



**Tembo & another v D'costa; Nyale (On his behalf and as an administrator of the estate of Nyale Mwango Disja) & another (Applicant) (Environment and Land Case Civil Suit 88 of 2013) [2022] KEELC 15392 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15392 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ENVIRONMENT AND LAND CASE CIVIL SUIT 88 OF 2013**  
**EK MAKORI, J**  
**DECEMBER 19, 2022**  
**IN THE MATTER OF: PLOT NUMBER KILIFI/MTWAPA/11**  
**AND**  
**IN THE MATTER OF: THE APPLICATION FOR DECLARATION**  
**THAT THE APPLICANT PLAINTIFFS HAVE OBTAINED OWNERSHIP**  
**OF THE ABOVE SAID LAND BY WAY OF ADVERSE POSSESSION**

**BETWEEN**

**MBIGO KADZO TEMBO ..... 1<sup>ST</sup> PLAINTIFF**

**ARNOLD KARISA MUHAMBI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**VINCENT SEBASTIAN D'COSTA ..... DEFENDANT**

**AND**

**KITI MWANGO NYALE (ON HIS BEHALF AND AS AN ADMINISTRATOR OF THE ESTATE OF NYALE MWANGO DISJA) ..... APPLICANT**

**KHAMIS NYALE MWANGO ..... APPLICANT**

**RULING**

1. The notices of motion dated March 7, 2022 and that dated June 14, 2022 are due for consideration. Significantly, seeking joinder and dismissal of the current suit in its entirety for allegedly having been brought against a dead person and that any litigation and orders obtained after the judgment of this court (Angote J) remain nullity by the ruling in review (Olola J) delivered and dated 5<sup>th</sup> day of November 2020.



2. Service of the motions was effected on the respondents. They did not reply to the same, nor file submissions as directed by this court.
3. The issues that fall for determination are joinder of the applicants in these proceedings at this stage of the trial. Whether the orders sought in the second application to have entries and dealings expunged from the register, concerning the suit property entered after the judgment and review thereof. In addition, the dismissal of the suit altogether with costs.
4. The applicants submit that they are the owners of the parcel of land title number Kilifi/Mtwapa/11. They were successful litigants against the plaintiffs and the defendants in this matter. They obtained a judgment against them - Mombasa, (ELC Number 1 of 1982) *Nyale Mwango Disja, Kiti Mwango Nyale & Khamisi Nyale Mwango versus Vincent Sebastian D'costa & others and Mbigu Kadzo Tembo, Arnold Karisa Muhambi (interested party)*. Judgment was delivered on February 13, 2014 by Mukunya J and which judgment reinstated the title over the suit property in their favour.
5. The applicants were never made aware of this matter and when they discovered it, they made the application dated March 7, 2022 to be joined and sought for the vacation of all orders made in this matter and the plaintiffs and defendant enjoined from trespassing and in any way dealing with the suit property in issue.
6. The applicants having changed their Advocates on the 13<sup>th</sup> of June 2022, filed a second application dated the 14<sup>th</sup> of June 2022 seeking *inter alia*, dismissal of the entire suit and a vacation of all orders issued herein. Further, and most importantly, sought orders to remove all entries in the register to the suit land at the Kilifi Land Registry.
7. By fiat of the ruling delivered by this court on 5<sup>th</sup> of November 2020 (Olola J), this court determined that this suit was a nullity in law for the reason that the suit was instituted against a deceased defendant. The court however fell short of dismissing the entire suit leaving it limping as it could not proceed in the face of such a finding.
8. At the point of making the ruling, the plaintiffs herein had already obtained judgment and used the judgment to register a change of title at the Kilifi Land Registry. The change of title gave them possession of the suit premises.
9. It is the entries that the applicants now seek an order of this court to expunge from the register, ensure, and realize the status quo ante the judgment of this court.
10. The respondents were served; they did not file replies or appear to participate in the current proceedings.
11. Joinder of parties can be done at any stage of the proceedings – order 1 rule 3,10(2) and 14 and order 51 of the *Civil Procedure Rules* sets out who can be joined as a defendant or an interested party in a suit, the most significant provisions being order 1 rule 3 and 10(2) of the *Civil Procedure Rules* respectively which stipulates as follows: -

Order 1 rule 3: -

“ All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”



Order 1 rule 10(2): -

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

12. This position has been reiterated in several authorities, for instance in *Jan Bonde Nielsen vs Hersman Philipus Steyn & 2 others* [2012] eKLR, Mabeya J observed as follows: -

“Thus, from the plain reading of this provision, it is obvious that the court has the discretion to strike out any party who is improperly joined in any proceeding. In the exercise of this discretion the court will of course act according to reason and fair play and not according to whims and caprice. So who is a necessary party and does the 3<sup>rd</sup> defendant fit the criteria for such a party? In my view, a ‘necessary party’ is a person who ought to have been joined as a party and in whose absence no effective decree can be passed in a proceeding by the court. If a ‘necessary party’ is not impleaded, the suit may be a non-starter as the relief(s) sought, if granted, may be ineffective. In this regard, the question that arises is whether the 3<sup>rd</sup> defendant is a necessary party for purposes of enabling the court to effectually and completely adjudicate upon the matter at hand.”

13. I have no difficulty in admitting the applicants in this matter as necessary parties to the suit since they have shown the stake they have in the instant case. They have a parallel judgment and decree involving the same suit property emanating from Mombasa (ELC Number 1 of 1982) *Nyale Mwangi Disja, Kiti Mwangi Nyale & Khamisi Nyale Mwangi versus Vincent Sebastian D’costa & Others and Mbigo Kadzo Tembo, Arnold Karisa Muhambi*, (Mukunya J) I will allow the application dated 7<sup>th</sup> of March 2022 and order the joinder of the applicants in this suit.

14. On the application dated June 14, 2022, I have been referred to the ruling dated November 5, 2020 where Olola J made a finding that the originating summons upon which the judgment was based was obtained against a dead person, and therefore the whole judgment stands a nullity in law. The judgment rendered by Angote J reported as *Mbigo Kadzo Tembo & another v Vincent Sabastian D’costa* [2017] eKLR, was arrived at in error since the person against whom it was litigated was dead and therefore invalid.

15. The consequence then will be that any dealings or entry concerning land parcel Nos Kilifi/Mtwapa/11 effected according to the judgment of Angote J stands null and void and ought to be expunged from the register. The application dated 14<sup>th</sup> of June 2022 is hereby allowed to that extent.

16. On whether to dismiss the entire case, since the parties who filed the suit are absent and did not participate in this proceedings, the applicants having been joined as necessary parties, can fix the matter for a formal hearing inviting the other side in the normal manner and within 45 days hereof. This is to check whether there could be any remaining issues to deal with. If they do not appear, the entire suit is to stand dismissed.

17. The respondents will bear the costs of the two applications.

**DATED, SIGNED, AND DELIVERED AT MALINDI THIS 19<sup>TH</sup> DAY OF DECEMBER, 2022.**

**E.K. MAKORI**



**JUDGE**

