



**Makau (suing as the legal representative of Thomas Makau Mulela(deceased)  
v Mirza & another; Mirza & another (Interested Parties) (Environment &  
Land Case 182 of 2010) [2022] KEELC 2417 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2417 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ENVIRONMENT & LAND CASE 182 OF 2010**

**A NYUKURI, J**

**MAY 11, 2022**

**?? OF ??**

**IN THE MATTER OF: THE REGISTERED LAND ACT, CAP 300 LAWS OF  
KENYA AND THE REGISTRAR OF TITLES ACT CAP 281, LAWS OF KENYA**

**AND**

**IN THE MATTER OF: LEASEHOLD INTEREST  
IN PARCEL NO. IR 6506 TITLE NO. LR 337/7**

**IN THE MATTER OF: LIMITATION OF ACTIONS ACT CAP 22 OF THE LAWS OF KENYA**

**BETWEEN**

**BONIFACE KIOKO MAKAU ..... PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE OF THOMAS MAKAU  
MULELA(DECEASED**

**AND**

**MOHAMED SADIK MIRZA ..... 1<sup>ST</sup> DEFENDANT  
MOHAMED HAFIZ MIRZA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**MOHAMED AJAZ MIRZA ..... INTERESTED PARTY  
MOHAMED NAWAZ MIRZA ..... INTERESTED PARTY**

**RULING**

1. This Ruling is in relation to a Chamber Summons Application dated, December 10, 2010, where the interested parties/applicants are seeking for orders:



- a. That leave be granted to Mohammed Azaj Mirza and Mohamed Nawaz Mirza to enter appearance and be joined as interested parties in this suit for the purposes of prosecuting this application and any ancillary or consequential proceedings arising therefrom;
  - b. That the Originating Summons filed in this suit be struck out on the ground that it is an abuse of the process of this Honourable court.
  - c. That this suit be dismissed with costs.
  - d. That the costs of this application be provided for.
2. The application is supported by the affidavit of the 1<sup>st</sup> interested party who deposed that on the November 22, 2010 they saw an advertisement in the Daily Nation notifying that the above-named plaintiff had instituted this suit against their late father (the 1<sup>st</sup> defendant) and their late uncle (the second defendant) relating to the leasehold interest in Parcel No. IR 6506 Title No. LR 337/7 (Hereinafter “the suit property”); that they are the beneficiary owners of the leasehold interest in the suit property; that they have an indefeasible right to be joined to these proceedings.
  3. He deposed further that the Originating Summons is a nullity and ought to be set aside ex debito justitiae and should further be struck out and the suit dismissed with costs as at the date when it was filed the defendants were both dead.
  4. The application is opposed. The plaintiff filed a replying affidavit sworn on April 30, 2021 and filed on even date and averred that the application by the interested parties was incompetent, bad in law, overtaken by events and an abuse of the court process. They further stated that they filed an application dated July 24, 2017 for substitution and revival of the suit which was allowed; that on March 14, 2019, they were granted leave to amend the Plaint which they filed on October 16, 2019, which was deemed as duly filed and served by order of the court made on September 23, 2019. That in the amended Originating Summons, the applicants are named as Interested Parties and are yet to respond to the Amended Originating Summons.
  5. The plaintiff/respondent further averred that the chamber summons dis bad in law, has been overtaken by events and what is stated therein ought to form part of the defence to the amended Originating Summons. They prayed the chamber summons dated December 10, 2010 be dismissed with costs.
  6. The Application was canvassed by way of written submissions and on record are both the interested parties’ submissions and the plaintiff submissions dated June 18, 2021 and November 23, 2021 respectively.

### **Interested Parties’ Submissions**

7. Counsel for the interested parties submitted that the said amended Originating Summons takes effect not from the date of amendment, but from the date of the original Originating Summons which it amended and the action continues as though the amendments had been inserted from the beginning.
8. Counsel further submitted that the said amended Originating Summons is a nullity and ought to be struck out and this suit should be dismissed because as at the date the suit was filed, the two defendants were deceased, and therefore the court has no jurisdiction to proceed with is matter. In support of the same, counsel referred to the cases of *Geeta Bharat Shah & 4 others v Omar Said Mwatayari & another* [2009] eKLR, *He Zhou Ying v Qui Wen Ren* Mombasa HCCC No. 128 of 1994 (OS), *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others* [2013], *Macfoy v United Africa Co. Ltd* (1961) 3 ALLER 1169 and *The Owners of the Motor vessel “Lilian s” v Caltex Oil Kenya Ltd* (1989) eKLR for



the proposition that a court has no jurisdiction to hear a suit against a dead person, which is a nullity and when a court has no jurisdiction, its orders are a nullity.

9. Counsel contended that the Interested Parties could not be required to enter appearance to the said Amended Originating Summons as the suit was a nullity.

### **Plaintiff's submissions**

10. Counsel for the plaintiff submitted that the prayer that Mohamed Ajaz Mizra and Mohamed Nawaz Mizra be joined to this suit as interested parties had already been spent as the court granted the plaintiff leave to amend the Originating Summons.
11. Counsel argued that this court should dispense justice without undue regard to technicalities. Counsel referred to Order 1 Rule 9 and 10 of the *Civil Procedure Rules 2010*, that provides that no suit shall be defeated by misjoinder or nonjoinder of parties and that the court may at any stage of proceedings, suo motto or on application of parties order the striking out of a name of a party improperly joined or add a party who needs to be added for purposes of settling all the questions in a suit.
12. Counsel relied on the cases of *Habiba W. Ramadhan & 7 others v Mary Njeri Gitiba* (2017) eKLR, *Eastern Bakery v Castelino* [1958] EA 461 and *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR for the proposition that the court should be more concerned with determining the substantive matters, instead of dwelling on technicalities and hence the power to allow an amendment is the tool that the court can use to rectify a situation like the circumstances obtaining in this matter.
13. Counsel therefore concluded that the issues raised by the plaintiff in the Originating Summons cannot merely be wished away or disposed of by way of an interlocutory application such as this one. Further that the interested parties had not tendered any evidence to contradict the assertions made by the plaintiff, and therefore, striking out the suit would therefore be prejudicial to the plaintiff.

### **Analysis and determination**

14. I have considered the application, the responses, the submissions by Counsel and authorities cited. In my considered opinion, the only issue that arises for determination is whether orders sought by the applicants should be granted.
15. 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 provides as follows;

1. ....
2. 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.



3. ....
4. ....
16. It is clear therefore in Order 1 Rules 9 and 10 of the *Civil Procedure Rules* 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 can no longer be the reason the court should strike out a suit. Article 159 of the *Constitution* as well as section 19 of the *Environment and Land court Act* enjoins this court to deliver substantive justice without undue regard to technicalities. My understanding is that post 2010, with the promulgation of the 2010 Constitution, errors like including a party who ought not be included or failing to include a necessary party are matters of technicality and errors which do not go to the root of the court's jurisdiction. That is why the court may act suo motto in rectifying such errors by directing striking out or addition of parties.
17. In view of the clear provisions of Order 1 Rules 9 and 10 of the *Civil Procedure Rules*, I therefore do not agree with the applicant's submissions that where a party named is deceased the suit ought to be struck out. The issues raised by the applicant are matters which ought to be determined in the substantive hearing and not at this stage and certainly not by an order of striking out the suit. The interested parties have not filed any pleadings in this matter and therefore striking out the suit on evidence produced outside the framework of pleadings herein would not only be irregular, but the same would amount to procedural unfairness against the plaintiff.
18. As the Originating Summons were amended and the interested parties joined to this suit, their prayer to be joined to this suit is overtaken as they are already parties to the suit.
19. The power to strike out a suit is not to be exercised by the court without circumspection. In the case of Crescent Construction *Co Ltd v Delphis Bank Limited* [2007] eKLR, the court held as follows;  
...the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest of care and caution. This comes from the rules of natural justice that the court must not drive away any litigant, however weak his case may be, from the seat of justice. This is a time-honored principle.
20. Similarly, the case of *D.T 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.
21. In the case of *Central Bank of Kenya v Kenya Akiba Microfinance Ltd & 14 others* [2013] eKLR, the Court of Appeal quoted with approval, the succinct sentiments of Danckwerts LJ in *Wenlock v Moloney*, [1965] 2 All ER 871 at page 874 as follows;  
There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.
22. The upshot is that the circumstances of this case, do not call for this court to invoke the draconian power of summary jurisdiction. Ultimately, the application dated December 10, 2010 lacks merit and the same is dismissed with costs.



DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 11<sup>TH</sup> DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

**JUDGE**

**In the presence of;**

Ms Nasimiyu holding brief for Mr. Nanji for the Interested Parties

Mr. Nzei for the Plaintiff

No appearance for the Defendant

Ms Josephine Misigo – Court Assistant

