



REPUBLIC OF KENYA



KENYA LAW
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Onsongo & another v Machongo; Nyakundi (Applicant) (Environment & Land Case 194 of 2017) [2023] KEELC 21535 (KLR) (16 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21535 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 194 OF 2017**

M SILA, J

NOVEMBER 16, 2023

BETWEEN

PAUL ONSONGO 1ST PLAINTIFF

MARK OMAIKO MACHONGO 2ND PLAINTIFF

AND

ANDREW NYAKUNDO MACHONGO DEFENDANT

AND

PETER MADARAKA NYAKUNDI APPLICANT

RULING

(Application for substitution of the deceased defendant; defendant having been sued as administrator of the estate of his deceased father (first deceased); applicant not holding a grant in respect of the first deceased but a grant in respect of the defendant; applicant not competent to take over as defendant as he needs to have a grant in respect of the first deceased; defendant sued in respect of the manner in which he distributed the estate of the deceased; the manner in which an estate is distributed being the purview of the succession court; suit improperly before this court and thus struck out).

1. The application before me is that dated 12 June 2023 and filed on 16 June 2023. It is an application brought pursuant to the provisions of Order 24 Rules ,1, 4 and 7 of the *Civil Procedure Rules*, 2010. The substantive prayer in the application is for an order to substitute the deceased defendant with the applicant, one Peter Madaraka Nyakundi. The application is opposed.
2. To put matters into context, this suit was commenced through a plaint which was filed on 5 October 2017. The plaintiffs averred that their late father, one John Machongo, who passed on in the year 1985, owned the land parcel Nyaribari Masaba/Bonyamasicho/289 and before his death, he had left



instructions on how his land should be subdivided amongst his sons. It is pleaded that the land was to be subdivided as follows: Paul Onsongo Machongo (1st plaintiff), 7.2 acres; Mark Omaiko Machongo (2nd plaintiff) 7.2 acres; Andrew Nyakundi Machongo (defendant), 7.2 acres; Michael Ondieki Machongo (deceased) 7.2 acres; and Sabina Mageto and Trusila Mosari Mageto, widows of Patrick Machongo, 3.6 acres each. It is pleaded that the shares of each person were well depicted on the ground and the beneficiaries constructed their homesteads in accordance thereto. The plaintiffs filed suit contending that the defendant, who held letters of administration for the estate of their late father, was partitioning the land without giving due regard to the developments on the ground and thus the plaintiffs stand to suffer loss. In the suit, the plaintiffs sought an order to have the court direct the Land Registrar and Surveyor, Kisii, to subdivide the land in accordance with the demarcations and developments on the ground, a permanent injunction to restrain the defendant from interfering with the demarcation and developments on the ground and costs.

3. The defendant filed defence and counterclaim. He pleaded that he was indeed issued with a grant of letters of administration for the estate of the late John Machongo, vide Kisii High Court Succession Cause No. 264 of 2000 and that the grant was confirmed. He pleaded that upon confirmation of the grant, the suit land was subdivided into 6 portions in the year 2013 in accordance with the will of John Machongo. In the counterclaim, he pleaded that he caused to be subdivided the suit land into the land parcels Nyaribari Masaba/Bonyamasicho/1858, 1859, 1860, 1861, 1862, and 1863, and that save for the plaintiffs, the other beneficiaries have taken their portions on the ground. He sought the following orders :-
 - a. A declaration that the plaintiffs have no right to challenge the implementation of the will of their late father John Machongo Omori and issue an order directing the plaintiffs to elect and take up their gift from the estate and move to LR No. Nyaribari Masaba/Bonyamasicho/1861 and 1859 respectively or decline and opt out.
 - b. An order of permanent injunction restraining the plaintiffs, their agents, servants or any person acting on their behalf from encroaching, ploughing, wasting or in any way interfering with the quiet possession and ownership of LR Nos. Nyaribari Masaba/Bonyamasicho/1858, 1860, 1862, and 1863 granted to other beneficiaries of the estate of John Mochongo Omori.
4. Through a ruling delivered by Mutungi J on 13 May 2019, the plaintiffs' suit was struck out with costs. What therefore remained was hearing of the counterclaim. Hearing commenced on 25 November 2021 before Onyango J, when the defendant testified in support of his counterclaim. Further hearing was conducted on 24 March 2022 and the defendant/counterclaimant closed his case. By consent, the matter was fixed for hearing of the plaintiffs' defence to the counterclaim on 24 January 2023. The plaintiffs did not attend but instead applied for adjournment which I declined and directed parties to file submissions on the main suit. When the matter came up on 20 March 2023, it was mentioned that the defendant/counterclaimant had died and therefore no step in the matter could be taken.
5. This application was then filed on 16 June 2023, and as I have mentioned, it is an application seeking to substitute the now deceased defendant/counterclaimant. The applicant, Peter Madaraka Nyakundi, has sworn the supporting affidavit, where he avers that he is son to the deceased defendant/counterclaimant. He deposed that the defendant/counterclaimant died on 23 February 2023 before the conclusion of this case. He has deposed that he was granted letters of administration for purposes of continuing this suit vide Kitale CM Succession Cause No. 78 of 2023.
6. The plaintiffs filed grounds of opposition to the effect that the application is bad in law and does not lie. Since the grounds did not elaborate what it is that is bad with the application, I directed Mr. Bosire Gichana, learned counsel for the respondents, to file submissions to elaborate on his grounds, which



he did. In a nutshell it is the submissions of counsel that the defendant brought the counterclaim as an administrator of the estate of his deceased father (John Machongo) and therefore the cause of action does not survive him. Mr. Bonuke in his rejoinder, submitted that the suit was filed against the deceased defendant/counterclaimant and was not against their late father. Mr. Bosire filed additional submissions arguing that since the case of the plaintiffs was struck out, the counterclaim ought to suffer the same fate.

7. I have considered the application and the submissions of counsel.
8. I have read and re-read the pleadings. It is apparent to me that what the plaintiffs were complaining about was the manner in which the defendant/counterclaimant exercised his powers as administrator of the estate of their father, John Machongo (deceased). They in fact complained that he proceeded to demarcate the land in a manner that was not commensurate to the developments on the ground. Whichever way you look at it, the defendant/counterclaimant was not being sued in his own capacity but in the capacity of administrator of the estate of John Machongo (deceased). The defendant reacted by filing his defence and counterclaim. Inter alia he did plead that he caused the estate of John Machongo to be subdivided according to his will. He averred that the original land parcel No. 289 has already been subdivided and in his counterclaim he wished to have the plaintiffs ordered to remain in their subdivisions No. 1861 and 1859. Again, the defendant could only make these prayers as administrator of the estate of John Machongo. If he was not, he could only seek orders in respect of whatever subdivision is in his name, which was not disclosed in his pleadings.
9. I therefore agree with Mr. Bosire that the suit herein was for and against the administrator of the estate of John Machongo (the first deceased). If an administrator dies (the second deceased), and a person wishes to take over and continue the suit, he needs to obtain a grant in respect of the estate of the first deceased, which is the estate that the original defendant was representing, for it was that estate of the first deceased that was party to the suit. A grant in respect of the personal estate of the defendant, as the second deceased, cannot help; it would only help if the suit was for or against the original defendant in his personal capacity. Thus, for any applicant to succeed in substitution in the case herein, such applicant needs to be a person holding a grant of letters of administration in respect of John Machongo, not in respect of the estate of Andrew Nyakundi Machongo (the second deceased). The applicant does not hold a grant in respect of the first deceased but in respect of the second deceased and this cannot allow him to represent the first deceased.
10. For the above reasons, I must decline the invitation to make the applicant a party since he is not a holder of a grant in respect of the first deceased, whose estate is the one in the litigation. I must thus disallow this application and do proceed to dismiss it.
11. I have not forgotten that within the hearing of this application, Mr. Bosire raised issue regarding the veracity of the entire counterclaim, given the ruling of Mutungi J of 13 May 2019. In that ruling, Mutungi J held that this court does not have jurisdiction to interrogate, vary, review and/or revoke the grant issued in the succession court and was of opinion that the suit was an abuse of the court process and ordered it to be struck out. That ruling is not very clear as to whether it was the whole suit that was struck out, i.e both plaint and counterclaim, or whether it was only the plaint. However, I do not see how the counterclaim could survive the dismissal of the plaint because the issues in the counterclaim were the same issues in the plaint. The ruling was never taken for interpretation, but that is the only interpretation that I can give it, for the issues in the plaint and counterclaim are tied at the hip. From 13 May 2019 when the ruling was made, this suit ought not to have continued in this court, and with respect, it was an error apparent on the face of record to proceed with the case. I will proceed to nullify the entire proceedings that took place after the ruling of 13 May 2019.



12. It is apparent that the parties came to this court because of a ruling of the High Court made in the succession court, which held that the court had no jurisdiction over the matter, and that it was now a matter for the Environment and Land Court. I disagree with that ruling and I am certainly not bound by it. Everything here relates to the manner in which the administrator was executing his mandate as administrator of the estate of John Masongo, and the way in which he was distributing the estate. Under the Law of Succession Act, Cap 160, Laws of Kenya, an administrator, at the time of confirmation of grant, needs to satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined as provided in Rule 40 (4) of the Probate & Administration Rules. Identifying the share, in the case of land, must include identifying the actual share on the ground. If there was an issue regarding the identity of the shares on the ground, the plaintiffs could very well have filed a protest to the manner of distribution of the estate, a matter which, the succession court would then determine. Relief could also come through Rule 49 of the Probate and Administration Rules which is the general rule allowing parties to file applications within succession causes. In my humble view, the issues fell squarely within the succession court and not this court. The manner in which an estate is distributed and subdivided falls within the purview and direction of the succession court, and that, indeed, is what Mutungi J held in his ruling of 13 May 2019.
13. This court would only entertain proceedings filed personally by a holder of title held by a beneficiary. Indeed, he would be filing such suit, not so much as beneficiary, but as an independent holder of a particular title. This would not be a suit relating to the manner in which an administrator has acted or is acting, but a suit by a title holder, acting as such, against any person interfering with rights acquired over such property. This scenario is not what we have here and the counterclaim was thus a non-starter once the plaint was struck out. It was for the parties to go back to the drawing board, probably even seek the opinion of the Court of Appeal on the contradictory rulings of the High Court and this Court, but there was nothing to sustain in proceeding with this case.
14. Thus for the above reasons, I not only decline the application for substitution but also proceed to invoke the inherent powers of this court to order the counterclaim struck out. The end result is that both the main suit through plaint and the counterclaim are struck out for reason that this court does not have jurisdiction to supervise how an administrator is distributing the estate of a deceased.
15. The suit was struck out with costs to the defendant. I will strike out the counterclaim with costs to the plaintiffs. The result is that the costs will even out and there will therefore be no orders as to the costs of this suit.
16. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 16 DAY OF NOVEMBER, 2023.

**JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT KISII**

In the presence of: -

Ms. Nyaenya for the plaintiffs/respondents

Ms. Gogi holding brief for Mr. Bonuke for the defendant/applicant

Court Assistant – Lawrence Chomba

