



**Wagitu & another v Mwanja & 4 others (Environment & Land Case
154 of 2016) [2022] KEELC 3481 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3481 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 154 OF 2016**

A NYUKURI, J

MAY 25, 2022

BETWEEN

SAMUEL NJARAMBA WAGITU 1ST APPLICANT

**RICHARD LIWA MAUYE (SUING AS THE LEGAL REPRESENTATIVE OF
MAUYE MUSAU (DECEASED)) 2ND APPLICANT**

AND

MICHAEL NGILA MWANIA 1ST RESPONDENT

PHILIP KAARIA M'MBUTURA 2ND RESPONDENT

MIKI SHELTER LIMITED 3RD RESPONDENT

THOMAS MAINGI WAMBUA 4TH RESPONDENT

DISTRICT LAND REGISTRAR MACHAKOS DISTRICT 5TH RESPONDENT

RULING

Introduction

1. In the notice of motion dated November 11, 2020, the plaintiff/applicant sought the following orders;
 - a. That the court be pleased to order that the name of the 2nd defendant herein Philip Kaaria M'Mbutura (Deceased) be and is hereby struck out.
 - b. That this court be pleased to order that the 2nd defendant Philip Kaaria M'Mbutura (deceased) be substituted by Harriet Igoki Kaawria or in the alternative that Harriet Igoki Kaaria be added as a defendant.
 - c. That the costs of this application be provided for.



2. The application is supported by the affidavit sworn by the 1st plaintiff/applicant on November 11, 2020. The applicant states that the suit against the 2nd defendant was filed through a bona fide mistake as the plaintiff was at the material time unaware that the 2nd defendant was deceased. That having a bona fide claim against the 2nd defendant and having been unable to trace him, the plaintiff served the 2nd defendant by substituted service by advertisement in the daily newspapers. That Harriet Igoki Kaaria is the administrator of the deceased's estate and has not bothered to inform court of the demise of the deceased 2nd defendant and therefore it is only fair that the orders sought be granted.
3. The application is opposed. The 3rd defendant filed grounds of opposition on June 10, 2021 and stated that the application is incompetent as there is no valid suit against the 2nd defendant to permit substitution. He further stated that the 2nd defendant died on September 29, 2015 while this suit was filed on October 14, 2016 and therefore the substitution is unlawful.
4. Counsel for the 2nd defendant filed a preliminary objection dated June 11, 2021 and stated that the application is incompetent as the suit was filed after the death of the 2nd defendant.
5. Harriet Igoki Kaaria filed a replying affidavit on June 15, 2021 in opposition to the application. She stated that she was the widow of the late Philip Kaaria M'Mbitura and the legal representative of his estate. She averred that the application and the suit are incompetent and ought to be struck out as the 2nd defendant died before the suit was filed, hence the suit is a nullity.
6. The application was canvassed by written submissions. On record are the applicant's submissions filed on July 30, 2021 as well as the 2nd respondent's submissions filed on November 19, 2021, both of which I have considered.

Analysis and determination

7. Having considered the application, the affidavit in support, the grounds of opposition, the preliminary objection, the replying affidavit and the submissions, the issues that arise for determination are;
 - a. Whether the suit herein is a nullity for misjoinder
 - b. Whether Harriet Igoki Kaaria ought to be joined to these proceedings as a defendant.
8. Order 1 rule 9 of the [Civil Procedure Rules](#) provides as follows;
Order 1 rule 9
No suit shall be defeated by reason of misjoinder or nonjoinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
Order 1 rule 10 (2) provides as follows;
The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
9. It is clear therefore that the concern of the court should be to effectually and completely adjudicate upon the merits of the suit and hence misjoinder and non joinder of parties does not render a suit a nullity. Article 159 of [the Constitution](#) and section 19 of the [Environment and Land Court Act](#) enjoin



this court to deliver substantive justice without undue regard to technicalities. Errors like including the name of a party who ought not have been included or failing to include a necessary party are matters of technicality that do not go to the root of the jurisdiction of the court. That is why the court may act suo motto in rectifying such errors by directing striking out or addition of parties.

10. The plaintiff has stated that he filed suit against the 2nd defendant because he was not aware that the 2nd defendant was deceased. He argues that including the deceased's name was by a genuine mistake. The respondents on the other hand argue that to the extent that the suit was filed after the death of the 2nd defendant, then such suit is incompetent, a nullity and ought to be struck out. I am however of the position that in view of the clear provisions of order 1 rules 9 and 10 of the Civil Procedure Rules, the respondents' contention that this suit ought to be struck out because the defendant named in this suit is deceased is untenable. The fact of the 2nd defendant's death was not within the plaintiff's knowledge and therefore a mistake in stating a defendant's name cannot be the reason to strike out a suit.
11. The power to strike out a suit must be cautiously and sparingly exercised, only in instances where the suit cannot be salvaged in any way including by amendment. In this case, what is needed is an amendment of the plaint to add the administrator of the deceased and the suit will be properly suited. In the case of DT Dobie & Company v Muchina (1982) KLR, 1, the court held as follows;

The power to strike out a pleading in a summary manner is a draconian remedy that should only be exercised in the clearest of cases, in plain and obvious cases where the pleading in question is unsustainable. It is a power to be exercised with extreme caution and that it is a strong power to be sparingly exercised.

12. In the premises, the application dated November 11, 2020 is merited and the same is allowed in the following terms;
 - a. That the name of the 2nd defendant herein Philip Kaaria M'Mbutura (Deceased) be and is hereby struck out from these proceedings.
 - b. That Harriet Igoki Kaaria be and is hereby added as a defendant in these proceedings.
 - c. That the plaintiff is granted leave of 14 days to amend his plaint accordingly.
 - d. That each party shall bear its own costs.
13. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Waudu for the Plaintiff/Applicant

Mr. Munyaka holding brief for Mr. Muia for the 1st Defendant

Mr. Wangira for the 4th Defendant

Ms Josephine Misigo – Court Assistant

