



**Muiruri (Suing as the Legal Representatives and the beneficiaries of the Estate of the Late Edward Muiruri) v Athi Water Servies Boa & 8 others (Environment and Land Case Civil Suit E202 of 2020) [2022] KEELC 15421 (KLR) (14 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15421 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT E202 OF 2020  
AA OMOLLO, J  
DECEMBER 14, 2022**

**BETWEEN**

**HELLEN WAMBUI MUIRURI (SUIING AS THE LEGAL REPRESENTATIVES AND THE BENEFICIARIES OF THE ESTATE OF THE LATE EDWARD MUIRURI) ..... PLAINTIFF**

**AND**

**ATHI WATER SERVIES BOA ..... 1<sup>ST</sup> DEFENDANT  
NBI METROPOLITAN COUNTY GOVERNMENT ..... 2<sup>ND</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT  
SAMSON MWENJE ..... 4<sup>TH</sup> DEFENDANT  
GATHIRIMU MULTI PURPOSE SOC. LTD ..... 5<sup>TH</sup> DEFENDANT  
SOPHIA NJOKI KARANJA ..... 6<sup>TH</sup> DEFENDANT  
JOHN BOSCO NDUNG’U KARANJA ..... 7<sup>TH</sup> DEFENDANT  
KIRAGU KIGONDU ..... 8<sup>TH</sup> DEFENDANT**

**AND**

**KANYIRI WAMAE ..... CLAIMANT**

**RULING**

1. The 1<sup>st</sup> defendant has moved this court by way of a preliminary objection dated October 12, 2022 to have the suit struck out on the grounds that it is defective, incompetent and bad in law. The 1<sup>st</sup>



defendant plead that the suit was not filed by all the administrators of the deceased Edward Muiruri as appointed in Nairobi Succession cause no 1926 of 2009.

2. It is trite law that a preliminary objection should be a pure point of law that ought not to be proved by adducing evidence, see the holding in *Mukisa Biscuits vs West End Distributors Ltd* The 1<sup>st</sup> defendant argues that the suit is incompetent because not all the administrators have sued. He referred this court to Nairobi Succession cause number 1926 of 2009 which cause he did not and could not annex to the preliminary objection. The court is not in a position to determine how many administrators were appointed in the cited cause. In essence, the 1<sup>st</sup> defendant is relying on evidence to prove the P O The 1<sup>st</sup> defendant had the option of raising the objection through an application which allows a party to plead facts.
3. The 1<sup>st</sup> defendants in his submissions set out the facts in support of the preliminary objection and refers to paragraph 3 of the plaintiff's supporting affidavit sworn on October 27, 2020 where the plaintiff deposed that she had authority of her co-administrators to swear the affidavit but there was no authority attached. The 1<sup>st</sup> defendant cited the case of *Dickson Eso v Suyianka Mayune & 2 others* [2022]eKLR, where the court stated *inter alia* that a preliminary objection cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.
4. On the face of the facts presented in the 1<sup>st</sup> defendant's submissions are the question whether the plaintiff has authority from her co-administrators as deposed I paragraph 3 of her affidavit dated October 27, 2020. More importantly is whether the non-joinder can be corrected by judicial discretion or the objection as raised is capable of disposing of the entire suit. The plaintiff in opposing the P O cited the provisions of order 1 rule 10 that provides for addition or substitution of parties. The plaintiff also argued that courts have held that a suit should not be struck out for mis joinder or non-joinder. The case cited include *Local Building and Construction Ltd v Institute of the Blessed Virgin Mary Loreto Msongari & 2 Others* [2019] eKLR.
5. The decision of the Court of Appeal in *Tanzania in Tang Gas Distributors Ltd v Said & Others* [2014] EA 448 to the effect that, "the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage."
6. In this case, if there is any defect, which the court cannot ascertain because of the manner she has been moved, such defect may be cured by the court exercising judicial discretion once moved under the provisions of order 1 rule 10 of the *Civil Procedure Rules*. In the circumstances, I find no merit in the preliminary objection raised and hereby dismiss it with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY ON 14<sup>TH</sup> DECEMBER 2022**

**A. OMOLLO**

**JUDGE**

