



**Kalaa & another v Attorney General & 11 others (Environment & Land
Petition 881 of 2015) [2022] KEELC 13478 (KLR) (13 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13478 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 881 OF 2015
SO OKONG'O, J
OCTOBER 13, 2022**

BETWEEN

ALOIS S.K. KALAA PETITIONER

AND

ALMIRA AL KARIM SUNDERJI APPLICANT

AND

ATTORNEY GENERAL & 11 OTHERS DEFENDANT

RULING

1. Alois SK Kalaa, deceased (hereinafter referred to only as “the deceased”) filed this suit as a constitutional petition in the High Court on August 13, 2014. However, the deceased did not file a petition but an originating summons. In the originating summons, the deceased indicated that he had brought the suit as an agent of one, Al-Karim Badruddin Sunderji whom he claimed owned all that parcel of land Known as LR No 209/30/10(hereinafter referred to as “the suit property”). The deceased sought several reliefs in the originating summons. The originating summons has been amended several times over the years that the suit has remained pending hearing.
2. On June 29, 2021, the deceased’s advocate informed the court that the deceased had died in early 2021 and sought time to substitute him with his legal representative. What is now before me is an application brought by one, Almira Al Karim Sunderji (hereinafter referred to only as “the applicant”) seeking an order that the suit be revived and reinstated and that she be substituted as a petitioner in place of the deceased. The application has been brought on the ground that the deceased died in December 2020 and that the applicant is a legitimate party to the petition within the meaning of article 22 of the *Constitution*. The applicant has contended that she is a daughter of the legal owner of the suit property, Al-Karim Badruddin Sunderji on whose behalf this suit was brought by the deceased. The applicant has contended that she has put sufficient reasons to warrant the revival of the suit and the substitution



- sought. The applicant has urged the court to allow the application so that she could proceed with the suit.
3. The application was argued on July 7, 2022 when Mr Ondieki appeared for the applicant while Mr Kamau appeared for the Attorney General. Mr Ondieki has submitted that the applicant's application is seeking the reinstatement of the suit and the substitution of the deceased petitioner with the applicant. He has submitted that the application is brought under articles 22(2)(a) and article 22(3)(d) of the Constitution. He has submitted that the applicant is seeking to join the petition as a representative of Al-Karim Badruddin Sunderji. Mr Ondieki has submitted that the deceased filed the petition as an agent of Al-Karim Badruddin Sunderji.
 4. Mr Kamau opposed the application. He has submitted that the applicant is not a legal representative of the deceased and as such cannot not be substituted in the petition in his place. Mr Kamau has submitted that the provisions of the Constitution cited by Mr Ondieki for the applicant are irrelevant since the petition before the court is not a public interest suit. He has submitted that the claim is in respect of a private piece of land. He has cited two authorities and submitted that the applicant cannot purport to act on behalf of the deceased without a grant of letters of administration.
 5. Order 24 rule 3 of the Civil Procedure Rules provides as follows:
 3. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.
 - (2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.”
 6. Order 24 rule 7(2) of the Civil Procedure Rules provides as follows:

“The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”
 7. I have considered the applicant's application and the submissions by the advocates for the applicant and the Attorney General. I am in agreement with the Attorney General that the application before the court is incompetent. As mentioned earlier in the ruling the deceased brought this suit as appointed attorney and agent of Al-Karim Badruddin Sunderji. I have not had sight of the power of attorney if any that was executed by the said Al-Karim Badruddin Sunderji in favour of the deceased neither have I seen a letter from Al-Karim Badruddin Sunderji appointing the deceased as his agent. Whatever the case, the suit was brought by the deceased and as such under the provisions of the Civil Procedure Rules that I have reproduced above which apply with equal force to originating summons, only a legal representative of a deceased party to a suit can be substituted in the suit in place of the deceased.
 8. It is admitted that the applicant is not a legal representative of the deceased. There is no basis therefore for the substitution of the deceased with the applicant. The applicant's advocate argued that the



application has been brought under articles 22(2)(a) and article 22(3)(d) of the Constitution. With due respect to counsel, the said provisions of the Constitution do not deal with substitution of parties but with the issue of persons who can bring a petition for the enforcement of rights and freedoms in the Bill of Rights and the reliefs that can be granted by the court. In any event, there is no evidence that the applicant has any relationship with Al-Karim Badruddin Sunderji or that Al-Karim Badruddin Sunderji has authorized her to represent him in this suit. There is also no explanation that has been given as to why Al-Karim Badruddin Sunderji cannot act in his own name in the matter.

9. I am in agreement with the submission by the Attorney General that the applicant cannot maintain this suit on behalf of the deceased. In the Court of Appeal case of Virginia Edith Wambui Otieno v Joash Ochieng Ougo & another (1982-88) 1 KAR 1049, that was cited by the Attorney General, it was held *per incuriam* that an administrator is not entitled to bring an action as administrator before he has taken out letters of administration and if he does so, the action is incompetent from the date it was instituted.
10. In the text, Law of Succession by WM Musyoka published by Law Africa, he has stated as follows at page 205 with regard to suits by administrators;

“Case law shows that no person has a right to enforce any cause of action, or defend any suit which survives the deceased or arises out of his death without a grant of letters of administration”.
11. I have said enough to show that the applicant’s application has no merit. The notice of motion application dated October 15, 2021 is dismissed with costs to the Attorney General.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 13TH DAY OF OCTOBER 2022

S. OKONG’O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr Ondieki for the Applicant/Petitioner

N/A for the Attorney General

Ms. J.Omondi-Court Assistant

