



**Qamar Investments Limited v Seif & 2 others (Suing as Trustees of Seif Bin Salim Trust)
(Environment & Land Case E079 of 2024) [2025] KEELC 3070 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3070 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E079 OF 2024**

SM KIBUNJA, J

APRIL 2, 2025

BETWEEN

QAMAR INVESTMENTS LIMITED PLAINTIFF

AND

SAID BIN SEIF 1ST DEFENDANT

ALI BIN MOHAMED 2ND DEFENDANT

MOHAMED SAID 3RD DEFENDANT

SUING AS TRUSTEES OF SEIF BIN SALIM TRUST

RULING

Notices Of Motion Dated 2nd September 2024 & 24th September 2024

1. The plaintiff filed the notice of motion dated 2nd September 2024, seeking for inter alia temporary injunction restraining the defendants herein whether by themselves and/or through their employees, officers, servants or agents from evicting or interfering with the quiet possession and enjoyment on suit properties Mombasa/Block XX/186 and 187, suit properties, pending the hearing and determination of this suit. the application is premised on the sixteen (16) grounds on its face and supported by the affidavit of Adnaan Talibhussein Bhaiji, director, in which he deposed among others that the plaintiff is the registered lessee of the suit properties for 99 years from 1st March 1938 that was registered on 8th May 2007 and certificate of lease issued, expressly stating that the ground rent due annually was Kshs.1,200; that the ground rent would be invoiced and paid by cheque up to eight (8) years in advance in good faith deposited at the defendants' office at Sheikh Jundan Road, Mombasa; that sometime in 2023 the plaintiff sent its agent to deliver a cheque for ground rent of the year 2023/2024 but found the defendants office closed, and later found out that the defendants had changed its physical address without notice; that on 28th May 2024, the plaintiff received a notice of forfeiture dated 24th May 2024 indicating that the plaintiff was in arrears of Kshs.2,500 being ground rent for two years, and the



- said notice also demanded vacant possession of the suit properties; that vide a letter dated 7th June 2024, the plaintiff forwarded a cheque dated 30th May 2024 for Kshs.2,500 that was received on the same date; that they had through the said letter requested the defendants to withdraw the said notice of forfeiture; that the defendants responded through their letter dated 21st June 2024 reiterating their notice of forfeiture and the plaintiff is apprehensive that the defendants will execute the forfeiture; that despite several attempts to engage the defendants over the matter, they have refused to change their position on the forfeiture notice; that the eviction if carried out will inconvenience the plaintiff, and monetary compensation will not suffice.
2. The application is opposed Defendants through their grounds of opposition dated the 17th November 2024, that also covered the plaintiff's notice of motion dated 24th September 2024 for substitution that is not subject matter of this ruling. The grounds relevant to the application dated 2nd September 2024, include that the application is a non-starter, fatally defective, badly constitute, an afterthought, spurious and abuse of court process; that the defendants are all deceased and hence the suit is a nullity/ non-starter, and injunction orders sought through the application against deceased defendants would be tantamount to court issuing orders in vain. The defendants' also filed their notice of motion dated 24th September 2024, seeking for striking plaintiff's application abovementioned and suit filed through plaintiff of even date. The application is based on four (4) grounds on its face and supported by the affidavit of Saif Said Saif Al-Busaidy, trustee, sworn on 24th September 2024, inter alia deposing that he is the managing trustee of Seif Bin Salim Trust, the trust, that has been wrongfully sued as Said Bin Seif, Ali Bin Mohamed and Mohamed Said, who were the previous trustees and are all now deceased, having passed on the 23rd February 1999, 12th October 1975 and 3rd January 1987 respectively; that he manages the affairs of the trust alongside fellow trustees Zain Al-Abidin Saif Said Al Busaidy and Ashwyn Said Seif Busaidy, and he annexed deeds of appointment dated 27th February 2004 and 7th September 2017 to confirm their appointment.
 3. The application is opposed by the plaintiff through their three (3) grounds of opposition dated 24th September 2024, inter alia stating that the application lacks merit, unmaintainable, abuse of court process and violated Order 1 Rule 10 of Civil Procedure Rules; that it is in the interest of expeditious administration of justice that the application be dismissed with costs.
 4. The learned counsel for the plaintiff and defendants filed their submissions dated 24th February 2025 and 17th November 2024 respectively, which the court has considered.
 5. The issues for determination by the court are as follows:
 - a. Whether the defendants were deceased by the time this suit was filed, and if so, whether the suit and application thereof should be struck out.
 - b. Whether the plaintiff has met the threshold for temporary injunction order to issue at this interlocutory stage.
 - c. Who bears the costs?
 6. The court has carefully considered the grounds on the two applications and grounds of opposition, submissions by the learned counsel, superior courts decisions cited thereon and has come to the following determinations:
 - a. I intend to deal with the defendants' application for striking out because if it is allowed, it will settle the plaintiff application for temporary injunction. Under section 3 (3) of the [Trustees \(Perpetual Succession\) Act](#) Chapter 164 of the Laws of Kenya, a Trust is not a legal person, and can only be sued through its trustees as was demonstrated in various superior courts



decisions including in the case of Keekonyokie Community Trust (through the duly appointed trustees) versus Moses Parantai, John Kamuye ole Kiok & Cabinet Secretary Ministry of Lands, Housing & Urban Development [2017] KEELC 3426 (KLR). The defendants have demonstrated through the certificates of death that are annexed to the supporting affidavit to their application that the three named defendants sued herein and against whom injunctive orders are sought had died in 1999, 1975 and 1987 which was long before this suit was filed in 2024.

- b. The defendant has moved the court to strike out both the suit and the application on the basis that the suit having been filed against trustees who had died years before was a nullity. The plaintiff's has submitted that the court should use the power to strike pleadings sparingly as what the defendants have complained about is curable through substitution of dead trustees with the living ones. I do agree with that position that where a suit can be salvaged through amendments and or substitutions, then the court should consider issuing the order that sustains the suit rather than that which terminates it thereby keeping a party away from the cradle of justice.
- c. Order 2 Rule 15 of the Civil Procedure Rules provides for applications for instances for striking out pleadings. In the case *Luseno & Another (Suing as the Administrators of the Estate of Dorcas A. Luseno) versus Wafula (Suing as the Administrator of the Estate of Julius Wafula) & Another* [2025] KEELC 1258 (KLR) the court cited with approval the case of *D.T. Dobie Co. (K) Ltd versus Joseph Mbaria Muchina & Another* [1980] eKLR, and held:

“...the court observed that courts should be reluctant to strike out suits unless it is plainly apparent that it cannot be cured through an amendment. The court said that if a suit shows a mere semblance of a cause of action, which may be cured through an amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness, without the full facts of the case before it.”

In the case of *Co-Operative Merchant Bank Ltd. versus George Fredrick Wekesa* Civil Appeal No. 54 of 1999 where the Court of Appeal held that striking out of pleadings is a draconian act which may only be resorted to in plain cases that disclose no cause of action and cannot be cured by amendment.

- d. I have considered the various superior courts decisions including those relied upon by both counsel in support of both positions and one thing that comes out clearly is that a suit filed against deceased person(s) is a nullity from inception. See the cases of *Japhet Nzila Muangi versus Hamisi Juma Malee* [2022] eKLR, and *Geeta Bharat Shah & 4 Others versus Omar Said Mwatayari & Another* [2009] eKLR. Applying that principle that a suit filed against a deceased person is a nullity to the instant suit before the court means the plaintiff's suit is therefore a nullity. The application dated 2nd September 2024 for temporary injunction being based on a suit that is a nullity cannot amount to much but a nullity.
- e. That while the plaintiff seem to hold the position that their suit can be resuscitated by amended and or substitution, as probably informed by their pending application dated 24th September 2024, and as it is trite that nullity begets nullity, the court finds their suit is incapable of resurrection, and should be allowed to rest through striking out. It follows that the application based on the suit will also suffer the same fate.



- f. Under section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, costs follow the events unless where for good cause otherwise ordered. That as the defendant are successful in their application, then they should have costs.
7. From the foregoing, the court finds and orders as follows on both applications:
- a. The Defendants' application dated 24th September 2024 has merit and is allowed in terms of prayer (1), and the plaintiff's suit is struck out with costs.
- b. That in view of order (a) above, the plaintiff's notice of motion dated 2nd September 2024 is struck out with costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 2ND DAY OF APRIL 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : Mr. Munya For Nziza

Defendants : M/s Waithera For Obinju

Shitemi – Court Assistant.

