



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC NO. 814 OF 2017

MUSA ONSANDO OMARE.....PLAINTIFF

VERSUS

YUSUF GITHINJI SALEH.....1ST DEFENDANT

JOSEPH KAMAU MWANGI.....2ND DEFENDANT

FRANCIS RUHIU MACHARIA.....3RD DEFENDANT

T/A CORO BAR & RESTAURANT.....4TH DEFENDANT

RULING

This ruling is on the Notice of Motion dated 16th April, 2021.

The gist of the application is that the witness statement of Joseph Kamau Mwangi be substituted with that of Francis Ruhiu Macharia. The reason for the intended substitution is that the said Joseph Kamau Mwangi who was the second Defendant passed away on 3rd April 2021 and it has become necessary to replace him with the third Defendant.

The Applicants are jointly sued in this case by the Respondent where the Respondent seeks to be declared the proprietor of the suit land through adverse possession.

The Respondent filed a Notice of Preliminary Objection dated 26/7/2021 urging that the Notice of Motion offends the mandatory provisions of **Order 24 Rules 1, 3, 4, 5 and 7** of the **Civil Procedure Rules**.

The Respondent also filed a replying affidavit in which he says that the Defendants defence should be struck out and the Respondent's suit be allowed.

Counsel filed written submissions on 9th November, 2021 and 28th January, 2022.

I have carefully considered the application in its entirety including the affidavits, the Preliminary Objection and submissions. I have also considered that the dispute started in Court in the year 1991 and it has a hearing dated of 28/3/2022.

I find that the application dated 16th April, 2021 has merit for the following reasons;

Firstly, the evidence sought to be replaced is similar to the new evidence. It is only the witness's name that is different. The reason given for seeking the replacement is sound. The witness who recorded died before he could testify.

Secondly, contrary to the deposition by the Respondent that the application offends **Order 24 Civil Procedure Rules**, it in fact complies with the same.

Here is a case where the Applicants are sued jointly and severally as joint owners of the suit plot. The action survives the deceased party because the surviving Defendants have capacity to be sued and to defend the suit.

Order 24 Rule 4(1) Civil Procedure Rules only applies when one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendants. It does not apply in a case such as this where the cause of action continues against the other Defendants.

Thirdly, this is a case that should be heard on merit because it involves the right to own land. Locking out evidence that may assist the Court in arriving at a just conclusion is wrong. It is a derogation of the Right to a Fair Hearing under **Article 50(1) of the Constitution**.

For the above reasons, I allow the application dated 16th April, 2021.

I dismiss the Preliminary Objection dated 26/7/2021 and order that the case proceeds as scheduled on 28/3/2022.

Costs in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 15TH DAY OF MARCH, 2022.

M.N. GICHERU

JUDGE