



**Rosa v Crutzen (Sued as the legal representative of the Estate of the Late Ruth Wanjiru Mwithia)
(Environment & Land Case 331 of 2012) [2022] KEELC 15168 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15168 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 331 OF 2012
SO OKONG'O, J
DECEMBER 7, 2022**

BETWEEN

FEDERICO ROSA PLAINTIFF

AND

MARC M CRUTZEN DEFENDANT

**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
RUTH WANJIRU MWITHIA**

RULING

1. The Plaintiff brought this suit against Ruth Wanjiru Mwithia, deceased (hereinafter referred to as “the deceased”) on July 7, 2008 in the High Court seeking; vacant possession of all that property known as Pent House Number D7, LR No 330/98 (Original No 330/40/9/2) (hereinafter referred to as the “suit property”), severance of the joint tenancy between the Plaintiff and the deceased and, the vesting of the suit property in the Plaintiff as the sole proprietor thereof. In his plaint dated July 7, 2008, the Plaintiff averred as follows: At all material times, the Plaintiff was in a serious intimate relationship with the deceased which they agreed would culminate into a marriage. In preparation for their marriage, it was agreed that the Plaintiff who was an Italian national would purchase a house in Nairobi which the two would use as their matrimonial home. Towards this end, the Plaintiff and the deceased identified the suit property which was being sold at Kshs 15,000,000/-. The Plaintiff paid 10% of the purchase price in the sum of Kshs 1,500,000/- as a deposit for the suit property through electronic funds transfer directly to the vendors account and the balance amounting to Kshs 13,500,000/- through a bankers cheque that was purchased by the deceased with the funds from the Plaintiff’s bank account at Commercial Bank of Africa. At the request of the deceased, the suit property was registered in the names of the Plaintiff and the deceased as joint tenants although the full purchase price and related expenses were met solely by the Plaintiff. The Plaintiff and the deceased took possession of the suit property which the Plaintiff furnished at his own cost.



2. After purchasing and taking possession of the suit property as aforesaid, the Plaintiff noted that the deceased no longer had enthusiasm in their marriage plans. The Plaintiff soon discovered that the deceased was living with another man in the suit property. This made the Plaintiff to terminate his relationship with the deceased and to cancel the plans they had for the future. Since the marriage between the Plaintiff and the deceased which was the consideration for the registration of the suit property in the names of the Plaintiff and the deceased as joint tenants was no longer feasible for the reason given above, the Plaintiff asked the deceased to vacate the suit property. The deceased refused to give vacant possession of the property contending that she was a joint owner of the same. It is on account of the foregoing that the Plaintiff was constrained to file this suit for the reliefs aforesaid.
3. The deceased entered appearance and filed a statement of defence on August 7, 2008. In her defence, the deceased denied that she was registered as a joint tenant of the suit property in consideration of her agreement to marry the Plaintiff. The deceased averred that she paid substantial portion of the purchase price for the suit property amounting to Kshs 13,500,000/-. The deceased averred that she was registered as a joint tenant of the suit property unconditionally and denied that the suit property was furnished by the Plaintiff. The deceased averred further that she had equal interest in the suit property with the Plaintiff and as such the Plaintiff's demand that she vacates the suit property had no basis in law. The deceased averred that the joint tenancy she had with the Plaintiff in the suit property was not severable and termed the Plaintiff's claim untenable in law and an abuse of the process of the court.
4. The deceased amended her statement of defence on October 28, 2011. In the amended defence, the deceased admitted that she had intimate relationship with the Plaintiff. The deceased averred that as a result of that relationship, the Plaintiff requested her to work as his assistant in a company known as Federico & Associates based in Italy at which the Plaintiff was a manager. The deceased averred that the Plaintiff did not pay her any salary but promised her that he would use what she was entitled to in terms of remuneration to buy a house and have it registered in their joint names in undivided equal shares. The deceased averred that the registration of the suit property in the names of the deceased and the Plaintiff as joint tenants was done through a mistake on the part of the advocate who handled the conveyancing transaction for them in that the Plaintiff and the deceased had agreed to have distinct equal shares in the suit property.
5. The deceased averred that during her relationship with the Plaintiff, she was married and this fact was well known to the Plaintiff. The deceased averred that in the circumstances, the issue of the Plaintiff and the deceased purchasing the suit property to be their matrimonial home could not arise. The deceased denied that she made representations to the Plaintiff that she was available for marriage. The deceased contended that the registration of the suit property in her name as a joint tenant with the Plaintiff was in consideration of the services she rendered to Federico & Associates aforesaid. The deceased contended that the Plaintiff's claim that the purchase price for the suit property was solely paid by the Plaintiff was not correct. She reiterated that the suit property was registered in their names as joint tenants by mistake and that their intention was to be registered as tenants in common. On the issue of the furniture, the deceased averred that they each bought the furniture for the suit property and denied that the same was solely purchased by the Plaintiff. The deceased contended that as a co-owner of the suit property, her interest in the property was equal to that of the Plaintiff in extent, nature and duration and as such, the Plaintiff had no right to force her out of the suit property. The suit was transferred to this court in 2012 and assigned its current case number. The deceased died on March 20, 2013 and was substituted with the defendant herein who is her husband and legal representative on May 13, 2013.



The Application Before the Court:

6. What is now before me for determination is the Plaintiff's Notice of Motion application dated November 26, 2020 brought under section 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#). In the application, the Plaintiff is seeking the following orders;
 1. Spent.
 2. That the court be pleased to strike out the Amended Defence dated October 25, 2011 and filed on October 28, 2011 based on the principle of survivorship (*jus accrescendi*).
 3. That the costs of the application be provided for.
7. The application is brought on the grounds set out on the face thereof and on the affidavit of the Plaintiff's advocate James Nyiha and supplementary affidavit of the Plaintiff sworn on November 26, 2020 and August 31, 2021 respectively. The Plaintiff has averred that the deceased and he were involved in an intimate relationship and that they agreed that the same would end in marriage. The Plaintiff has averred that he purchased the suit property at Kshs 15, 000,000/= to be their matrimonial home and caused the same to be registered in his name and that of the deceased jointly. The Plaintiff has averred that the deceased died and ownership of the suit property automatically vested in the Plaintiff by virtue of the principle of survivorship. The Plaintiff has averred that he has been denied possession of the suit property by the Defendant who has been in illegal occupation of the same without paying any rent thereby causing the Plaintiff loss.
8. The Plaintiff has averred that he filed this suit to recover possession of the suit property. The Plaintiff has averred that the Defendant has not disputed in his amended defence dated October 25, 2011 that the suit property is owned by the Plaintiff and the deceased jointly. The Plaintiff has averred that following the death of the deceased, the Plaintiff is the sole owner of the suit property through the principle of *jus accrescendi*. The Plaintiff has averred that it is in the interest of justice that the court exercises its inherent powers under section 3A of the [Civil Procedure Act](#) and strikes out the defendant's amended defence on the basis of the principle of survivorship (*jus accrescendi*).
9. The application is opposed by the Defendant through Grounds of Opposition dated March 18, 2021 and a replying affidavit of the Defendant sworn on March 23, 2022. In his grounds of opposition, the Defendant has contended as follows;
 - a) That the application is incurably defective and bad in law.
 - b) That the application is totally misconceived, incompetent and does not lie.
 - c) That the supporting affidavit of James Nyiha sworn in support of the application is not only incompetent but the same offends the rules of the court pertaining to swearing of affidavits.
 - d) That the application and the supporting affidavit of James Nyiha annexed thereto do not make out a case to warrant the orders sought.
 - e) The applicant in his application and the supporting affidavit annexed thereto has misapprehended and/or misconceived the tenor of the Defendant's Defence filed herein and he is therefore not entitled to the orders sought.
 - f) That the applicant's application amounts to a grave abuse of the process of this court.
 - g) The registration of the suit property in the joint names of the Plaintiff and the late Ruth Mwithia deceased as joint tenants (as opposed to tenants in common) and on the basis of which



the Plaintiff's application is premised is an issue for determination by this court as the same is being challenged by the Defendant.

10. In his replying affidavit, the Defendant has stated that he is defending this suit in his capacity as the legal representative of the estate of the late Ruth Wanjiru Mwithia, deceased pursuant to a Limited Grant of Letters of Administration *Ad Litem* issued to him by the court on April 12, 2013. He has stated that the affidavit of James Nyiha and the supplementary affidavit of the Plaintiff do not make out a case to warrant the grant of the orders sought. The Defendant has averred that the Plaintiff's application to strike out the amended defence is founded on the principle of survivorship applicable in case of a property registered in joint names of a husband and wife where in the event of death of either of them the property passes to the surviving spouse by operation of the law.
11. The Defendant has averred that the Plaintiff has pleaded in his Complaint that the registration of the suit property in his name and that of the deceased as joint tenants was procured allegedly through fraud and as such he does not recognize the said joint tenancy. The Defendant has averred that the Plaintiff having challenged and/or disputed the registration of the suit property in the names of the Plaintiff and the deceased as joint tenants, he cannot at the same time rely on the doctrine of survivorship to strike out the amended defence.
12. The Defendant has averred that the Plaintiff cannot depart from his pleadings in order to take advantage of the unfortunate death of the deceased by invoking the doctrine of survivorship which he has not acknowledged in his pleadings. The Defendant has averred further that the deceased in her witness statement filed prior to her death stated that the registration of the suit property in her name and the name of the Plaintiff as joint tenants was a mistake. The Defendant has averred that the deceased stated that her name was included in the title of the suit property not by virtue of her being a potential wife to the Plaintiff as alleged by the Plaintiff but by virtue of her contribution towards the purchase of the property through the remuneration that she earned while working for the Plaintiff.
13. The Defendant has averred that the registration of the suit property in the names of the Plaintiff and the deceased as joint tenants was made through a mistake as they were not husband and wife. The Defendant has averred that the deceased was married to him and as such was not capable of contracting another marriage at the time. The Defendant has averred that his amended Defence raises serious triable issues and as such it is only fair and just that the suit be allowed to proceed to full hearing so that the court can have an opportunity to determine the matters raised in the pleadings conclusively. The Defendant has averred that the deceased was survived by two minors who are living with him in Belgium and for whose benefit he is defending the suit as the legal representative of the estate of their mother.
14. The Defendant has averred that the averment at paragraph 16 of the Plaintiff's supplementary affidavit to the effect that the court had in its ruling of March 28, 2017 found that the deceased's interest in the suit property had been extinguished and the suit premises vested on the Plaintiff through the doctrine of survivorship does not hold. The Defendant has averred that in the same ruling the court held that it would serve the interest of justice if the property the subject matter of the suit was preserved pending the hearing and determination of this suit.
15. The Defendant has averred that in the said ruling, the Plaintiff was restrained from selling, transferring or charging the suit property pending the hearing and determination of the suit. The Defendant has averred that the statement by the court alluded to in paragraph 16 of the Plaintiff's supplementary affidavit was obiter dicta and as such cannot be a basis for striking out the Defendant's Amended Defence.



The Plaintiff's submissions:

16. The Plaintiff filed his submissions dated September 23, 2021 in which he has raised two issues for determination by the court. The first issue is whether the Plaintiff is the owner of the suit property by virtue of the principle of survivorship. The Plaintiff has submitted that the suit property was registered in the names of the Plaintiff and the deceased as joint tenants. The Plaintiff relied cited [*Boniface Awuor & Another v Victor Otieno Nyadimo & 2 Others*](#) [2017] eKLR and submitted that the principle of survivorship upon which the Plaintiff's ownership of the suit property is premised operates to remove a jointly owned property from the operation of the law of succession upon the death of the joint tenant and therefore he is the sole proprietor of the suit property. The Plaintiff has submitted further that in its ruling of March 28, 2017, this court agreed with the fact that the suit property was registered as a joint tenancy and upon the death of the deceased, her interest in the suit property was extinguished and the suit property vested in the Plaintiff under the doctrine of survivorship. In support of this submission, the Plaintiff relied on [*Peter Mburu Echaria v Priscilla Njeri Echaria*](#) [2007] eKLR.
17. The second issue raised by the Plaintiff is whether the Defendant's amended defence ought to be struck out. The Plaintiff has submitted that in his amended defence, the Defendant does not dispute the fact that the suit property was registered in the names of the Plaintiff and the deceased as joint tenants. The Plaintiff has averred that although the Defendant has averred that there was an error in registering the suit property as a joint tenancy, he has not provided this court with evidence showing the existence of the alleged error. The Plaintiff has averred that since the suit was instituted, he has not had possession or benefited from the suit property and even before the filing of the suit, the deceased was in possession of the same to his exclusion. The Plaintiff has averred that the Defendant has been in occupation of the suit property to the detriment of the Plaintiff. The Plaintiff has averred that the Defendant has not been paying rent to the Plaintiff. The Plaintiff has averred that this is an appropriate case in which the court should invoke the principles in section 1A and 3A of the [*Civil Procedure Act*](#) and proceed to strike out the amended defence.

The Defendant's submissions:

18. In his submissions dated March 25, 2022, the Defendant has raised one main issue for determination namely, whether the Plaintiff has made out a case warranting the striking out the Defendant's amended defence. The Defendant has submitted that both parties have raised serious issues regarding the registration of the suit property in the names of the Plaintiff and the deceased as joint tenants. The Defendant has submitted that the Plaintiff having pleaded that the said registration was procured by fraud, the Plaintiff cannot at the same time seek to sanctify the said registration so as to take advantage of the death of the deceased through the principle of survivorship.
19. The Defendant has submitted that under Order 2 Rule 6 of the [*Civil Procedure Rules*](#), the Plaintiff is barred from relying on the principle of survivorship in a joint tenancy to claim the ownership of the suit property since the registration of the Plaintiff and the deceased as joint tenants of the suit property is in issue and can only be determined at the full trial. In support of this submission, the Defendant cited [*Chumo Arap Songok v David Kibiego Rotich*](#) [2006] eKLR. The Defendant has submitted further that the Plaintiff cannot be allowed to depart from his pleadings so as to sanctify or acknowledge the registration of the suit property in his name and that of the deceased as joint tenants a fact that he has challenged in his plaint. The Defendant has submitted that striking out a pleading is a draconian remedy which should be granted sparingly and the power should be exercised only in plain and obvious case. [*DT Dobie & Co \(Kenya\) Limited v Joseph Mbaria Muchina & Another*](#) [1980] e KLR and [*Ramji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 Others*](#) [2005] e KLR were cited in support of this submission.



Analysis and Determination:

20. I have considered the Plaintiff's application together with the affidavits filed in support thereof. I have also considered the grounds of opposition and replying affidavit filed by the defendant in opposition to the application. Finally, I have considered the submissions filed by the parties. In my view, the only issue arising for determination in the application before me is whether the amended defence dated October 25, 2011 should be struck out based on the principle of survivorship. The Plaintiff's application is brought under sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya. It is not clear why these provisions of the Civil Procedure Act were invoked while there is an express provision in the Civil Procedure Rules providing for the striking out of pleadings. I do not wish to hazard a guess but I believe the answer would become obvious shortly.

21. Order 2 rule 15 of the Civil Procedure Rules 2010 provides as follows:

- 1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - a) it discloses no reasonable cause of action or defence in law; or
 - b) it is scandalous, frivolous or vexatious; or
 - c) it may prejudice, embarrass or delay the fair trial of the action; or
 - d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

22. As I have mentioned above, the Plaintiff has not invoked the provisions of Order 2 rule 15(1) of the Civil Procedure Rules. However, looking at the application, it has been brought on the ground that the Defendant's amended defence discloses no reasonable defence. Under Order 2 Rules 15 (1) (a) of the Civil Procedure Rules, the court has a discretion to strike out a pleading on the ground that it discloses no reasonable cause of action or defence. In view of the draconian nature of this remedy, it is now settled that the court's power to strike out pleadings should be exercised with great circumspection and only in clearest of cases. In *DT Dobie & Company (K) Ltd v Joseph Mbaria Muchina & Another (supra)*, Madan JA stated as follows regarding the exercise of the power to strike out pleadings:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.”

23. In *JP Machira v Wangethi Mwangi*, Court of Appeal, Civil Appeal No 179 of 1997, Omolo JA, stated as follows:

“I do not think the unfettered power in the courts to allow amendments at any stage is to be used to enable the parties to create all sorts of fanciful defences in the course of litigation. Nor do I understand the decision of this court, particularly that of Madan JA in the case of *DT Dobie & Company (Kenya) Ltd v Joseph Mbaria Muchina & another*, Civil Appeal, No 37 of 1978 (unreported) to mean that no pleading could ever be struck out even where it is patently clear that no useful purpose could ever be served by a trial on merits.....I agree that these powers are drastic and as the court said.....the powers are to be exercised with great caution and only in clearest of cases. But once such caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on the merits, the court is perfectly entitled to strike out a pleading for as I have said, there is no magic in holding a



trial on the merits particularly where it is obvious to everyone that no useful purpose would be served by it.”

24. I have set out at the beginning of this ruling the Plaintiff’s case and the amended defence filed in response thereto by the Defendant. I am not persuaded that a case has been made out for the striking out of the Defendant’s amended defence. The Plaintiff has not convinced me that the defence put forward is not reasonable. In my view, the Plaintiff appears to have lost sight of the party against whom the suit herein has been brought. The suit has not been brought against the Defendant in his personal capacity but in his capacity as a legal representative of the estate of the deceased. The suit is therefore against the deceased and not the defendant. In the amended defence sought to be struck out, the deceased has contended that the registration of the suit property in the names of the Plaintiff and the deceased as joint tenants was made through a mistake on the part of the advocate who acted for them in the transaction. The deceased has contended that the Plaintiff and the deceased had agreed that each would have distinct and equal share in the suit property. It is clear from this defence that the issue of whether or not the Plaintiff and the deceased had agreed to be joint tenants or tenants in common is in dispute. This is not an issue that the court can determine on affidavit evidence. It is after the court has heard the parties at a plenary hearing and made a determination that the Plaintiff and the deceased were joint tenants in the suit property that the issue of survivorship comes into play. It is my finding that the principle of survivorship (*jus accrescendi*) is not an answer to the defence put forward by the deceased. I am of the view that the same has been raised by the Plaintiff prematurely. I also find nothing in the ruling made by the court on 28th March 2017 in support of the Plaintiff’s application herein. The ruling was on an interlocutory application by the Defendant. The court did not intend to and made no conclusive findings of either fact or law in the ruling which can be a basis for the present application which if allowed will determine the dispute between the parties without a trial.
25. The upshot of the foregoing is that the plaintiff’s notice of motion application dated November 26, 2020 has no merit. The same is dismissed with costs to the defendant.

DELIVERED AND DATED AT KISUMU THIS 7TH DAY OF DECEMBER 2022

S. OKONG’O

JUDGE

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

Mr. Wagura h/b for Ms. Olembo for the Plaintiff

Mr. Kimondo for the Defendant

Ms. J. Omondi-Court Assistant

