) That the Learned Trial Magistrate erred in law and in fact by awarding the Respondent the costs of the disallowed prayer seeking to strike out the Respondent's suit and ordering the Interested Party to bear the costs and thereby arrived at a wrong decision that occasioned miscarriage of justice.
2. The Appellant seeks the following orders;
- 1) This Appeal be allowed, and;
  - 2) The learned Magistrate's Ruling in RMCC NO. 1367 of 2014 between the parties herein that was delivered on 4<sup>th</sup> August 2022, and the consequential order therein be set aside and/or be vacated and the suit be struck out as prayed for the Appellant/Applicant in the Notice of Motion application dated 4<sup>th</sup> May 2022;
  - 3) The costs of both this Appeal and the proceedings in the Magistrate's Court be awarded to the Appellant;
3. This court has carefully considered the appeal and the submissions therein. This being a first appeal, this court has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. In the case of *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR, the Court of Appeal held that;
- “This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”
4. The Appellant's main contention is that the Learned Magistrate erred in Law and in fact in failing to strike out the suit filed against the deceased Defendant despite establishing that the suit was already filed after the Defendant had passed away.
5. It is common ground that the defendant was not alive when the suit was filed against him. The defendant died on 24<sup>th</sup> November 1996 and the suit was filed on 15<sup>th</sup> July 2014. It is also inconceivable how a party who is deceased can instruct counsel and that counsel takes over instructions from a non-existent person. Ordinarily then it would mean that, any action including the filing of the plaint, the extraction of the summons; the entering of appearance and filing of the defence would be a nullity. In the case of *Benjamin Leonard Mcfoyo v United Africa Company Limited* (1961) All ER 1169 the court stated as follows;
- “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.”
6. The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the



court through an executor or a personal representative. A formal application has to be filed to facilitate this. In the instant case this cannot happen because the deceased died before the suit was filed. In the Indian case of C. Muttu v Bharath Match Works AIR 1964 Kant 293 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 on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

7. In the Case of Pratap Chand Mehta vs Chrisna Devi Mehta AIR 1988 Delhi 267 the court citing another decision 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 is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

8. Going by the material on record, submissions by counsel and cited authorities I find that this case is clearly different and I wish to distinguish it from the above authorities for the following reasons. One, the application whose ruling is being appealed against was brought after the trial process was concluded and at the execution stage and two, the defendant was represented by an advocate who participated throughout the trial. In the instant case by an affidavit of service dated 23<sup>rd</sup> July 2014 a court process server Maita Dzitu Mwangome proceeded to the defendant's house in Bamburi. It is deponed that he served the defendant through his mother who was present at the material time. The firm of Katsoleh & Company Advocates filed a defence on the defendant's behalf on the 8<sup>th</sup> September 2014 and participated fully during the trial. The issue of the defendant's death was never raised in the defence or during the entire trial in the lower court. Judgement was entered on the 26<sup>th</sup> February 2016. I find that the counsel on record chose to conceal the information and the trial court was ignorant of the death of the defendant and as far as the court was concerned he was ably represented.

9. I concur with the judge in the case of Africa Merchant Assurance Co. Ltd v Michael Ndungu Wambugu (Deceased and substituted by Stephen Kamatho Ndungu) (2020) eKLR where she held that;

“29. This court is satisfied that there was no proof of death of the defendant in the lower court so as to render the proceedings as a nullity; and therefore, this court finds no good reason to declare the proceedings as being a nullity;

30. This court is satisfied that the proceedings in Nyeri CMCC 360/2011 were properly conducted and the purported death of the defendant is found to be of no effect on the subsequent proceedings in the declaratory suit Nyeri CMCC No.18/2013;”



10. The estate of the defendant cannot take the court for a ride and now turn around during the execution stage to nullify the whole process. I find that they deliberately concealed the fact that the defendant was deceased. I find that the Appeal is not merited and is dismissed with costs to the respondent.

11. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28<sup>TH</sup> DAY OF NOVEMBER 2023.**

**N.A. MATHEKA**

**JUDGE**

