



REPUBLIC OF KENYA



**Bandari & another v Gilani (Environment & Land Case 106 of 2018)  
[2023] KEELC 22014 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22014 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 106 OF 2018**

**LL NAIKUNI, J**

**DECEMBER 5, 2023**

**IN THE MATTER OF: THE LAND ACT 2012 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE LAND REGISTRATION  
ACT OF 2012 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: PLOT NO. MSA/MS/BLOCK II/124**

**BETWEEN**

**MUSA MOHAMED BANDARI ..... 1<sup>ST</sup> APPLICANT**

**NASIRI MWINYIHAJI MASEMO ..... 2<sup>ND</sup> APPLICANT**

**AND**

**GULAM HUSSEIN HASHIM GILANI ..... DEFENDANT**

**RULING**

**I. Introduction**

1. The Ruling of the Honourable Court regards to the Notice of Motion application dated 22<sup>nd</sup> February, 2023 filed by Mr. Abdul Gula Hussein Gilani, the Legal Representative of the Estate of Gulam Hussein Hasham Gilani – the Applicant herein. It was brought under the dint of the provision of Order 2 Rule 15 (1) (a) and Order 51 Rule 1 of the Civil Procedure Rules of Kenya (2010), Section 3A of the [Civil Procedure Act](#), Cap. 21.
2. Upon service, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents herein while opposing this application, filed and served their replies in form of a Replying Affidavit dated 27<sup>th</sup> February, 2023. The Honourable Court will be dealing with this issue indepth at a later stage herein.



## II. The Applicant's case

3. The Applicant's sought for the following orders:-
  - a) Spent.
  - b) That an order be granted arresting the delivery of Judgment in this matter scheduled for 23<sup>rd</sup> February 2023 pending "the inter – Partes" hearing and determination of this application;
  - c) That a date be fixed for "inter - partes' hearing of this application;
  - d) That following "inter - partes" hearing, this Honourable Court be pleased to strike out the Plaintiff filed herein;
  - e) That further, this Honourable Court be please to dismiss the suit herein;
  - f) That the costs of this application be awarded to the Estate of Gulam Hussein Hasham Gilani alias Gulamhusein Hasham Gilani (Deceased).
  
4. The application was based on the grounds, testimonial facts and the averments made out under the seven (7) Paragraphed Supporting Affidavit of Abdul Gulamhussein Gilani sworn and dated on the 27<sup>th</sup> February, 2023 together with annextures marked as "Pages 1 to 5 AAG – 1" annexed thereto. He deponed as follows:-
  - a) He was a resident of Nairobi and of Post Office Box Number 38955-00623, Nairobi in the Republic of Kenya.
  - b) He the Applicant herein and conversant with the facts of this matter and therefore competent to swear this Affidavit.
  - c) The contents of this Affidavit were based partly on facts within his own knowledge which were true, partly on information contained in various documents involved in these proceedings, and partly on advice given to him by his Advocates on record.
  - d) In the course of this Affidavit, he shall make reference to a bundle of documents which had been annexed herein and marked as "AGG-1".
  - e) He was competent to represent the Estate of my Late father, Gulamhussein Hasham Gilani alias Gulamhusein Hasham Gilani, by virtue of a Grant of Probate of Written Will issued in Nairobi Succession Cause Number 51 of 2014. A true copy of the Grant and Certificate of Confirmation of Grant were hereby shown at "Pages 1 - 2 of AGG-1".
  - f) The suit herein was filed against a Defendant, Mr. Gulamhussein Hasham Gilani, who was Deceased at the time of instituting the suit (Hereinafter referred to as "The Deceased"). A copy of the Certificate of Death of Mr. Gulamhussein Hasham Gilani was shown at "Page 3 of AGG – 1"
  - g) He was advised by his Advocates on record that the suit was a nullity at the onset and should rightly be struck out.
  - h) He urged the Court to have the Plaintiff herein be struck out and this suit be dismissed with costs.



### III. The Replying Affidavit by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/ Respondents

5. On 28<sup>th</sup> February, 2023, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents while opposing the application filed an 11 Paragraphed Replying Affidavit sworn by Musa Mohamed Bandari dated 2<sup>th</sup> February, 2023 with two (2) annexures marked as “MMB – 1 and 2”. He averred as follows:-
- a) He was the 1<sup>st</sup> Plaintiff herein. He had the consent of the 2<sup>nd</sup> Plaintiff to swear this affidavit.
  - b) He had been read to and explained the contents of the Applicant’s Application dated 22<sup>nd</sup> February 2023 and the supporting affidavit and hereby wished to respond thereto as follows.
  - c) In reply to the contents made out under Paragraphs 2, 3 and 4 of the affidavit, he stated that the Applicant never annexed the Probate Will which he used to obtain the Grant of Letters of Administration of the Estate of Gulamhussein Hasham Gilani – the Deceased - which could disclose the ownership of the suit property and or his beneficial status.
  - d) In reply to the averments made out under Paragraph 5 of the affidavit, he stated that that the summons in this suit were served by way of substituted service in the local dailies being “The Daily Nation” Newspaper pursuant to an Order of the Court issued on 28<sup>th</sup> March 2019. He annexed herewith a copy of the order and the Advertisement marked as “MMB -1”.
  - e) In reply to the assertions made out under Paragraph 6 of the affidavit, he stated that where a Defendant was deceased and/or his whereabouts was unknown or whose legal representatives were unknown, service of summons upon such Defendant was effected through substituted service by advertisement in a widely read out newspapers or by postal address pursuant to the provisions of Order 5 Rule 17 of the Civil Procedure Rules 2010.
  - f) In the circumstance, whether the Defendant was deceased or not, which he vehemently opposed the service of summons was effective and the proceedings taken in this matter were regular proceeding with effective service.
  - g) At the time of filing the suit, the suit property was registered in the names of the Defendant and the Applicant had not proved any change of ownership or any dealing with the suit property as an Administrator more than five (5) years had since elapsed. He annexed hereto a copy of the official search marked as “MMB – 2”.
  - h) The Applicant who alleged to be a Legal Administrator of the Defendant herein which was disputed, may apply to challenge the Judgment upon delivery at their own liberty.
  - i) Finally, he held that the Applicant's application was devoid of merit latently and patently mischievous which was calculated to delay the delivery of justice which the Court should not entertain and the same should be dismissed with costs at the earliest time possible, without postponing the Judgment herein.

### IV. Submissions

6. On 23<sup>rd</sup> February, 2023 while all the parties were present in Court and the Honourable Court was ready to deliver the Judgement herein as scheduled, its attention was drawn to the impugned application dated 22<sup>nd</sup> February, 2022 by the Applicant herein. Pursuant to that, the Court took consideration of the issues raised thereon and temporarily proceeded to grant the orders of arresting the delivery of the said Judgement which had been ready. Further, it directed that the Plaintiffs file replies to the said applications.



7. On 23<sup>rd</sup> March, 2023, the Honourable Court directed that the said application be disposed off by way of written submissions. Subsequently, both the Applicant and the Plaintiffs obliged. By the time of penning down the Ruling, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents had not as yet filed their submission. Thus, the Court proceeded to reserve a date to deliver its Ruling accordingly.

#### **A. The Written Submissions by the Applicant**

8. Sometimes in the month of May, 2023, the Learned Counsel for the Applicant herein, the Law firm of Messrs. Daly Inamdar Advocates LLP filed their written Submissions dated 16<sup>th</sup> May, 2023 and a set of authorities to boot. M/s. Baraza Advocate commenced by providing a brief introduction and facts of the matter. The Learned Counsel informed Court that these was the written submissions on behalf of the Applicant in respect of the Notice of Motion dated 22<sup>nd</sup> February 2023 (the "Application") seeking for this Court to strike out the Plaint filed in this matter (the "Plaint") and strike out the entire suit (the "Suit") with costs to the Applicant.
9. The Learned Counsel relied on the grounds set out in the Application, the Supporting Affidavit of Abdul Gulamhussein Gilani (the "Applicant") sworn on 21<sup>st</sup> February 2023 and the annexures thereto and on these written submissions in support of the Application. In support of these submissions, the Applicant also relied on its List and Bundle of Authorities (referred to herein as "LOA") filed in conjunction with these submissions.
10. The Learned Counsel provided brief facts by stating that the Defendant, the Late Gulamhussein Hasham Gilani, died on 11<sup>th</sup> July 2013 as was shown on the face of the Certificate of Death at page 3 of "AGG-1" filed with the Application. The Applicant was the duly appointed Legal Representative of the estate of the Defendant by virtue of a Grant of Probate of Written Will issued in Nairobi Succession Cause Number 51 of 2014.
11. She asserted that the Plaintiffs instituted this suit against the Defendant sometimes in the year 2018, 5 years from the death of the Defendant which occurred in the year 2013.
12. As a way of analysis of the matter, the Learned Counsel raised the following four (4) issues extensively backed up with several authorities cited herein. Firstly, the Respondents had not disputed the authenticity of the Certificate of Death filed towards proof of the Defendant's long demise. The Learned Counsel's contention was that the suit having been filed as against a person who was deceased, was a nullity ab initio and was incurably defective and on that basis ought to be struck out. In so submitting, she was guided by several cases including the Court of Appeal decision in

"Geeta Bharat Shah & 4 Others – Versus - Omar Said Mwatayari & Another [2009] eKLR where the court said:

"We have no doubt whatsoever that the learned Judge, in refusing to allow the application as in favour of the deceased against whom a suit was filed after his demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased's estate to urge the court to do so for once the respondent also admitted that he sued a dead person, the court was duty bound to down its tools as it had no jurisdiction to proceed to bear a suit filed against a person who was already dead by the time the suit was filed".

Additionally, the Counsel referred the court to the case of: "Viktar Maina Ngunjiri & 4 Others – Versus - Attorney General & 6 Others [2018] eKLR, which referred to the decision in the Indian case



of “Pratap Chand Mehta – Versus - Chrisna Devi Meuta AIR 1988 Delhi 267 in which the court observed,

“.....if a suit is filed against a dead person then it is a nullity and we cannot join any had been filed...If the case has been instituted against a dead person and that person”

Further, she relied on this Court’s decision in the case of:- “Michael Thoya Mbwana – Versus - Hussein Karimbhai Anjarwalla [2019] eKLR, in a matter that was factually similar to this, concluded as follows:

“Unless the estate was sued, the suit against the deceased is nullity ab initio. Once the irregularity is brought to the court’s attention, any orders made by the court are automatically set aside”.

In the case of:- “Japhet Nzila Muangi – Versus - Hamisi Juma Malee [2022] eKLR attached to these submissions as Authority No.4,where the Court stated:-

“I am afraid that the question is actually whether the Defendant had died at the time that this suit was filed and if I find for a fact that he was deceased at the time, then I will have no choice but to strike out this suit as null and void for one cannot sue a dead man and claim that the suit is properly before court.”

13. Secondly, the Learned Counsel submitted that the Plaintiffs/Respondents had in the Replying Affidavit filed on 28<sup>th</sup> February 2023 substantively contended that service of the summons was effected and therefore the proceedings were regular. The party purported to have been served was however dead. It was therefore irregular. It could not be. For the above proposition, the Learned Counsel relied on the decision in “Attain Advisory Consultants Limited – Versus - Nairobi City County and 3 others [2019] eKLR, where the Court of Appeal referred to the decision in the case of “Joseph Njenga Njoroge – Versus - Kabiri Mbiti [1986] eKLR and quoted extensively from it:

“.....the deceased had to be served. The deceased was not served because he had died. The ex - parte order was a nullity on that account...The other point is that there can

Drawing on that decision, the court said:-

“In reference to this appeal, several egregious acts of nullity were committed in respect of the court proceedings and the sale of the suit property which deprived the court of nullity.....”

14. Additionally, the Learned Counsel cited Justice Mbogholi Msagha (as he then was) in the case of:- “Viktar Maina Ngunjiri (Supra) the High Court at Nairobi referred to the decision in the Indian case of “C. Muttu – Versus - Bharath Match Works AIR 1964 Kant 293 in which the court observed:-

“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. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person”



15. Thirdly, she relied on the decision in the case of:- “Benjamin Leonard Mc foy – Versus - United Africa Company Limited [1961] All ER 1169 where the Court stated 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.”

16. Fourthly, the Learned Counsel contention was that the Applicant, as the duly appointed personal representative of the deceased Defendant, moved swiftly to court once he got notice of what had transpired. He did so by way of discharge of his duty as the personal representative of the estate of the deceased Defendant and as the trustee of the assets of the estate in the interest of preserving and protecting those assets.
17. Finally, according to the Learned Counsel, the Court was left with no option but to down its tools. She averred that the Court could not proceed to render itself on a suit that was defective as that would constitute a nullity. She submitted that the Court was mandated by the law to strike out the Plaint on the ground that the Defendant died before the suit was instituted. Once the Plaint was struck out as a nullity ab initio, nothing remained in this suit which should be dismissed with costs.

#### **B. The Written Submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents.**

18. In the month of May, 2023, the Learned Counsels for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents through the Law firm of Messrs. Katib & Company Advocates filed their written submissions dated 31<sup>st</sup> May, 2023. M/s. Omondi Advocate commenced the submissions by stating that it was on behalf of the Plaintiffs. Further, that it was in respect of the Applicant's Application dated 22<sup>nd</sup> February 2023 seeking to strike out the Plaintiff's suit on grounds that the Defendant was deceased. The Application was opposed through a Replying Affidavit dated 27<sup>th</sup> February 2023 wherein he deponed that the proceedings taken upon service were regular and prayed for dismissal of the Application with costs.
19. The Learned Counsel posed the query as to whether the Applicant was entitled to be granted the orders sought. She asserted that at paragraph 4 of the supporting affidavit, the Applicant deponed that he was the Legal Administrator of the Defendant herein. This was an indication that the Defendant was deceased. To this effect, the Applicant also attached a copy of a Certificate of Death annexed and marked as “AGG – 1”. Thus, on that basis, the Applicant prayed for suit to be stricken out.
20. According to the Learned Counsel, the Plaintiff in his Replying Affidavit stated that, the Applicant never annexed the Probate Will which he was used to obtain the Grant Letters of Administration which could have disclosed the ownership of the property. It could show that the Defendant was the registered owner of the suit property. It was not known whether he was a beneficiary of the estate. That as it may, even if the Defendant was indeed dead, she submitted that a dead person was like a person who could not be traced and where there were summons to be effected upon such person then service was to be effected through substituted service under the provision of Order 5 Rule 17 of Civil Procedure Rules 2010.
21. It was the contention of the Learned Counsel that, it was trite law that where proceedings had been taken upon proper service, the same were deemed regular proceedings. There were no grounds for setting aside the proceedings and or dismissing the Plaintiff's claim. In any event, the Applicant herein



could apply to challenge the Judgment when it was delivered on the grounds, which he had pleaded in this Application.

22. The Learned Counsel submitted that the Application was devoid of merit. They said so upon reading the Applicants' written submission dated 16<sup>th</sup> May 2023. In substance, the Applicant had relied in several authorities which denoted that if a suit was filed against a deceased person that suit was a nullity. However, the instant case was different because at the time of filing the suit there was a belief that the Defendant was alive and subsequently service of summons was effected through substituted service by an order of the Court.
23. Further, the Applicant deponed that he was an Administrator of the Defendant's Estate pursuant to a Probate Will left by the Defendant. But, the Applicant failed to annex the said will in the supporting affidavit. It was the Counsel's submission that the Applicant's Application was intended to delay justice by delaying final determination of the case. The Application was devoid of merit and it should be dismissed with costs.

## V. Analysis and Determination

24. I have keenly assessed all the filed pleadings herein being the Notice of Motion application dated 22<sup>nd</sup> February, 2023 by the Applicant herein, the responses, the written submissions and the plethora of cited authorities, the appropriate and relevant provision of *the Constitution* of Kenya, 2010 and the statutes herein.
25. To enable the Honourable Court arrive at a reasonable, Just, fair and informed decision on the subject matter, it has framed three (3) issues as a guide in its determination. These are:-
  - a). Whether the Notice of Motion application dated 22<sup>nd</sup> February, 2023 by the Applicant herein has any merit whatsoever.
  - b). Whether the parties herein are entitled to the reliefs sought.
  - c). Who will bear the Costs of the application herein.

### **Issue No. a). Whether the Notice of Motion application dated 22<sup>nd</sup> February, 2023 by the Applicant herein has any merit whatsoever.**

26. Under this sub heading, the Honourable Court wishes to state that the main substratum of the matter at hand through the filed application dated 22<sup>nd</sup> February, 2023 by the Applicant is threefold as follows:-
  - a). Arresting (not delivering of an impugned Judgement as scheduled) after the Court has already heard the case. In the instant case, its after it heard the case by the Plaintiffs/Respondents through formal proof under the provisions of Order 10 Rules 4, 5, 6, 7 and 8 of the Civil Procedure Rules, 2010;
  - b). Striking out of the suit on the basis that it was a nullity – ab initio taking that the Plaintiffs/Respondents instituted the case and sought for reliefs from a dead person; and
  - c). the awarding of costs for the application.
27. Nonetheless, before embarking on the analysis of the framed issues and in all fairness, the Honorable Court feels it imperative to extrapolate on the brief facts of the case. From the filed pleadings, on 8<sup>th</sup> May, 2018 the Plaintiffs/Respondents filed this suit against the Defendant, through an Originating Summons under the provision of Order 37 Rule 1, 2 and 30 of the Civil Procedure Rules, 2010,



Sections 3A of the [Civil Procedure Act](#), Cap. 21, Sections 38 of the Limitation of Action Act, Cap. 22 and Section 28 of the [Land Registration Act](#), No. 3 of 2012. The Plaintiffs/Respondents sought to be granted a title to the suit land by virtue of Land Adverse Possession according to them having fulfilled all the requirements by law. They argued that the rights and title vested onto the Defendant by law over the suit land had been extinguished by law. Ideally, they claimed to have been in occupation of the suit land continuously, without any interruption nor permission of the Respondent since the years of 1940s and where their grandfathers were buried. They carried several development and cultivation on the suit land.

28. Further, as required by law required, they annexed a copy of a Certificate of Title Deed issued on 14<sup>th</sup> November, 1997 bearing the joint names of GulamHussesin Gilani and Alnoor Ismail Thobani respectively as tenants in common in equal undivided shares and a map of the suit land. On 28<sup>th</sup> March, 2019, the Plaintiffs/Respondents vide an application dated 27<sup>th</sup> November, 2018 moved Court under the provision of Order 5 Rule 17 of the Civil Procedure Rules, 2010 to have the Defendant served by way of substituted means. The application was allowed. The advertisement was published in the local dailies being “The Daily Nation” newspaper edition of 15<sup>th</sup> October, 2019 being one with a wide national circulation and readership. An affidavit of service to that effect under the provision of Order 5 Rules 15 of the Civil procedure Rules, 2010 was filed and the matter was fixed for hearing in earnest. Despite of the service having been effected upon the Defendant, there was no response under Order 6, 7 nor 11 of the Civil Procedure Rules, 2010. Subsequently, directions were taken under Order 37 Rules, 11, 16 and 18 of the Civil Procedure Rules, 2010 and the matter was fixed for formal proof accordingly. Indeed, on 2<sup>nd</sup> February, 2022 the matter proceeded for hearing whereby PW – 1 testified and closed his case. The Plaintiffs filed their submissions and Court reserved a date for delivery of the Judgement – on 23<sup>rd</sup> February, 2023.
29. It was at this juncture, that the Applicant filed the instant application. The Applicants holds that the Defendant, the Late Gulamhussein Hasham Gilani, died on 11<sup>th</sup> July 2013 as was shown on the face of the Certificate of Death at page 3 of “AGG-1” filed with the Application. The Applicant was the duly appointed Legal Representative of the estate of the Defendant by virtue of a Grant of Probate of Written Will issued in Nairobi Succession Cause Number 51 of 2014.
30. She asserted that the Plaintiffs instituted this suit against the Defendant sometimes in the year 2018, 5 years from the death of the Defendant which occurred in the year 2013. That is adequate on brief facts of the case.
31. Now turning to the issues under the sub heading commencing with the set out sub - issues herein. Firstly, the Honourable Court wishes to critically address the issues of arresting the Judgement. The Civil jurisdiction of matters of procedures for the Environment and Land Court flow from the provision of Article 162 (2) ( b) of [the Constitution](#) of Kenya, 2010 and Sections 3, 13 and 19 of the Environment & Land Court Act, No. 19 of 2011. These are set out under the Civil Procedure Rules, 2010. Although this Court has inherent legal jurisdiction vested on it under the other provisions of the Law such as Section 101 of the [Land Registration Act](#), No. 3 of 2012 and Section 150 of the [Land Act](#), No. 6 of 2010, a keen perusal of these provisions of the Law, clearly there is no specific provisions to entertain and determine applications (motions) for the arrest of Judgements of the Court. However, this Courts do have inherent powers – see the provisions of Sections 1, 1A, 3, and 3A of the Civil Procedures Act, Cap. 21) and unlimited jurisdiction to even entertain such as the instant application. The existence of the inherent powers of the Court has long been recognized and used to prevent the abuse of the Court process. (See the cases of Stanley Munga Githunguri – Versus - Republic (1986)



KLR 1 and Metropolitan Bank Limited – Versus – Pooley (18185) 10 App. Cases 210 at Page 220 where Lord Blackburn pronounced himself in relation to the inherent powers as such:-

“ But from early times.....the Court had inherently its powers the right to see that its process was not abused by proceeding without reasonable grounds, so as to be vexatious and harassing - the Court had the right to protect itself against such an abuse’.

Furthermore, it is only the High Court that has the vested power to entertain and determine motions for the arrest of delivery of Judgements.

32. Ideally, I wish to state that the objectives to arrest Judgement is made with the intention to stop further proceedings in order to enable another party have an opportunity to take the matter from where it would have reached before it proceeded on further hence likely to cause prejudice or travesty of Justice. Suffice to say, I wish to add that as a sound and legal basis to entertain such applications would the principles of fair hearing and principles of natural Justice under the provision of Articles 25 (c), 47 and 50 (1) and ( 2 ) of *the Constitution* of Kenya, 2010.
33. From the instant application, I am fully satisfied that the Applicant has met all these fundamental requirements of Law to be considered for granting the relief for arresting the Judgement. The Applicant claims to be a duly appointed Legal Administrator to the Estate of the deceased who supposedly has an interest in the suit property. He has attached a copy of the Grant Letters of Administration and Certificate of Confirmation of the Grant for the estate of the Deceased. Although, there are two basic and relevant issues which are not clear – the connection between the deceased and the instant case and secondly where they Applicants had been all these time from the filing of the case and his failure to have filed pleadings immediately there was an advertisement of the matter in the local dailies, this Honourable Court will still proceed to grant him some benefit of doubt and in the interest of Justice proceed to allow that prayer.
34. Secondly, with regard to striking out of the suit as sought on the ground of the Plaintiffs having sued a dead person. In as much as this Court fully concurs with the arguments and the Legal position taken by the Learned Counsel on as far as suing persons who are dead is concerned, that ordinarily such suit ought to abate. This legal position are as well stated out in the Provisions of Order 24 Rules 2, 3 and 4 of the Civil Procedures Rules, 2010 particularly where it involves parties in a suit. Undoubtedly, this Honourable Court fully concurs with the contention held by the Learned Counsel for the Applicant and legal ratio sustained from all the authorities cited herein. However, in the given surrounding circumstances and the inferences of this particular case, the Honourable Court wishes to make a distinct interpretation and beg to differ from that position based on the following five (5) broad rationale:-  
  
Firstly, the Applicants has urged Court to strike out the pleadings under the provision of Order 2 Rule 15 (1) (a) of the Civil Procedure Rules, 2010. Specifically, it is on the grounds that:- (a) it discloses no reasonable cause of action or defence in law...”. Critically, from the pleadings, it is clear that the Plaintiffs have sought to attain title through the land adverse possession over the suit land under the provision of Sections 13 and 38 of the Limitation of Action, Cap. 22. They claim to have been in occupation and continuously for a long period beyond the twelve (12) statutory years without any interruption and without the permissiveness of the land owner. To them the rights and the title of the Defendant has been extinguished by law. For whatever it is worth, to me this is a reasonable and clear cause of action to be tested during the adjudication process of a full trial.
35. Secondly, from a keen perusal of the copy of the Certificate of the Title Deed issued on 14<sup>th</sup> November, 1997 annexed by the Plaintiffs and marked as “MMB – 3” bears the joint names of GulamHussesin



Gilani and Alnoor Ismail Thobani respectively. It clearly indicates that the suit property is owned as tenants in common in equal undivided shares and a map of the land. Currently, the status of the title deed is not known as both the Plaintiffs nor the Applicant furnished the Court with the current Certificate of official Search. The annexed Certificate of Search by the Plaintiffs was undertaken on 16<sup>th</sup> April, 2016 – close to seven (7) years ago!! Surely, that leaves the Honourable Court in a very precarious and awkward situation whatsoever. Be that as it may, assuming as the Applicants wishes to convince the Court that indeed the Defendant died being an owner where does that leave the shares of the Co – joint owner as founded under the provisions of Sections 91 (1), (2), (3), (4), (5), (6) and (7) of the [Land Registration Act](#), No. 3 of 2012? To me, the Co – Joint owner still has a stake in the matter and hence the suit should not merely abate by virtue of the death of the deceased. The nature, scope and meaning of the Concept of Joint Tenancy and Tenancy in common are both recognized from the provision of Section 91 of the [land Registration Act](#), 2012. It provides as follows:-

91. Meaning and incidents of co-tenancies

- (1) In this Act, co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.
- (2) Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.
- (3) An instrument made in favour of two or more persons and the registration giving effect to it shall show-
  - (a) whether those persons are joint tenants or tenants in common; and
  - (b) the share of each tenant, if they are tenants in common.
- (4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently-
  - (a) dispositions may be made only by all the joint tenants;
  - (b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; and
  - (c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.
- (5) If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.
- (6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.
- (7) Joint tenants, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joining ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenants in common.



- (8) The Registrar may upon receipt of adequate proof dispense with the consent under subsection (6) if the Registrar considers that the consent cannot be obtained or is being withheld unreasonably and the Registrar shall note on the register and on the instrument the reasons for dispensing with the consent.
- (9) A person who is aggrieved by the decision of the Registrar may apply to the Court for the necessary orders.

### Joint Tenancy

36. Based on the above legal rationale, the characteristics of a joint tenancy, the court has surmised as follows:- In the case of *Cornella Nabangala Nabwana – Versus - Edward Vitalis Akuku & 2 others* [2017] eKLR (Nairobi ELC)) Court held that:-

“The key distinguishing features of joint tenancy are the right of survivorship and the “four unities”. The right of survivorship implies that upon the death of one joint tenant, his interest in the land passes to the other joint tenants by the right of survivorship (“jus accrescendi”). This also implies that an interest held by a joint tenant cannot pass to another person through a Will or through intestacy. It automatically passes to the surviving Joint Tenant (s). The four unities of a joint tenancy are the unities of possession, interest, title and time. The unity of possession implies that each joint tenant is as much entitled to possession of any part of the land as the others. He cannot point to any part of the land as his own to the exclusion of the others. No one joint tenant has a better right to the property than another, so that an action for trespass or for rent or for money had and received or an account will not normally lie.

37. Vide the doctrine of “jus accrescendi”, upon the death of a Joint tenant, the deceased tenant’s interest vests in the surviving tenant or tenants jointly as a right of survivorship takes precedence, except in instances where the interaction of joint owners with the property showed that they intended for a deceased co-owner to maintain exclusive ownership of the suit property, in which case it falls to the administrators of his estate see the case of *Mwangi Gakuri – Versus - Bernard Kigotho Maina & Another* [2016] eKLR (Nairobi High Court) . Matrimonial property jointly owned remains to be the property of the joint owners even after divorce see the case of “*C.M.N – Versus - A.W.M* [2013] eKLR (Nairobi ELC); *J.N.M. Versus - W.W.M.*[2014] eKLR (Embu High Court).
38. By dint of the provision of Section 91(7) of the [Land Registration Act](#), joint tenants are free to sever the tenancy which severance must be completed by registration. A joint tenancy can therefore be converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders so remain. (*Isabel Chelangat – Versus - Samuel Tiro Rotich & 5 others* (2012) eKLR (High Court at Eldoret))

### B. The Tenancy in Common

39. The characteristic feature of a tenancy in common is that two or more holders of the property hold the same in equal undivided shares. Each share in the property is distinct and has not yet been divided between the co-tenants. The co-owners have separate interests that remain undivided, thereby holding the interest together.
40. The distinguishing aspect of the tenancy in common is the absence of the doctrine of survivorship. The shares of a tenant are unaffected by the death of a co-owner. Upon the death of the co-owner,



the share of the deceased devolves to estate of the deceased. See the case of “Isabel Chelangat – Versus Samuel Tiro Rotich & 5 others (2012) eKLR (High Court at Eldoret)).

41. Having elaborately spelt out the legal concept of the two joint tenancies, it is critical that the Honourable Court applies them to the instant case herein.
42. Thirdly, I fully concur with the assertion raised by the Learned Counsel for the Plaintiffs/Respondents, and backed up the provision of Section 107 of the *Evidence Act*, Cap. 80 on the burden of proof comes in handy. He who alleges has to prove. The Learned Counsel has for umpteenth times stressed that the Applicant failed to attach a copy of the Schedule of assets nor Probate Will to ascertain that indeed the Defendant was the owner to the suit property. Without that information, it would be extremely unfair, unjust and unreasonable to strike out the pleadings.
43. Fifthly, taking that the Honourable Court has already confirmed that there was proper service onto the Defendant in the matter through substituted means under Order 5 Rules 17 of the Civil Procedure Rules, 2010. The notice was advertised in the local daily of wide national circulation and readership. Despite of this, the Defendants opted to ignore entering appearance and filing relevant pleadings. Indeed, from the proceedings, PW – 1 stated that a Legal representatives of the estate of the deceased appeared and brandished a copy of the title deeds. This was an indication the Estate of the Deceased were all along aware of the proceedings. Why they opted to be inactive from participating in the suit until now when the Court was just about to deliver its Judgement on the grounds that the Plaintiffs sued a dead person and thus making the suit a nullity is unclear.
44. Finally, the jurisdiction to strike out pleadings is now well established by our Courts. It is trite law the legal mandate to strike out pleadings is discretionary and must be exercised judicially. In the case of: “Postal Corporation of Kenya – Versus – Versus - I.T Inamdar & 2 Others [2004] 1 KLR 359”, the Court stated that “the law is now well settled that if the defence filed by a Defendant raises even one bona fide triable issue, then the Defendant must be given leave to defend”.

Further, in the “Co - operative Merchant Bank Limited – Versus - George Fredrick Wekesa (Civil Appeal No. 54 of 1999)” the Court of Appeal stated:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the Appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the Respondent’s action or which is otherwise an abuse of the process of the court.”

45. Additionally, this position was reinforced in the case of:- “Yaya Towers Limited – Versus Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000)” the same court expressed itself thus:

“A Plaintiff (Defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant (Plaintiff) can demonstrate shortly and conclusively that the Plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”



Similarly, and at the initial stages of jurisprudence building in Kenya on this issue, the Court of Appeal in “D.T. Dobie & Company Kenya Limited – Versus - Joseph Mbaria Muchina & Another [1980] eKLR”, Madan JA, stated:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

46. In view of the above stated reasons, therefore, I hold that the second limb of the Applicant must not succeed whatsoever. Should the Honourable Court proceed as per the Applicant’s assertion, it would automatically mean driving away the Plaintiffs/Respondents from the temple and seat of Justice before they are accorded an opportunity to be heard in a full trial contrary to the principles of natural justice. Therefore, the Honourable Court declines to grant the prayer as sought by the Applicant.

**Issue No. b). Whether the parties herein are entitled to the reliefs sought.**

47. Under this sub – title, the Honourable Court feels it has already made the most relevant pronouncements required from the filed application. Nonetheless, to fully achieve the objective of the arresting of the Judgement which ideally was ready for delivery, the Honourable Court has already noted the existence of a Co – Joint owner to the suit property. It is imperative and critical that he be joined in the matter so as to enable the Court to eventually and completely adjudicate upon and settle all questions involved in this suit. It follows that the Plaintiffs will have to amend its pleadings accordingly.
48. Additionally, taking that the Honourable Court has already confirmed that there was proper service onto all the parties in the matter through substituted means under Order 5 Rules 17 of the Civil procedure Rules, 2010. I have noted that the intended 2<sup>nd</sup> Defendant was never properly served and that has to happen this time round. Despite of this, the Defendants opted to ignore entering appearance and filing relevant pleadings. Pursuant to that there were regular proceedings on this matter where the Plaintiff’s witnesses testified. It would defeat logic, justice, setting a bad precedent and such a waste of resources to nullify these proceedings which are intact on record. The witnesses who have testified will not be made to go through that process again. Be that as it may, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants may have the right to recall the said witnesses solely for cross examination and re – examination as provided for under Section 146 (4) of the *Evidence Act*, 80, Cap.
49. To cap it up, and in the spirit of the principles of natural justice, Equity and Conscience, all parties will be accorded an opportunity to file in further empirical documents and summons further witnesses in support of their case but within stringent timelines.

**Issue No. c). Who will bear the Costs of the application herein.**

50. It is now well established that the issue of Costs is at the discretion of the Court. Costs means the award that a party is granted at the conclusion of any legal action or proceedings in a litigation process. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap 21 holds that Costs follow the event.
51. From the prevailing and given circumstances in the instant case, its just, fair and Equitable that each party bears their own costs.



## VI. Conclusion & findings

54. Consequently, upon conducting an elaborate analysis of the framed issues herein, the Honourable Court on the Preponderance of probabilities and the balance of convenience, makes the following specific orders:-

- a. That the Notice of Motion application dated 22<sup>nd</sup> February, 2023 by the Applicant herein be and is hereby partially allowed under the following terms and conditions:-
  - i. An order be granted arresting the delivery of Judgment in this matter scheduled for 23<sup>rd</sup> February 2023 pending hearing and determination of this suit.
  - ii. The prayer seeking to have the suit struck out be and is hereby disallowed.
- b. That for expeditious sake, this suit be fixed for hearing upon observation and compliance of the following tangible steps:-
  - i. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs granted leave of 21 days to Amend its Plaint under Order 8 Rule 3 and Order 1 Rule 10 (4) of the Civil Procedure Rules, 2010 by joining Alnoor Ismail Thobani being the Co – Joint Owner to the suit land as the 2<sup>nd</sup> Defendant in the matter.
  - ii. The Plaintiffs granted directed under the provision of Order 5 Rule 17 of the Civil Procedure Rules, 2010 to effect service upon the 2<sup>nd</sup> Defendants, Mr. Alnoor Osmail Thobani - through substituted means by publishing a notice in a conspicuous space of “the Daily Nation” newspaper being a one of wide national circulation and readership.
  - iii. Thereafter, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be granted leave of 21 days to fully comply with the provision of Orders 6, 7 and 11 of the Civil Procedure Rules, 2010.
  - iv. The Plaintiffs to have collaborating leave of Seven (7) days to file and serve any further Lists of documents and Witness statements from the new issues raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  - v. The matter to be heard on 5<sup>th</sup> June, 2024 from where the proceedings had reached. There shall be a mention on 4<sup>th</sup> March, 2024 for compliance of these orders and conducting of the final Pre – Trial conference pursuant to the provision of Order 11 of the Civil procedure Rules, 2010.
  - vi. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants to be at liberty to invoke the provision of Section 146 (4) of the Evidence Act, Cap. 80 to recall any witness by the Plaintiff who has already testified for Cross Examination and Re – Examination accordingly.
- c. That each party to bear their own costs.

It is so ordered accordingly

**RULING DELIEVERED VIA EMAIL AS PER THE NOTICES DISPATCHED TO ALL THE PARTIES HEREIN, SIGNED AND DATED AT MOMBASA THIS.....5<sup>TH</sup> ..... DAY OF ..... DECEMBER .....2023.**

**HON. JUSTICE L.L. NAIKUNI, (MR.),**

**ENVIRONMENT & LAND COURT AT MOMBASA.**

**Copy sent by M/s. Joan Ndwiga (Office Admin) to:**



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