



Bee (Suing as the Legal Representative of the Estate of Packom Bee Kizito) v Omollo (Environment and Land Appeal E34 of 2023) [2025] KEELC 2942 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2942 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E34 OF 2023
FO NYAGAKA, J
MARCH 6, 2025**

BETWEEN

DANIEL OGEDHO BEE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PACKOM BEE KIZITO) APPELLANT

AND

ROSE ATIENO OMOLLO RESPONDENT

(Being an Appeal from the Judgment of Hon. E. M. Onzere SRM delivered in Ndhiwa Senior Resident Magistrate's Court, Civil Case No. 30 of 2018 on 14th June 2023)

JUDGMENT

1. The instant Appeal was admitted on 7th November 2023 and placed before the learned judge for further directions on 30th January 2024. After that it was mentioned three times for compliance.
2. When it was placed before me on 18th February 2025, I noted that the directions leading to that mention were that the parties were to file a Supplementary Record of Appeal within fourteen (14) of the orders made on 12/11/2024, serve it and then submit. They had not done the former, but appellant had already filed his written submissions.
3. Upon a careful reading of the already filed Record of Appeal and the record of the original file already before the Court, the learned Judge noted two critical issues which he wished the parties to address or clarify before the appeal could proceed to hearing. The first one for the Appellant's counsel to indicate to Court who Daniel Ogedhi Bee (Suing on behalf of the Estate of Packom Bee Kizito (deceased, on 06/11/2020 due to Covid-19 Virus) was in relation to the original Plaintiff (in the lower court, who had since died. The reason why that question was very critical was because the original Plaintiff, Packom Bee Kizito Kaluccie, had instituted the suit on behalf of the Estate of the deceased father, one Bee Bwana Earnest alias Bee Bwana, who died on 17/01/2016 and the original Plaintiff took out a Limited Grant of Letters of Administration Ad Litem on 22nd August 2018 in order to bring the suit.



4. Then when the original Plaintiff died, the Appellant herein took out letters of administration Ad Litem to the Estate of the original Plaintiff and had himself substituted as the Plaintiff, even way after the suit had abated. This substitution raised two fundamental issues, namely, did the original claim then continue to exist. If it did, was a Grant of Letters Ad Litem or a full Grant of letters taken in respect of the Estate that claimed in the suit? Secondly, could a personal representative who dies ‘pass’ that capacity to another one to continue with it by being substituted in that behalf or once he died the capacity also ended thereby requiring fresh representation to the Estate of the original claimant on whose behalf the suit was brought? Simply put, and flowing from the maxim *Delegatus Non Potest Delegare*, meaning, a delegate of authority cannot sub-delegate it or a delegate cannot further delegate, could the authority given to Packom Bee Kizito Kaluccie be sub-delegated or transferred to another person, in this case Daniel Ogedhi Bee? The simple answer to all the above is “No”.
5. Thus, was the consent was recorded on 02/03/2022, (as reproduced below), proper and could it found or be the basis of the continuity of proceedings and the suit legally? It was to the effect that,
 1. “1. The Plaintiff advocate be and is hereby allowed to substitute the plaintiff out of time.
 2. The applicant be allowed to be substituted in the place of the plaintiff.
 3. The plaintiff be allowed to amend the plant and the amended payment be filed and served upon. As. So that we also amend our defence.
 4. The plaintiff be allowed to reopen his case if need be.
 5. Costs be in the cause.”
6. This Court still thinks that the answer to the question posed before the consent above is in the negative. In any event could it have been done without there being taken out another Limited Grant of Letters Ad Litem? It was not done in the suit. Further, that “in conjunction with the entire family, I was nominated to proceed with the suit on behalf of the Estate of my brother.” That was the ‘authority’ he used to apply for substitution. Was that “nomination” a legally recognized authority in the [Law of Succession Act](#), Chapter 160, Laws of Kenya? This Court had a different view, but it wished and called on the parties to address it on the same.
7. The second critical issue was, Packom Bee Kizito Kaluccie died on 06/11/2020. When the Applicant in the suit, one Daniel Ogedho Bee applied through the application dated 06th February 2022 he admitted in his Supporting Affidavit that the suit abated on 06th November 2021. Then learned counsel recorded a consent that substitution be done after abatement. The question the court wished the parties to address was whether when the substitution was being done and amendment effected the suit was still existing or having abated it ought not to have been revived first. The procedure of extending the period of abatement (sic) that was adopted was totally out of the blue and unknown in law.
8. In *Julius Maina Kabiru v Kabiru Kang’ara & Thomas Irungu Kigoi* [2022] eKLR, the learned Judge held,

“In An order for substitution without a revival would be a nullity in law and what ought to have happened was to seek a revival and substitution in the same Application.”
9. Also, in *Mbaya Nzulwa v Kenya Power & Lighting Co. Ltd* [2018] eKLR, the court held,

“I hold the view that under the proviso to Rule 3(2) the court has a discretion to extend time even where the application for substitution is not made within one year but an abated suit



need revival under Rule 7(2). The proper way to proceed is to seek in the same application for substitution that the suit which has abated be revived. That to me is what the applicant and counsel ought to have done here but they have not done. I will not seek to punish the Applicant and the beneficiaries to the estate for failure by delay as well as failure to seek revival of the suit. Rather I will adopt the courts duty to sustain claims for purposes of them being heard on the merits. I invite the intrinsic power of the court to administer justice devoid of technicalities as well as the overriding objective of the court and understand the applicant to plead that the suit be heard on the merits. I accede to that plea”.

10. There was no application for revival of the suit that was made by any of the parties. Additionally, as stated above was the individual, Daniel Ogedhi Bee, authorized to be substituted for the deceased? Is he duly authorized by law (the [Law of Succession Act](#)) even up to this day? I think not.
11. Therefore, when the parties were given the opportunity to address the Court on the two issues upon reflection thereon, they returned the verdict as hereunder.
12. On the part of the Appellant learned counsel stated that he had carefully looked at the matter. He thanked the learned Judge for having had a keen eye to note that there were fundamental mistakes made in the subordinate court, particularly in the way the death of the first Administrator of the Estate of the father was handled in substitution. He agreed with the learned judge that the consent entered into on 2nd March 2022 was irregular and therefore all the proceedings that followed it were a nullity and void. Further, the resultant proceedings and judgment were a nullity and void. He added that since they are the ones that founded the instant appeal, it too was wrought with difficulty. He prayed for a declaration that the entire judgment and proceedings after the consent recorded be set aside and declared null and void.
13. On the part of the Respondent, he too agreed with the submissions by counsel for the appellant. He added that since the suit had abated, then whatever proceedings that followed without revival of this suit were a nullity. He submitted that therefore, the appeal should be struck out and the judgment of the lower court, too, would be declared a nullity. Further, the person substituted as the Administrator was not properly on record.
14. I have considered the appeal, the law and the short submissions by both learned counsel. I have also given due regard to the proposed compromise of the appeal as reached by learned counsel for the parties. I am of the humble views that the Appeal herein having arisen from a judgment and proceedings that were a misapprehension of both the law and facts, are a nullity and cannot stand. This Court relies on the English decision of Benjamin Leonard Mc foy v United Africa Company Limited [1961] All ER 1169 where the court stated as follows,

“If an Act is void, then it is in Law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

15. Thus, the appeal herein ought to collapse. It ought to be dismissed. However, it is dismissed on the following terms :-
 1. That the consent recorded on 02/03/2022 and proceedings subsequent to it as borne on the record of the learned trial magistrate in the Senior Resident Magistrate’s Court in Ndhiwa in



Civil Case No. 30 of 2018, and the judgment delivered on 14th June 2023 by Honorable E. M. Onzere SRM, and the resultant decree are a nullity in law and are hereby set aside.

2. The proceedings having constituted a mistrial arising from a mistaken belief mutually held by the parties that they were correctly proceeding ought not to attract any costs thereof.

3. Therefore, each party will bear their own costs of both this Appeal and those of the lower court.

16. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 6TH DAY OF MARCH 2025

HON. DR. IUR NYAGAKA

JUDGE.

In the presence of,

Mr. Kisia Advocate for Advocate for the appellant

Obara Advocate holding brief Wameyo Advocate for the Respondent

