



**Obare v Wanyama & 2 others (Environment & Land Case
153 of 2021) [2022] KEELC 3415 (KLR) (16 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3415 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 153 OF 2021
LL NAIKUNI, J
JUNE 16, 2022**

BETWEEN

LORNA OSYA OBARE PLAINTIFF

AND

JOSEPH WANYAMA 1ST DEFENDANT

CHARLES HODARI MZUNGU 2ND DEFENDANT

MATILDA ODARO 3RD DEFENDANT

RULING

I. Preliminaries

1. What is before the Honorable Court for its determination is a very short Notice of Motion application dated October 13, 2021. It is filed by the 3rd Defendant/Applicant on the October 29, 2021. The application is brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21 and Order 24 Rules 4 and Order 51 of the *Civil Procedure Rules*, 2010.

II. The 3rd Defendant/Applicant's Suit.

2. The 3rd Defendant/Applicant sought for the following the orders:-
 - a) That the suit be struck out as against all the Defendants
 - b) That costs to be in the cause.
3. The application is based on the grounds, facts and averments on the face of an 11 Paragraphed Supporting affidavit sworn by Matilda Ombera Musungu, and two unmarked annexures being a copy of a Certificate of death of Charles Hodari Musungu, the 2nd Defendant herein indicating, unfortunately and as fate would have it that he died on March 4, 2010. There is also annexed a copy of



an affidavit sworn by the Deceased, on September 30, 1992 showing that it is the 2nd Defendant who was the absolute and legal registered owner to the suit property.

4. She averred that the 2nd Defendant herein died on March 4, 2010. It is thus contended that this suit which was filed on 3rd August 2021, by which time the said original registered owner of the suit property was already deceased. She asserted that the entire suit and the pleadings filed by the Plaintiff as against the Defendants was incompetent as it could not be possible for a deceased person to give instructions to an Advocate to file any suit on his or her behalf. The suit was a nullity against all the Defendants. She urged Court as the only fair and just thing to do for the Application to be allowed.

III. The Replying Affidavits by the Plaintiff/Respondent

5. The application is opposed by the Plaintiff. The Learned Counsel for the Plaintiff, the Law firm of Messrs. Musing & Company Advocates filed a two (2) points Grounds of Opposition dated 31st January 2022 and filed in Court on February 1, 2022.

Their grounds of opposition were that the application dated 13th October 2021 was frivolous, vexatious and devoid of any merits. They further stated that the application was fatally and incurably defective.

IV. Submissions.

6. On February 1, 2022 while all parties were present in Court, they were directed to have the said Notice of Motion Application be disposed off by way of written submission. However, I noted that it's only the Plaintiff/Respondent who complied by filing a Skeletal submission. Nonetheless, the Honorable Court proceeded to reserve a ruling date.

The Skeletal Written Submissions by the Plaintiff/Respondent

7. On May 11, 2022, the Learned Counsel for the Plaintiff/Respondent the law firm of Messrs. Musinga & Company Advocates filed their skeletal written submissions dated even date I response to the issues raised by the 3rd Defendant vide the Notice of Motion application dated October 13, 2021. His contention was that the Further Replying Affidavit dated May 8, 2022 by the 3rd Defendant was filed without leave all intended to sanitized the case and hence need to be strike out.
8. Mr. Okoko Advocate submitted that the Plaintiff's suit disclosed a reasonable cause of action against all the three Defendants unless a proper rebuttal of facts was provided by the them and/or legal representative if any of them had died. The Learned Counsel's view was that the question for determination was not whether the Defendant is dead but whether the property is one vesting in the estate of the Defendant. He argued that the provision of Order 24 Rules 4 (1) of the Civil Procedure Rules, 2010 never came to the assistance of the 3rd Defendant as assuming the 2nd Defendant was dead, then there still existed a cause of action against the 1st and 3rd Defendant herein. Further, he argued that even if there was no cause of action against the 1st and 3rd Defendant, this Court was empowered to cause the Legal Representative of the 2nd Defendant to be a party of the suit. He urged court to dismiss the application with Costs.

V. Analysis & Determination.

9. I have keenly considered the filed pleadings by the Plaintiff, the Notice of Motion application dated October 13, 2021, the skeletal written the submissions in response to the application by the 3rd Defendant made by the Learned Counsel for the Plaintiff, dated May 11, 2022. In order to arrive at an informed, just and fair decision, the Honorable Court has framed the following four (4) issues as a guide for its consideration. These are:-



- a) Whether a suit by the operation of the law and in particular the provisions of Order 24 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2020 and the laws of Succession a suit can be instituted and/or sustainable against a deceased person.
- b) Whether the suit instituted against the 1st, 2nd and 3rd Defendants herein should be struck out as prayed in the filed Notice of Motion application by the 3rd Defendant dated October 13, 2021 by virtual of the fact that the suit was instituted against the 2nd Defendant, the ostensible registered proprietor to the suit property yet he was already deceased by the time of its institution.
- c) Whether this suit should be transferred to the Chief Magistrate's Court based on the pecuniary jurisdiction.
- d) Who will bear the Costs of the suit and the application.

Issue No. a).

Whether a suit by the operation of the law and in particular the provisions of Order 24 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2020 and the laws of Succession a suit can be instituted and/or sustainable against a deceased person.

Brief facts

10. The Plaintiff herein filed this suit through a Plaint on 11th August 2021. She held that at all material times to the suit she was the bona fide registered legal and beneficial owner to all that parcel of land known as Plot No. 7994/I/MN (Original No. 624/70) containing by measurement Nought Decimal Three Five Three (0.0353) of a hectare or thereabout and more particularly as demarcated and delineated on Land Survey Plan Number 1161134 and registered in the Land Titles Registry at Mombasa as C.R No. 23271 (Hereinafter referred to as "The Suit land). She claimed to have acquired it from Signon Co -operative Savings & Credit Society Limited.
11. Her case was against the 1st, 2nd and 3rd Defendants making a claim that from the years 2014 and 2015 to date they had trespassed onto her suit property and erecting permanent structures on it. She also alleged that they all efforts to evict them had been futile as they had refused to vacate thus limiting her right to quiet enjoyment. They had become violent and threatened her all the time.
12. In the long run, she urged court to grant her the orders of permanent injunction against the Defendants, general damages for trespass, mesne profits, an order of vacant possession and costs of the suit.
13. Be that as it may, the bottom line issue here is whether the 2nd Defendant had died at the time that this suit was filed. If that issue is found to be in affirmative, then this Honorable Court as shall be graphically demonstrated herein below, there will no choice but to strike out this suit as null and void as against the 2nd Defendant for one cannot sue a dead man and continue claiming that the suit is properly before court.
14. The issue was comprehensively addressed by Mbogholi Msagha J (as he then was) in the case of "Viktar Maina Ngunjiri & 4 Others – Versus - Attorney General & 6 Others", High Court at Nairobi, Civil Suit No. 21 of 2016 (2018) eKLR where he reviewed various authorities as follows :-



In the Indian case of “*C. Muttu – Versus - Bharath Match Works* AIR 1964 Kant 293 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. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

In yet another “Indian Case of *Pratap Chand Mehta – Versus - Chrisna Devi Meuta* AIR 1988 Delhi 267 the court citing another decision observed as follows:-

“.....if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

Having reviewed the above authorities, he found that the suit as against the 7th Defendant, who was dead when the case was filed, was null and void ab initio.

15. The Court of Appeal has also had occasion to address the issue of a suit filed against a dead person in the case of “*Geeta Bharat Shah & 4 Others – Versus - Omar Said Mwatayari & Another*, Court of Appeal at Mombasa, Civil Appeal No. 46 of 2008, (2009) eKLR. In that case, a suit was filed against two persons one of whom was already dead when the case was filed. Judgment was entered against the deceased. An application to set aside the judgment was disallowed and the applicants appealed to the Court of Appeal. The Court of Appeal held that the judgment could not be sustained as it was entered against a person who was already dead. The court stated as follows :-

In the result, as Bharatkumar Nathalal Shah was already dead by the time the suit was filed, we hold the view that the suit was a nullity and Mr. Oddiaga, is with respect right in conceding the appeal in respect of him on that score. We see no merit in directing that he be allowed to file defence as he is not there to do so and the administrators to his estate cannot in law take over the matter as it was filed after he was already dead.

Issue no. b). Whether the suit instituted against the 1st , 2nd and 3rd Defendants herein should be struck out as prayed in the filed Notice of Motion application by the 3rd Defendant dated 13th October, 2021 by virtual of the fact that the suit was instituted against the 2nd Defendant, the ostensible registered proprietor to the suit property yet he was already deceased by the time of its institution.

16. The legal principles under this sub heading is solely founded under the provisions of the *Laws of Succession*, Cap. 160 and Order 24 of the *Civil procedure Rules*, 2010. From the provision of Oder 24 Rules 1 of the *Civil Procedure Rules*, upon the death of a Plaintiff or Defendant shall not cause a suit to abate if the cause of action survives or continues.



However, under Order 24 Rule 4 (1) provides:-

“Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.

17. The clear understanding to this provision of the law is that the moment a Defendant dies the suit against him/her abates. In the event that the cause of action still subsists, the only way out is to make an application for a limited “Ad Litem” (Ad Colligenda) or full grant for the estate of the deceased under the Laws of Succession whereby the suit may be revived afresh through duly appointed legal administrators or Executors. Likewise, there can be an application made by the legal Representatives to be joined as a party and may continue as such in the suit.
18. Having stated the legal principles herein, the answer to the query posed here is in the negative. In the given circumstance the suit instituted against the 1st and 3rd Defendants herein cannot be struck out as prayed in the filed Notice of Motion application by the 3rd Defendant dated 13th October, 2021 by virtual of the fact that the suit was instituted against the 2nd Defendant, the ostensible registered proprietor to the suit property yet he was already deceased by the time of its institution. Thus, I emphasize, the suit can only be struck out against the 2nd Defendant.

Issue No. c) Whether this suit should be transferred to the Chief Magistrate’s Court based on the pecuniary jurisdiction.

19. On close assessment of the filed pleadings, from this sub heading, the Honorable Court took notice that the transaction for the transfer of the suit land was a sum of Kenya Shillings One Hundred and twenty thousand (Kshs. 120, 000.00). Indeed, the total value of the suit land based on the valuation requisition form dated 18th July, 2016 by the Government Valuer, it is a sum of Kenya Shillings One Million Five Hundred thousand (Kshs. 1, 500, 000.00). Clearly, in terms of pecuniary jurisdiction, the value of the suit property is far below the value of what this Court should be dealing with it at this stage. It could be better for the sake of according the parties an opportunity to prefer their appeal and based on the principle of fair hearing under the provisions of Article 50 of *the Constitution* of Kenya, 2010.
20. Based on the provisions of Section 7 of the *Magistrate’s Act*, Section 18 of the *Civil procedure Act*, 2010 and taking that the parties already entered a consensus to have the matter transferred to the Chief Magistrate’s Court for its adjudication and final determination, the Honorable court makes the decision that the case be forthwith transferred there as stated hereof.

VI. Conclusion & Disposition.

21. In conclusion, and before making the final decision with great humility I have noted that the names of the 3rd Defendant is cited describing her as “Matilda Odaro” while in her Supporting Affidavit which she swore on 13th October, 2021 her names are described as being “Maltida Ombera Musungu”. Unless an affidavit is sworn under the provisions of “the *Registration of Persons*” Cap. 107, “The *Oaths & Statutory Declarations Act*” Cap. 15 and before a Commissioner for Oaths clearly indicating that these are one the same persons, in as far as the provisions of Order 19 of the *Civil procedure Rules*, 2010 and this suit is concerned, these will remain two distinct and separate persons.
22. The above notwithstanding, and in the principles of “Stare Decisis” this Honorable is fully bound by the above decision of the Court of Appeal, and therefore make the following findings. These are:-



- a. That the Notice of Motion application dated October 13, 2021 be and is hereby allowed but only to the extent that the suit against only the 2nd Defendant is a nullity ab initio and therefore abates by the operation of law, Order 24 Rules 4 of the Civil Procedure Rules the 2nd Defendant having passed on 4th March, 2021 while the suit was instituted October 12, 2021 seven (7) months thereafter. The same is therefore strike out.
- b. That in the given circumstances, the rest of the suit filed by the Plaintiff against the 1st and 3rd Defendants herein subsists.
- c. That based on the consensus by the parties and the strength of the pecuniary jurisdiction of the subject matter, this matter be and is hereby transferred for adjudication and final determination before the Chief Magistrate Court, Civil division, Mombasa. It shall be mentioned before the said Court on 30th June, 2022 for the courts further and appropriate direction.
- d. That the Plaintiff to be the costs of the suit against the estate of the 2nd Defendant and to the 3rd Defendant/Applicant for this application.

It is ordered accordingly.

DELIVERED, SIGNED & DATED THIS 16TH DAY OF JUNE 2022.

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

ENVIRONMENT AND LAND COURT AT MOMBASA

In the presence of:

M/s. Yumna Hassan, Court Assistant

M/s. Kihoro Advocate holding brief for Mr. Okoko Advocate for the Plaintiff/Respondent.

Non Appearance for the 1st & 2nd Defendants.

Non Appearance for the 3rd Defendant/Applicant.

