



REPUBLIC OF KENYA



**Saju v Baker & 2 others (Environment and Land Case Civil Suit
E008 of 2023) [2023] KEELC 21837 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21837 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E008 OF 2023**

**JO MBOYA, J
NOVEMBER 23, 2023**

BETWEEN

NADIA KARA SAJU PLAINTIFF

AND

ROBERT JOSEPH BAKER 1ST DEFENDANT

CONSUELO FAYE TEGLE 2ND DEFENDANT

PAULA J BAGSHAW 3RD DEFENDANT

RULING

1. The Instant Ruling relates to two [2] Applications, one filed by the 2nd Defendant and which seeks the striking out of the Originating Summons; whilst the other Application has been filed by the Plaintiff and which essentially seeks for orders of Temporary Injunction and an Inhibition, as pertains to the Suit Property.
2. Owing to the diverse reliefs that have been sought at the foot of the two named Applications, it is appropriate that the reliefs at the foot of each Application be serialized, for ease of reference and in any event, for the sake of brevity.
3. Pursuant to the Application dated the 13th April 2023; the 2nd Defendant herein has sought for the following reliefs; [verbatim]:
 - i. The Originating Summons dated the 10th February 2023 be struck out.
 - ii. Costs of this application be paid by the Plaintiff
4. The instant Application is premised and or anchored o various grounds which have been enumerated at the foot thereof. Furthermore, the Application is supported by the Affidavit of Consuelo Smykal



- Paterson; sworn on the 31st March 2023; and in respect of which same has annexed a total of six Documents thereto.
5. Upon being served with the instant Application, the Plaintiff herein filed a Replying affidavit sworn on the 25th July 2023; and in respect of which the Plaintiff herein has averred, inter-alia, that the Application by and on behalf of the 2nd Defendant is not only misconceived, but legally untenable.
 6. The Second Application is the one dated the 5th September 2023; and in respect of which the Plaintiff has sought for the following reliefs;
 - i. That pending the disposal of this suit, or until further orders, the Defendants by themselves, their servants, agents or otherwise whomsoever be restrained, stayed or prevented from trespassing on, wasting, damaging, alienating or in any other manner disposing of, the parcel of land known as L.R. No. 17/75 (Original No. 17/5/24) or any part thereof.
 - ii. That until the disposal of this suit an Inhibition do issue inhibiting the registration of any dealings with the parcel of land known as L.R. No. 17/75 (Original No. 17/5/24).
 7. The subject Application is similarly premised and anchored on assorted grounds which have been enumerated at the foot thereof. Further and in addition, the Application herein is supported by the affidavit of the Plaintiff, sworn on the 5th September 2023.
 8. Suffice it to point out that upon being served with the Plaintiff's Application, the 2nd Defendant responded thereto vide Grounds of opposition.
 9. Be that as it may, the subject matter came up for mention on the 25th September 2023; when the advocate for the respective Parties intimated to the Honourable court that there were two [2] Applications, which were pending hearing and determination. Besides, the advocates for the respective Parties also covenanted to canvass and dispose of the two [2] applications simultaneously.
 10. Pursuant to and in line with the agreement amongst the advocates for the respective Parties, the court proceeded to and issued directions, pertaining to and concerning the hearing and disposal of the two [2] Applications.
 11. Moreover, the Honourable court also ventured forward and directed that the two [2] Applications be canvassed by way of written submissions to be filed and exchanged by the Parties within set timelines.
 12. Suffice it to point out that the Parties proceeded to and indeed filed and exchanged written submissions. For good measure, the Plaintiff filed two sets of written submissions dated the 28th September 2023; and Rejoinder submissions dated the 2nd November 2023.
 13. On the other hand, the 2nd Defendant filed written submissions which are however undated whilst the 3rd Defendant filed written submissions dated the 11th October 2023.
 14. For coherence, the four [4] sets of written submissions are on record.

THE PARTIES' SUBMISSIONS:

a. PLAINTIFF'S SUBMISSIONS:

15. The Plaintiff herein adopted and reiterated the grounds contained at the foot of the Application dated the 5th September 2023; as well as the contents of the Supporting affidavit sworn on even date.
16. Further and in addition, the Plaintiff thereafter raised, highlighted and canvassed four [4] salient issues for due consideration by the Honourable court.



17. First and foremost, Learned counsel for the Plaintiff has submitted that the Plaintiff herein has been in open, continuous and uninterrupted occupation and possession of L.R No. 17/75 (Original Number 17/5/24) ever since the year 1992. In this regard, Learned counsel for the Plaintiff has thus submitted that the occupation and possession of the suit property by the Plaintiff has therefore extinguished the rights and interests of Kenneth Robert Baka, now deceased; as well as the Defendants herein, who have been described as the Legatees of the Estate of Kenneth Robert Baker.
18. Arising from the foregoing, Learned counsel for the Plaintiff has thus contended that the Plaintiff herein has therefore acquired lawful and legitimate rights and interests over the suit property, which merits protection.
19. Additionally, Learned counsel for the Plaintiff has submitted that on the basis of the claim of adverse possession, the Plaintiff herein has thereby established and demonstrated the existence of a prima facie case to warrant the grant of an order of temporary injunction, in the manner sought.
20. Secondly, Learned counsel for the Plaintiff has also submitted that pursuant to a Certificate of confirmation of Grant dated the 13th November 1987, the Defendants herein are stated to be the lawful Legatees, to whom the suit property shall devolve to upon the termination of the interest of one, Purvis Kara Baker, now deceased.
21. Furthermore, it has been contended that insofar as Purvis Kara Baker, is now deceased, there is a likelihood that the Defendants herein, as the Legatees of the Estate of the deceased, are likely to proceed and cause the suit property to be transferred and registered in their names.
22. On the other hand, Learned counsel for the Plaintiff has thereafter submitted that if the Defendants proceed to and effect the registration of the suit property in their names, then same shall be amenable to dispose of, alienate and/or deal with the suit property in such a manner, that will affect the interests of the Plaintiff.
23. Consequently and in the premises, Learned counsel for the Plaintiff has thus contended that the Plaintiff herein has demonstrated irreparable loss that is likely to accrue and/or arise, if the orders of temporary injunction are not granted.
24. Lastly, Learned counsel for the Plaintiff has also contended that the Defendants herein do not reside within the Jurisdiction of this Honourable court; and hence if same are not restrained vide an order of injunction, then it would be difficult to enforce such other orders that the court may issue and/or grant.
25. In support of the submissions pertaining to and or concerning the grant of an order of injunction, Learned counsel for the Plaintiff has cited and relied on the case of Lorna Catherine Philips versus I&M Bank Ltd & Another (2021)eKLR.
26. In respect of the Application for striking out, namely, the application dated the 13th April 2023, Learned counsel for the Plaintiff has contended that the application under reference is misconceived and legally untenable.
27. In particular, Learned counsel for the Plaintiff has submitted that the issue before this Honourable Court relates to a claim for adverse Possession, which can only be entertained and adjudicated upon by the Environment and Land Court and not otherwise.
28. Furthermore, Learned counsel for the Plaintiff has submitted that though the Plaintiff herein had hitherto filed Nairobi HCC Succession cause No. 736 of 2018; concerning the Estate of Purvis Kara Baker alias Purvis Sadrudem Kara Saju Baker alias Purvis Sadrueen Kara Saju; however, the said Succession Court has no Jurisdiction to entertain and adjudicate upon a claim for adverse Possession.



29. Based on the foregoing, Learned counsel for the Plaintiff has contended that the Plaintiff was therefore at liberty to commence and/or lodge the instant proceedings before the Environment and Land court, insofar as it is the said court that is seized of the requisite Jurisdiction to entertain the subject matter by dint of the Provision of Section 37 and 38 of the Limitations of Actions Act, Chapter 22, Laws of Kenya.
30. The Second issue that has been raised and canvassed on behalf of the Plaintiff herein relates to the fact that the Succession Cause which has been alluded to in terms of the preceding paragraph touches on and concerns the Estate of Purvis Kara Baker and not Kenneth Robert Baker, Deceased, who is the registered proprietor of the suit property, which is the subject of adverse possession.
31. Remarkably, Learned counsel for the Plaintiff therefore contends that the premise upon which the application to strike out is based is therefore misconceived, erroneous and legally untenable.
32. Finally, Learned counsel for the Plaintiff has submitted that striking out of a suit is a very drastic and draconian action, which should thus be exercised sparingly and with due circumspection, so as to avoid driving the Plaintiff away from the seat of Justice and thereby depriving the Plaintiff of the Right to Fair Hearing.
33. Further and at any rate, Learned counsel for the Plaintiff has contended that the 2nd Defendant has not established and/or demonstrated the requisite grounds, to show that the suit beforehand constitutes and/or amounts to an abuse of the Due process of the court, either as alleged or at all.
34. In support of the submissions that striking out of a case ought to be exercised sparingly, Learned counsel for the Plaintiff has cited and relied on, inter-alia, the case of Saudi Arabian Airlines Corporation versus Sean Express Service Ltd (2014)eKLR and Linnet Bee Oyier & Another vs Savings & Loans Kenya Ltd HCC No. 891 of 1966 [UR].
35. Premised on the foregoing, Learned counsel for the Plaintiff has therefore invited the Honourable Court to find and hold that the Application for temporary injunction and inhibition, is meritorious, whilst the application to strike out the originating summons is devoid of merits and ought to be dismissed.

b. 2ND DEFENDANT’S SUBMISSIONS:

36. The 2nd Defendant herein has adopted the various grounds at the foot of the Application dated the 13th April 2023; as well as the contents of the Supporting affidavit and thereafter same has raised, highlighted and canvassed two [2] salient issues for consideration by the Honourable court.
37. Firstly, Learned counsel for the 2nd Defendant has submitted that the Plaintiff herein had moved the High Court and filed Nairobi HCC Succession cause No. 736 of 2018, wherein same sought for and obtain Grant of Probate over and in respect of the Estate of Purvis Kara Baker, now deceased, who was the wife of Kenneth Robert Baker, similarly deceased.
38. It was the further submissions of Learned counsel for the 2nd Defendant that upon procuring and obtaining the Grant of Probate of the Estate of Purvis Kara Baker, the Plaintiff herein sought to have the suit property transferred to and registered in her name as the Executrix of the Estate of Purvis Kara Baker, now deceased.
39. On the other hand, Learned counsel for the 2nd Defendant has also submitted that when the Plaintiff realized that the suit property had not been transferred to and registered in the name of Purvis Kara Baker, now deceased, but was still in the name of Kenneth Robert Baker, [Deceased], the Plaintiff



proceeded to and filed an Application dated the 27th October 2021; wherein same sought to have the suit property transferred to and registered in her name in lieu of the administrator of the Estate of Kenneth Robert Baker, now deceased.

40. Additionally, Learned counsel for the Second Defendant has submitted that the said Application which was filed by the Plaintiff remains outstanding and has not been heard and determined to date.
41. Arising from the foregoing, Learned counsel for the 2nd Defendant has therefore contended that the filing of Succession Cause wherein the Plaintiff claims to be a beneficiary of Purvis Kara Baker, now deceased; on one hand and the filing of the current suit, wherein same is seeking to acquire the suit property on account of adverse possession constitutes and amounts to an abuse of the Due process of the court.
42. In support of the submissions that the current suit constitutes ad amounts to an abuse of the Due process of the court, Learned counsel for the 2nd Defendant has cited and relied on, inter-alia, the case of Muchanga Investment Ltd versus Safaris Unlimited (Africa) Ltd & 2 Others (2009)eKLR.
43. Secondly, Learned counsel for the 2nd Defendant has submitted that even though the Plaintiff was privy to and knowledgeable of the existence of succession cause vide Nairobi HCC Succession No. 736 of 2018; and the pending application filed therein, same nevertheless, failed to disclose the said proceedings to the court whilst filing the current suit.
44. Premised on the foregoing, Learned counsel for the 2nd Defendant has therefore contended that the Plaintiff herein is similarly guilty of concealment and/or non-disclosure of material facts, which thus deprives the Plaintiff of the right to partake of and benefit from the Equitable discretion of the Honourable court.
45. Thirdly, Learned counsel for the 2nd Defendant has also submitted that the Plaintiff suit is also misconceived insofar as the Plaintiff is seeking to be declared as the owner of the suit property by way of adverse possession, whereas the same Plaintiff holds a Grant of Probate pertaining to and concerning the suit property.
46. Consequently and in this regard, Learned counsel for the 2nd Defendant has thus invited the Honourable court to find and hold that the claim by the Plaintiff at the foot of the originating summons is not only paradoxical, but inherently contradictory, insofar as the same property cannot be the subject of ownership vide Grant of Probate and at the same time on the basis of adverse possession.
47. In respect of the Application for temporary injunction, Learned counsel for the 2nd Defendant has submitted that the Plaintiff herein has neither established nor demonstrated the existence of a prima facie case, to warrant the grant of the orders of temporary injunction, either as sought or at all.
48. Furthermore, Learned counsel for the 2nd Defendant has re-visited the contention that the Plaintiff herein cannot stake a claim to the suit property vide Grant of Probate, which constitutes beneficial ownership; whilst at the same time purporting to have acquired adverse possession over and in respect of same the suit property.
49. In a nutshell, Learned counsel for the 2nd Defendant has therefore contended that the contradictory claims by and on behalf of the Plaintiff herein, therefore negates the cause of action, if any, available to the Plaintiff.
50. Other than the foregoing, Learned counsel for the 2nd Defendant has also submitted that insofar as the Plaintiff is not the owner of the suit property, same has therefore failed to show the irreparable loss that is likely to accrue and/or arise, if the orders sought are not granted.



51. In short, Learned counsel for the 2nd Defendant has contended that the Plaintiff herein has neither met nor satisfied the threshold for the grant and or issuance of orders of temporary injunction as underpinned by the decision in *Giella vs Cassman Brown Ltd (1973)EA* and *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003)eKLR*, respectively.
52. In a nutshell, Learned counsel for the 2nd Defendant has implored the Honourable court to find and hold that the suit by and on behalf of the Plaintiff herein constitutes and amounts to an abuse of the Due process of the court.

c. 3RD DEFENDANT’S SUBMISIONS:

53. Learned counsel for the 3rd Defendant filed written submissions dated the 11th October 2023; and in respect of which same has raised, highlighted and canvassed three [3] issues for due consideration by the court.
54. First and foremost, Learned counsel for the 1st Defendant has submitted that the plaintiff herein is non-suited as against the Defendants herein, who are neither the registered owners of the suit property nor the Legal Representatives of the Estate of the deceased.
55. To the extent that the Defendants are neither the registered owners nor the duly constituted Legal Administrators of the Estate of the deceased, Learned counsel for the 3rd Defendant has therefore submitted that the entire suit is therefore bad in law and legally untenable.
56. In support of the foregoing submissions, Learned counsel for the 3rd Defendant has cited and relied on the case of *Titus Mutuku Kasuve vs Mwaani Investment Ltd & 4 Others (2004)eKLR*.
57. Secondly, Learned counsel for the 3rd Defendant has submitted that the current suit filed by and on behalf of the Plaintiff is prohibited by dint of the Doctrine of res-sub-judice, insofar as, there is in existence a previous suit Nairobi HCC Succession Cause No. 736 of 2018; which touches on and concerns the same subject property.
58. Additionally, Learned counsel for the 3rd Defendant has also submitted that prior to and before filing the instant suit, the Plaintiff filed and/or caused to be filed an Application dated the 27th October 2021; vide the Succession cause and wherein same sought to have the suit property transmitted to her on the basis of (sic) the “Will” which was handed down by Purvis Kara Baker, now Deceased.
59. Arising from the foregoing, Learned counsel for the 3rd Defendant has therefore contended that the Plaintiff herein is running two suits, albeit before different courts, but seeking ownership over and in respect of the same suit property.
60. Consequently and in the premises, Learned counsel has contended that the issues attendant to and which color the two proceedings by and on behalf of the Plaintiff therefore contravene the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
61. In support of the submissions that the current suit is prohibited by the Doctrine of res-sub-judice, Learned counsel has cited and relied on the case of *Kinatwa Cooperative Savings & Credit Society Ltd vs Kinatwa Prestige Ltd (2021)eKLR*.
62. Finally, Learned counsel for the 3rd Defendant has submitted that the Plaintiff herein concealed and/or failed to disclose to the Honourable court that same had since filed an application dated the 27th October 2021; and wherein same was seeking to acquire ownership to and in respect of the suit property on the basis of being the heir, beneficiary and/or executrix of the estate of Purvis Kara Baker now deceased;



- who was the wife of Kenneth Robert Baker (similarly deceased); and who was the original proprietor of the suit property.
63. Pertinently, Learned counsel for the 3rd Defendant has submitted that an order of temporary injunction is an equitable relief and hence an Applicant deserving of an order of temporary injunction, must approach the court with clean hands and not otherwise.
 64. Nevertheless, Learned counsel has contended that the current Plaintiff has concealed pertinent and material information from the court and hence same has approached the court with unclean hands. Consequently and in this regard, Learned counsel for the 3rd Defendant has therefore contended that the Plaintiff is not deserving of Equitable discretion.
 65. In support of the foregoing submissions, Learned counsel has cited and relied on the case of *Hezron Kamau Gichura vs Kianjora Enterprises Ltd & Another* (2022)eKLR and *Esther Nugari Gachomo vs Equity Bank Ltd* (2019)eKLR, respectively.
 66. Based on the foregoing submissions, Learned counsel for the 3rd Defendant has therefore impressed upon the Honourable court to find and hold that the entire suit by and on behalf of the Plaintiff constitutes and amounts to an abuse of the due process of the court and thus ought to be struck out with costs.

ISSUES FOR DETERMINATION:

67. Having reviewed the two [2] Applications and the Responses thereto; and upon consideration of the written submissions filed by and on behalf of the respective Parties, the following issues do arise and are thus worthy of determination;
 - i. Whether the Plaintiff's suit as against the 1st Defendant is a nullity ab initio.
 - ii. Whether the Plaintiff's case as against the Defendants and more particularly the 2nd and 3rd Defendants, is Legally tenable.
 - iii. Whether the suit by and on behalf of the Plaintiff constitutes an abuse of the Due process of the court.
 - iv. What reliefs, if any; ought to be granted.

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1 Whether the Plaintiff's suit as against the 1st Defendant is a nullity ab initio.

68. The Plaintiff herein took out originating summons against the three Defendants, who have been described as the Legatees in interests of Kenneth Robert Baker, now deceased. Furthermore, the Plaintiff herein claims as against the Defendants jointly and/or severally, a declaration that same (Plaintiff) has since acquired ownership of the suit property, namely, L.R No 17/75 (Original No. 17/5/24), vide adverse possession.
69. It suffices to point out that a civil suit and/or proceedings can only be commenced and/or mounted as against Legal entities, whether Natural human beings or body corporates, incorporated pursuant to the *Companies Act*, Chapter 486, Laws of Kenya, [now repealed and replaced by the *Companies Act*, 2015], or such other Act that confers an entity with legal capacity, to sue or be sued.
70. As pertains to the subject matter, there is no gainsaying that the Defendants herein are Human beings and thus natural persons, under the law. Consequently, it is instructive to observe that a law suit/civil



proceedings can only then be commenced and maintained against a Living human being/person, but not otherwise.

71. Notwithstanding the foregoing, it is important to point out that the 2nd Defendant herein filed an Affidavit wherein same has stated as hereunder;

“ Paragraph 3

The Robert Joseph Baker, the 1st Defendant herein is my brother who died on the 16th April 2013. Annexed herewith and marked CSP-2 is a true copy of the certificate of death”

72. From the averment, which has been reproduced in the preceding paragraph, it is evident and apparent that the 1st Defendant herein died on the 16th April 2013 and thus ceased to be a legal entity, capable of suing and/or being sued, or at all.

73. Moreover, the Plaintiff herein in her own affidavit sworn on the 5th September 2023; has conceded to and admitted that the 1st Defendant is indeed dead.

74. For brevity, the contents of paragraph 2 of the supporting affidavit are illustrative.

75. Same provide as hereunder;

“ That the Defendants are children of Kenneth Robert Baker. The registered proprietor of the suit parcel. ‘certificate of postal search annexed hereto and marked as KNS-1’ – who died on 31st January 1987. They all live abroad although I have gleaned from their pleadings that the 1st Defendant unfortunately died on the 16th April 2013, domiciled in the State of Arizona, United States of America.

76. Pertinently, the suit which was filed on or about the 10th February 2023; and which has impleaded the 1st Defendant ha one of the Parties, was therefore filed long after the 1st Defendant had died and therefore ceased to be a Legal person in the eyes of the law.

77. Owing to the foregoing, the question that the court must grapple with is whether or not a suit can be commenced against a Dead person and if not, whether such a suit is a nullity ab initio.

78. To my mind, no suit can be commenced and maintained against a Dead person or at all. For good measure, where a person dies and/or is dead, it behooves the Plaintiff or such other person keen to commence a suit to implead the Executor/executrix; or the Administrator/Administratrix of the deceased, but not otherwise.

79. However, in the instant case the Plaintiff has filed and continues to prosecute a suit against the Defendants, including the 1st Defendant, whom same concedes and admits, to be dead.

80. In my humble view, the suit which was filed against the 1st Defendant, who was long dead, as at the time of the filing of the suit was void for all intents and purposes. Simply put, same is a nullity and which is incapable of redemption by any amount of amendment or otherwise.

81. To be able to appreciate the import and tenor of what amounts to a nullity and whether what is a nullity is capable of redemption, it suffices to cite and reiterate the dictum in Mcfooy versus United Africa Ltd (1952)eKLR, where the court stated and held thus;

“ 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.”

82. Arising from the foregoing, my answer to issue number one [1] herein before is to the effect that the Plaintiff’s suit as against the 1st Defendant was/is a nullity ab initio and thus legally untenable.

ISSUE NUMBER 2 Whether the Plaintiff’s case as against the Defendants and more particularly; the 2nd and 3rd Defendants, is Legally tenable.

83. Other than the fact that the 1st Defendant is long dead and in any event, died long before the filing of the instant suit, there is also the issue as to whether or not the Defendants herein have themselves taken out the Grant of Letters of administration in respect of the Estate of Kenneth Robert Baker, now deceased.
84. Before venturing to address and analyze the issue herein, it is instructive to observe that following the death of Kenneth Robert Baker, deceased, one, namely, Purvis Kara Baker, (who was his widow), proceeded to and took out Grant of Letters of administration Intestate in respect of the Estate of Kenneth Robert Baker.
85. Subsequently, the Grant of Letters of administration which had been issued to and in favor of Purvis Kara Baker, now deceased, was duly confirmed culminating into the issuance of a Certificate of confirmation of Grant dated the 13th November 1987.
86. Pursuant to the Certificate of confirmation of Grant, the Estate of Kenneth Robert Baker, including the suit property was to devolve to and in favor of Purvis Kara Baker, (widow); for as long as same was alive or had not entered into a re-marriage.
87. On the other hand, the Certificate of confirmation of Grant also alluded to the fact that upon the termination of the interest of Purvis Kara Baker, now deceased, the Estate of Kenneth Robert Baker, deceased, was to devolve to and inhere in Robert Joseph Baker, Consuelo Faye Tegle and Paula J Bagshaw, in equal shares.
88. Be that as it may, it is conceded by the Plaintiff herein that the Certificate of conformation of Grant in favor of Purvis Kara Baker, deceased, was neither presented to the Land Registry nor was the suit property transmitted to and registered in the name of the said Administratrix.
89. For good measure, it is conceded that the suit property herein remains registered in the name of Kenneth Robert Baker, deceased; and not otherwise.
90. At this juncture, the issue that does arise is whether the Estate of Kenneth Robert Baker, now deceased, has been duly administered and effectively distributed in accordance with the provisions of Section 71 of the *Law of Succession Act*, Chapter 160 Laws of Kenya.
91. Conversely, if the answer is in the negative; then the incidental question relates to what happens if the single/sole administrator of the Estate of a deceased, dies prior to and before effective distribution of the Estate.
92. To my mind, upon the death of Purvis Kara Baker, now deceased, the Estate of Kenneth Robert Baker, Deceased, reverted back to the State, where there was no administrator/administratrix or otherwise.
93. For the avoidance of doubt, if there were two or more administrators/administratrix to the Estate of Kenneth Robert Baker, now deceased, then upon the death of Purvis Kara Baker (also deceased), the administration of the Estate, including the distribution thereof, would have vested in the surviving



administrators/administratrix. [See the provision of Section 81 of the [Law of Succession Act](#), Chapter 160 Laws of Kenya].

94. However, in respect of the instant matter, there was only one administratrix, namely, Purvis Kara Baker, who has since passed on, prior to and before distribution or effective administration of the Estate.
95. In the current and obtaining situation, the only available way as pertains to the administration of the Estate of Kenneth Robert Baker, Deceased, would call for either of the 2nd or 3rd Defendants taking out fresh Grants of Letters of administration; and thereafter pursuing confirmation.
96. For coherence, it is only then that the 2nd and 3rd Defendants can procure the transmission of the Estate of the deceased, including the suit property in their names.
97. The foregoing aside, the critical question for determination is whether the 2nd and 3rd Defendants, who are the only surviving Defendants; can be sued over and in respect of the estate of Kenneth Robert Baker, now deceased.
98. Unfortunately, the answer is in the negative. For coherence, no suit can be mounted and/or maintained against the 2nd and 3rd Defendants pertaining to and concerning the suit property which is registered and remains registered in the name of Kenneth Robert Baker, deceased.
99. Further and at any rate, there is no gainsaying that the Plaintiff herein acknowledges and confirms that the 2nd and 3rd Defendants have not been sued as the administrators of their late Father, namely, Kenneth Robert Baker, now deceased.
100. To the contrary, the Plaintiff herein has sued the Defendants and in particular, the 2nd and 3rd Defendants as the Legatees of the estate of the deceased.
101. To my mind, a Legatee, is a person or persons who are entitled to partake of and/or benefit from the legacy and/or inheritance of the deceased. Simply put, a Legatee is heir of the Estate.
102. Perhaps it is imperative to take cognizance of the meaning, import and tenor of a Legatee.
103. Same is defined as hereunder;

“A person who receives a legacy” [See Concise Oxford English Dictionary, 12 Edition]”.

104. Arising from the foregoing definition, the question that arise is whether a Legatee is seized and/or possessed with the requisite locus standi to sue and/or to be sued on behalf of the Estate of the deceased.
105. In my humble albeit considered view, the only person or persons seized of the requisite locus standi to sue and/or be sued on behalf of the Estate of the deceased are the Executors/Executrix; administrators/administratrix and not otherwise.
106. To fortify the foregoing position, it suffices to cite and reproduce the provisions of Section 82 of the [Law of Succession Act](#), Chapter 160 Laws of Kenya.
107. Same is reproduced as hereunder;

82. Powers of personal representatives Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;



- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that-

- (i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
 - (ii) no immovable property shall be sold before confirmation of the grant;
- (c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;
 - (d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Provided that, except so far as otherwise expressly provided by any will-

- (i) no appropriation shall be made so as to affect adversely any specific legacy;
- (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.

108. Furthermore, it is also instructive to take cognizance of the holding of the Court of Appeal in the case of *Rajesh Pranjivan Chudasama versus Sailesh Pranjivan Chudasama* [2014] eKLR, where the court held thus;

“As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased’s estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo* (supra) this Court differently constituted rendered itself thus:



“... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

109. Quiet clearly, no suit, which touches on and/or concerns the Estate of a deceased person, a claim for adverse possession not excepted, can be maintained against Legatees, heirs and/or beneficiaries of the Estate, prior to and/or before issuance of Grants of Letters of administration in their favor.
110. Consequently and in the premises, it is common ground that the instant suit, which touches on and impacts upon the Estate of Kenneth Robert Baker, now deceased, is indeed premature, misconceived and thus bad in law, for being maintained against persons without the requisite locus standi.
111. Put differently, the Plaintiff herein is non-suited as against the Defendants, but in particular, the 2nd and 3rd Defendants, who are the only persons who are alive.

ISSUE NUMBER 3 Whether the suit by and on behalf of the Plaintiff constitutes an abuse of the Due process of the court.

112. Evidence abound that during her lifetime, Purvis Kara Baker, now deceased, who was the widow of Kenneth Robert Baker (similarly deceased); same (sic) issued a will in favor of the Plaintiff herein and wherein Pervis Kara Baker was bequeathing inter-alia, her interest in respect of (sic) the suit property to the Plaintiff herein.
113. Instructively, the will in question was generated and executed in the year 2017. At any rate, it is the said Will which was thereafter utilized by the Plaintiff to procure the Grant of Probate vide Nairobi HCC Succession Cause no. 736 of 2018.
114. Flowing from the foregoing, what comes out is to the effect that the Plaintiff herein was staking a claim to and in respect of the Suit property as heir, beneficiary and better still, as the Executrix of the Estate of Purvis Kara Baker, now deceased.
115. Other than the foregoing, it is not lost on this Honourable court that Purvis Kara Baker, now deceased; and from whom the Plaintiff was staking a claim to the suit property, was the widow of Kenneth Robert Baker, deceased, against whom the claim for adverse possession is now mounted.
116. To my mind, the kind of interest, if any, that Purvis Kara Baker [Deceased], was endeavoring to bequeath to the Plaintiff herein, if at all, in respect of the suit property, was the interest that Purvis Kara Baker was holding as a Trustee of the Estate of her late husband.
117. Consequently, the question that must be grappled with and unraveled is whether the Plaintiff herein whose claim is anchored on (sic) the Will by Purvis Kara Baker, Deceased, could stake a claim of adverse possession against Purvis Kara Baker; and if not, then the same applies against Estate of Kenneth Robert Baker.
118. Suffice it to state that one cannot purport to hold and/or lay a claim as an heir, beneficiary and/or administrator on one hand; and on the other hand, purport to stake a claim founded on adverse possession.
119. Notably, the claim of beneficial interests and/or ownership, which is certainly predicated on a Grant of Probate; cannot co-exist with one based on adverse possession. To be precise, a claim for adverse possession is antithetical to one based on administration [based on a Grant of Probate].



120. To this extent, it suffices to adopt and reiterate the holding of the Court of Appeal in the case of Catherine Koriko & 3 others v Evaline Rosa [2020] eKLR, where the court held and stated thus;

In Haro Yonda Juaje –v- Sadaka Dzeno Mbauro & Kenya Commercial Bank (2014) eKLR it was stated:

(29) One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered *Land Act* and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.

In the application, the appellants sought to lay claim to the suit property on the basis of adverse possession. A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person.

121. Simply put, a person who has proceeded to and procured Grant of probate over and in respect of the same property cannot by sidewind turn around and purport to lay and/or stake a claim over the same property on the basis of adverse possession.
122. Surely, the Plaintiff herein cannot be allowed to approbate and reprobate at the same time.
123. Other than the foregoing, there is also no gainsaying that the Plaintiff's claim to the suit property flows from (sic) the Will which was issued by Purvis Kara Baker, now deceased and which forms the basis of Nairobi HCC Succession 736 of 2018, which culminated into the issuance of the Grant of probate.
124. Invariably, the Will, which anchors the Grant of probate denotes that the Plaintiff's claim, interests and/or stake in the suit property, if at all, is premised on the consent, permission of and/or relationship with Purvis Kara Baker, now deceased, who was the widow of Kenneth Robert Baker, deceased.
125. In the circumstances, it is legally untenable to fathom a situation and/or scenario where the Plaintiff derives permissible interests on the basis of the Will, but turns back and says that she holds an adverse/ hostile title to the original owner, who was the husband of the person, who (sic) has granted to the Plaintiff the permissible rights of possession and occupation.
126. To my mind, the Plaintiff's claim to the suit property on account of adverse possession, whilst holding a Grant of probate in respect of the same property, is not only paradoxical but replete with extreme/ gross abuse of the Due process of the court.
127. Before departing from the issue herein, it suffices to take cognizance of the dictum of the court of appeal in the case of MUCHANGA INVESTMENTS LTD v SAFARIS UNLIMITED (AFRICA) LTD & 2 others [2009] eKLR, where the court stated and observed as hereunder;

On the basis of the letters of admission we think that Mr Church and by extension his company were tenants and tenants in possession have no adverse possession. Time cannot run in their favour until the tenancy is terminated.



The situation of a tenant as far as adverse possession is concerned is similar to that of a licensee and we therefore re echo the decision of this Court cited by the learned counsel for the appellant, namely, the case of WAMBO v NJUGUNA 1983 KLR 172 at holding 4 where the Court held:-

“Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist.”

128. Having come to the conclusion that the Plaintiff herein cannot on one hand stake a claim to the suit property on the basis of Grant of probate in respect of the Estate of Purvis Kara Baker, deceased; whilst on the other hand purporting to have acquired title to the same property vide adverse possession against Kenneth Robert Baker, now deceased; who was the husband of Purvis Kara Baker, what becomes apparent is that the Plaintiff is playing lottery with the Due process of the court.
129. Remarkably, the Plaintiff is endeavoring to acquire title to the suit property by invoking both the succession and civil Jurisdiction of the court contemporaneously, albeit without blinking an eye.
130. Simply put, this is what is otherwise referred to in ordinary parlance, as acquiring by hook or crook, so long as the End justifies the means.
131. Certainly and to my mind, the conduct by and on behalf of the Plaintiff herein fits squarely within the parameters/delineations that constitutes and amounts to (sic) gross abuse of the dues process of the court.
132. To this end, it suffices to invoke, adopt and reiterate the holding of the court in the case of Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR, where the court held thus;
 21. Clearly, this Judicial Review Application, is founded on issues that have been dealt with in the above Petition. To me this suit constitutes abuse of Court process. It is trite law that the Court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The black law dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use “An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use”. [11]
 22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]
 23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-



- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
- (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
- (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
- (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

24. In the words of Oputa J.SC (as he then was)[15] abuse of judicial process is:-

“A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process.”

25. Justice Niki Tobi JSC observed:-[16]

“that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.”

26. It’s settled law that a litigant has no right to pursue paripassu two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.

133. To surmise, the Plaintiff’s suit herein, which constitutes yet another avenue for seeking to procure and obtain title to the suit property on the basis of (sic) adverse possession, whilst still holding Grant of probate pertaining to the suit property amounts to an abuse of the due process of the court.



ISSUE NUMBER 4 What reliefs, if any; ought to be granted.

134. The Plaintiff herein had filed and/or mounted an application wherein same sought for, inter-alia, an order of temporary injunction to restrain and/or prohibit the Defendants, (including the deceased 1st Defendant), from interfering with her possession of the suit property.
135. On the other hand, the Plaintiff herein had also sought for an order of inhibition, to bar and/or restrict any transaction and or dealings of the suit property by the Defendants.
136. Nevertheless, whilst discussing issues number one, two and three above, it has become evident and apparent that the entire suit filed and/or mounted by the Plaintiff herein is not only premature and stillborn, but also constitutes an abuse of the Due process of the court.
137. Arising from the foregoing, there is therefore no gainsaying that the reliefs/prayers sought by the Plaintiff herein cannot be issued and/or be granted. Invariably, it is evident that the Plaintiff herein has neither demonstrated not proved any case let alone a prima facie case, or at all.
138. In the premises, the Plaintiff's case vide Originating summons herein, is one that was Dead long before arrival and in any event, was a nullity ab initio.
139. In this regard, it suffices to adopt and reiterate the holding of the Court of Appeal in the case of Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) v Rosaline Njeri Macharia & another [2016] eKLR, where the court held thus;

(29)] Clearly, a suit not by or against a person or a body corporate is incompetent. It is anullity. That answers the first question. If more authority was required, the philosophy in the sagacious words of Madan, JA as he then was in *D. T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another*, (Civil Appeal No. 37 of 1978) that “a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal...”, show that only there is a suit, however poorly drafted, is amendment possible to save it. Where, as here, the suit is a nullity, there is no litigation in being in law and the issue of amendment does not arise. Madan, JA as he then was alluded to litigation which is akin to a patient who can be treated and healed. Here, the patient is in the morgue. He is dead.

140. In short, the relief that commends itself to me is one that beckons for the striking out of the suit.

FINAL DISPOSITION:

141. In conclusion, it is crystal clear that the suit that was filed and/or mounted by the Plaintiff herein was intended to achieve some ulterior purpose only known to the Plaintiff. Nevertheless, in her endeavor to pursue the ulterior motive, the Plaintiff herein resorted to mis-using/ abusing the Due process of the court.
142. Consequently and in the premises, I come to the conclusion that the Application by the 2nd Defendant is meritorious, whilst the Application by the Plaintiff herein, is devoid of merits.
143. In a nutshell, I now proceed to and do hereby make the following orders;
- i. The Application dated the 5th September 2023; be and is hereby Dismissed with costs.
 - ii. The Application dated the 13th April 2023; be and is hereby allowed with costs.



- iii. The suit vide Originating summons dated the 10th February 2023; be and is hereby struck out.
- iv. Costs of the suit be and are hereby awarded to the 2nd and 3rd Defendants.
- v. The orders of Status Quo hitherto granted be and are hereby vacated and/or discharged.

144. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF NOVEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Mr. Githuka for the Plaintiff/ Applicant.

Ms Ngania for the 2ND Defendandant/ Respondent.

Ms Ruth Mosoti for the 3RD Defendant/ Respondent.

