



Mogoi & 2 others v Nyang’au & 4 others; Nyang’au (Interested Party) (Environment & Land Case 33 of 2021) [2022] KEELC 14954 (KLR) (23 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14954 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 33 OF 2021
JM KAMAU, J
NOVEMBER 23, 2022
FORMERLY IN THE ENVIRONMENT & LAND COURT AT KISII CASE NO 1064 OF 2016

BETWEEN

NYANGOSI MOGOI 1ST PLAINTIFF
NYARIKI MOSETI 2ND PLAINTIFF
CHARLES MOMANYI 3RD PLAINTIFF

AND

TERTIO NYANG’AU 1ST DEFENDANT
NATHAN MARIMBIA 2ND DEFENDANT
JEREMIAH MWAMBI 3RD DEFENDANT
FRANCIS AMENYA 4TH DEFENDANT
ELIZABETH ONYINKWA 5TH DEFENDANT

AND

RICHARD NYABUTI NYANG’AU INTERESTED PARTY

RULING

1. This suit was filed on November 14, 2012 by Nyangosi Mogoi, Nyariki Moseki and Charles Momanyi suing in their official capacities as Chairman, Secretary and Treasurer respectively of Lietego Farmers’ Co-operative Society Ltd. The same was filed against Tertio Nyang’au, Nathan Marimbia, Jeremiah Mwambi and Elizabeth Onyikwa praying for the following orders: -
 - a. A declaration that the constructive tenancy or lease hitherto subsisting between the Plaintiffs and each and/or the Defendants has determined and/or been terminated under the Provisions



of Section 10 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301.

- b. An order that each of the Defendants, their agents, servants and/or persons claiming their authority settles all and any outstanding rent or arrears of rent of Kshs 27,720.00 calculated at the rate of Kshs 70.00 per month up to October 1, 2011 and thereafter at Kshs 70.00 per month until the date of eviction.
 - c. An order of eviction against each and all the Defendants by themselves, their agents, servants, employees and/or persons claiming their authority from the land/known as Lietego Settlement Scheme/91.
 - d. Costs of this suit.
2. On December 18, 2012 the firm of Koina Onyancha & Co Advocates entered appearance on behalf of the 5 Defendants and on January 28, 2013 filed Defence and challenged the jurisdiction of this court to try this suit. They said that the suit is fatally defective and incompetent and that the same does not disclose any reasonable cause of action against the Defendants and should be struck out with costs. Issues were framed by the Plaintiff with one of them (No 5) being whether the suit is properly before this court. The same were filed on March 21, 2013.
 3. On January 25, 2021 one Richard Nyabuti Nyang'au sought leave of court to be joined in the suit as an interested party on the ground that he is the rightful allottee and owner of the suit property and that the 1st Defendant Tertio Nyang'au died in March 2009 before the suit was filed. He annexed a copy of the letters of Administration ad litem dated March 10, 2020 issued by the Chief Magistrate's Court, Kisii showing that Tertio Nyang'au Isoe died on March 4, 2009 and Richard Nyabuti Nyang'au had been appointed the Administrator in his place but the letters were limited to the purpose only of filing suit. The same was granted by the consent of both parties on January 26, 2021. By then the 3rd Plaintiff had already testified as PW1 after which evidence the Plaintiffs' case was closed on May 28, 2014. Also, the court had been informed that the 1st and 4th Defendants had died. This left the case against the 2nd and 3rd Defendants. On January 26, 2021 the 3rd Defendant was granted leave to file Power of Attorney so that he could be represented by the Donee. This was to be done within 7 days. Equally, the 2nd Defendant who had now already died as well was to be substituted within 60 Days.
 4. Finally, on October 4, 2022, the Interested Party, Richard Nyabuti filed an Application seeking the striking out of this suit against the 1st and 4th Defendants and also a declaration that the proceedings against the 2 were a nullity because the suit was commenced against them when they were already dead. He also sought a declaration that the suit against the 2nd and 5th Defendants has abated as against the 2 on April 17, 2017 and July 20, 2018 respectively. He therefore sought to be discharged as a party. On January 25, 2021 Letters of Administration Ad Litem were produced in court in respect of the Estate of Tertio Nyang'au Isoe. The letters were granted by the Chief Magistrate's Court, Kisii having been satisfied that Tertio Nyang'au Isoe, the 1st Defendant died on March 4, 2009 before this suit was filed. The court was also told that the 2nd and 3rd Defendants had also died, the 4th Defendant before the suit was filed and the 2nd Defendant while the case was going on, on April 17, 2016 and the 5th Defendant on July 20, 2017. Jeremiah Mwambi, the 3rd Defendant passed on in August 2022. But there is still time to substitute him. The case against him has therefore not abated. As to the 1st and 4th Defendants the suit against them was a nullity since they were already dead on the arrival of this suit. Their Estate should have been sued in their place. Even after their demise was pointed out in court, no substitution was made. I agree with the Interested Party that the suit against the said 1st and 4th Defendants should be accordingly struck out with costs to their Estates and I so order. As for the 2nd and 5th Defendants, the



case against the 2 abated on April 17, 2017 and July 20, 2018 respectively. And since there is time for the 3rd Defendant to be substituted in spite of the Estate having been granted 60 Days on January 20, 2021 to substitute him, the suit against the said 3rd Defendant still stands. The costs of this Application to the Interested Party.

5. The Plaintiffs' contention that the Applicant has no capacity to bring the current Application has no basis and I invite them to peruse the consent order dated January 26, 2021. Both M/s Onyancha and Onsongo were in court and consented to the Order.

Ruling dated, signed and delivered at Nyamira this 23rd day of November 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiffs: N/A

Defendants: N/A

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