



**Washe & 23 others v Mitchel; Harry & another (Applicant) (Environmental and Land Originating Summons 7 of 2023) [2025] KEELC 3176 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3176 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 7 OF 2023**

**EK MAKORI, J  
APRIL 3, 2025**

**BETWEEN**

**MACMILLAN KALAMA WASHE & 23 OTHERS & 23 OTHERS & 23 OTHERS ..... PLAINTIFF**

**AND**

**DAVID MITCHEL ..... RESPONDENT**

**AND**

**DORAH MTEKELE HARRY ..... APPLICANT**

**VICTORIA NGAVA ..... APPLICANT**

**RULING**

1. Applicants' Notice of Motion dated November 21, 2024, seeks that this court unconditionally set aside the judgment and any decree issued on November 13, 2024, along with all consequential orders, and that this court be pleased to strike out the plaintiff's Originating Summons dated October 24, 2023, as it was filed and prosecuted against a deceased person.
2. The application is opposed by the replying affidavit deposed by one Macmillan Kalama Washe on 23<sup>rd</sup> January 2025.
3. The application was canvassed via written submissions.
4. The issues I frame for the determination of this court are whether to join the applicants in these proceedings, set aside the ex parte judgment of this court, have the entire suit struck out, and who should bear the costs of these proceedings. It is the court's responsibility to ensure that the legal standing of the case is in accordance with the law.



5. The Applicants assert that the plaintiffs initiated proceedings before this court in October 2023 against one David Mitchell, who is the only named defendant. The aforementioned David Mitchell passed away on August 14, 1992, as evidenced by Annexure “DMH5”. His death was further communicated to the general public via Legal Gazette Notice No. 13651 dated 12th November 2010, which is annexed as “DMH6”. This court is obliged, under Sections 59, 60, and 82 of the Evidence Act, to take judicial notice of matters published in the Kenya Gazette.
6. The named defendant, David Mitchel, died in August 1992. Therefore, when this matter was filed in October 2023, it was filed against a deceased person. The facts set out in the Supporting Affidavit of Dorah Mtekele Harry, sworn on November 21, 2024, and a further affidavit sworn on January 31, 2025, reveal the averments. This has significant legal implications as proceedings cannot be initiated against a deceased person.
7. Following the death of David Mitchel, his wife, Harriet Kadzo Mitchel, and his daughter, Gladys Mponda Mitchel, applied for Letters of Administration under Mombasa High Court Succession Cause No. 279 of 2010. The full Grant of Letters of Administration marked “DMH2”, was issued on 11 February 2011.
8. The Applicant has deposed in paragraph 3 of the Supporting Affidavit that the Administrators of the Estate of David Mitchel, namely Harriet Kadzo Mitchel and Gladys Mitchel Mponda, having died in 2021 and 2022, respectively, she has petitioned to substitute them as administrators of the deceased’s estate together with her sister Victoria Ngava. The Limited Grant was issued by the court in Succ. Cause E075 of 2024 on November 21, 2024.
9. The respondent/Applicants concede that it has now become apparent to them that the respondent in the OS is no longer alive. They sued, knowing that the respondent was alive. Having failed to serve him physically, they applied for substituted service, which was allowed by this court. Thereafter, the matter proceeded to trial, and judgment was delivered in their favor, further establishing that they had proved a claim under the doctrine of adverse possession.
10. That their actions were taken in utmost good faith. They followed established procedures regarding the service issue.
11. Mr. Wafula, learned counsel for the applicant, contends that the plaintiffs commenced these proceedings on 24th October 2023 against David Mitchel, who died on 14th August 1992. Therefore, the proceedings against the deceased are null and void for all purposes and intents, as per the legal principle that proceedings cannot be initiated against a deceased person.
12. Mr. Makworo, learned counsel for the respondents in this application, argues that the respondents acted in good faith. He contends that it would be unfair to set aside the judgment, join the applicants in these proceedings, and simultaneously strike out their claim, as no defense in place discloses this: the respondent in the main OS, David Mitchell, was deceased.
13. I concur with Mr. Wafula for the applicants, who, citing relevant judicial authorities, asserts the well-established legal principle that proceedings cannot be initiated by or against a deceased person. This principle is underscored in the case of *Juma & others v Shah & another; Shah (Respondent)* [2022] KEELC 13819 (KLR), where Munyao J. stated:

“We cannot close our eyes and ears to the fact that one cannot sue a dead person and that a suit against a dead person is null and void.”



14. In the same vein, in the case of *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others* [2018] eKLR, Msagha J cited two Indian cases to demonstrate the above point. - the good Judge stated as follows:
- “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 writs of Summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of the Plaintiff by substituting the legal representative of the deceased as 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.”
15. Msagha J. further citing the Indian case of *Pretap Chad Mehta v Chrima Devs Mehta* AIR 1988 Delhi 267, stated:
- “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 ... if the case has been instituted against a dead person and that person happens to be the only person, then the proceedings are a nullity.”
16. The Court of Appeal decision - *Geeta Bharat Shah, Vipinkumar Nathalal Shah, Milan Nathalal Shah, Bharatkumar Nathalal Shah, and Vipinkumar Nathalal Shah v Omar Said Mwatayari and Coastland Properties Limited* [2009] KECA 126 (KLR)- also cited by Mr. Wafula, persuades me. On the issue of commencing a suit against a person who was deceased at the time of institution of the suit, it stated as follows:
- “Indeed, in our view, there was no need for the administrators of the deceased’s estate to urge the court to (set aside judgement) for once the respondent admitted that he sued a dead person, the court was duty bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed.”
17. The Court of Appeal concluded 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.”
18. In *Njoki v Pussy* [2023], KEELC 945 (KLR), Bor J. considered the implications of Section 45 of the *Law of Succession Act* in adverse possession claims and stated that:
- “Section 45 prohibits any person from taking possession or disposing of, or otherwise intermeddling with the free property of a deceased person except where it is authorised by law or by a grant of representation under that Act. A person who contravenes that provision is guilty of an offence besides being answerable to the rightful executor to the extent of the assets which he has intermeddled with.”
19. The plaintiff’s Replying Affidavit alleges that the plaintiffs were unaware of David Mitchell’s death and that they acted in good faith, thereby establishing their claim under the doctrine of adverse possession. According to the authorities mentioned above, knowledge of death is irrelevant. If a suit is initiated against a person who was deceased at the time of initiation, the suit is dead on arrival. It is a nullity.



20. Under the circumstances where the plaintiffs initiated these proceedings against David Mitchel, who passed away in August 1992, the suit is inherently flawed and void. The judgment rendered in this matter on November 13, 2024, is also void ab initio.
21. The argument of whether the applicants have filed a defense in this application or not applies only to a defendant who is required to file a defense in a matter. The Applicants are not defendants. The named defendant is deceased, and by virtue of his death, the named defendant, David Mitchel, is incapable of instructing Advocates to prepare any defense. The suit is a nullity and does not require a defence to be filed against it. The suit cannot even be revived with the addition of the applicants to these proceedings – if the cited authorities are anything to go by.
22. Arising from the foregoing application, dated 21st November 2024, is hereby allowed.
23. As to costs, since the respondents/applicants in this application have shown that they were not aware of the demise of the sole defendant, David Mitchell, I will not condemn them to pay costs; each party is to bear their own costs.
24. Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 3<sup>RD</sup> DAY OF APRIL 2025.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Wafula, for the Applicants

Mr. Makworo, for the Respondents.

Court Assistant: Happy

