



REPUBLIC OF KENYA



**Osoro v Nguzo & 5 others; Kadhi's Court, Mombasa (Interested Party) (Environment & Land Case 412 of 2017) [2025] KEELC 1225 (KLR) (12 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1225 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND CASE 412 OF 2017**  
**SM KIBUNJA, J**  
**MARCH 12, 2025**

**BETWEEN**

**OBUTU ZA OSORO ..... PLAINTIFF**

**AND**

**JUMA ABDALLA NGUZO ..... 1<sup>ST</sup> DEFENDANT**

**MWANAJUMA JUMA ..... 2<sup>ND</sup> DEFENDANT**

**MWALIMU SHAIBU ..... 3<sup>RD</sup> DEFENDANT**

**JUMA SHEE ..... 4<sup>TH</sup> DEFENDANT**

**MASAI SHAIBU ..... 5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**AND**

**KADHI'S COURT, MOMBASA ..... INTERESTED PARTY**

**RULING**

1. The application dated the 2<sup>nd</sup> March 2023 was made by the defendants/applicants seeking the following orders:

- “1. Spent.
2. That Mwinyi Hussein Jumaa and Fatuma Hussein Jumaa be allowed to join this suit as defendants in place of Juma Abdalla Nguzo and Mwanajuma Juma Omari who is sued as Mwanajuma Juma who are both now deceased.



3. That this court be pleased to review the order of this court made on 19th January 2023 allowing the application dated 6th December 2022 for reason that it was not opposed.
4. That the court be pleased to set aside orders made in this matter arising from representation by Mr. Moses Waweru Ndungu Advocate of Omondi Waweru & Company Advocates and particularly affecting applications dated 6th December 2022 and one dated 13th November 2020.
5. That this court be pleased to order that both the application dated 6th December 2022 and 13th November 2020 to be listed for hearing on merit.
6. That costs of this application be provided for.”

The application is premised on the eleven (11) grounds on its face and supported by the affidavit Mwalimu Shaibu, 3<sup>rd</sup> defendant, sworn on dated 2<sup>nd</sup> March 2023, deposing inter alia that he has never instructed the firm of Omondi Waweru & Co. Advocates to act for him in this suit; that he was surprised to learn that the said advocate purported to act on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, who are deceased when Mwinyi Hussein Jumaa and Fatuma Hussein Jumaa who had been appointed as trustees by the court in succession cause 112 of 2014, had not given him instructions to so act; that in the above mentioned probate, the court appointed five beneficiaries whose names were registered on the title deed for the plot 382/I/MN; that since the death of the 1st and 2nd defendants, no orders can be made against them, and all such orders issued against them are fraudulent and aimed at assisting the plaintiff to take land illegally; that since the deceased have been replaced by legally appointed trustees, and they were not aware of the application dated 3rd May 2021, but together with other trustees had attended court on 24th May 2021 for purposes of hearing an application by Mr Stephen Oddiaga counsel, for fees but the matter did not proceed; that they went back to court on 26th May 2021 and a consent was recorded between Mr. Oddiaga and Mr. Waweru who was appearing for an interested party; that the consent was for Kshs. 950,000 to be paid within 60 days, failure to which the said application be allowed only in terms of issuance of vesting orders, and transfer of plot MN/I/29452 CR. 60508, plot MN/I/20453 CR 60509 and plot MN/I/20454 CR 60510 to Mr. Oddiaga counsel; that they did not have money to settle the fees, and willingly surrendered these three plots and this suit was marked as withdrawn against the 3rd, 4th and 5th defendants on 5th November 2020, which is the status to date; that a purported payment of the Kshs. 950,000 was done vide a letter dated 22nd July 2022 from the firm of Omondi Waweru, who represents another party in a different suit touching on the same suit property; that further that there is a notice to withdraw this suit against the 1st and 2nd defendants filed after the deaths of the said defendants; that all the other trustees have denied giving instructions to the firm of Omondi Waweru & Company Advocates to represent them; that pursuant to orders of the Kadhi’s Succession Cause 112 of 2014 Title Deeds over he suit properties have been issued to the trustees.

2. The application is opposed by the plaintiff through the replying affidavit of Obutu Z, A. Osoro, sworn on 5<sup>th</sup> April 2023, deposing inter alia that the application is fatally defective as it has omnibus prayers; that the firm of Stephen Oddiaga & Company Advocates representing the applicants/defendants is not properly on record as they have not filed a notice of change of advocates; that on 18<sup>th</sup> November 2022, the firm of Omondi Waweru & Company Advocates was instructed by the applicants whereby the application dated 6<sup>th</sup> December 2022 was filed against the firm of Stephen Oddiaga & Company Advocates for settlement of fees; that despite service, the firm of Stephen Oddiaga did not appear on the hearing dated of 19<sup>th</sup> January 2023, and the court determined heard the parties present and gave its ruling; that the applicants have a habit of giving instructions from one advocate to another and later



renewing the same instructions; that the firm of Omondi Waweru advocates have instructions on behalf of the applicants, and that the consent entered into on 19<sup>th</sup> January 2023, where the suit properties were to revert back to the plaintiff and the plaintiff to settle the fees of Stephen Oddiaga & Company Advocates, had been settled; that any orders made before the Kadhi's court with regard to fees involving this suit is bad in law and ought to be struck out; that the applicants are in contempt of this honourable court's order dated 11<sup>th</sup> July 2018 and the orders issued in Kadhis court succession cause No. 122 of 2014 should be struck out; that the applicants cannot walk away from consent orders they willingly entered into, and this application is an afterthought.

3. M. N. Waweru Advocate filed the replying affidavit sworn on 14<sup>th</sup> March 2023, in response to the application inter alia deposing that about October 2020, Ms Stephen Oddiaga & Company Advocates filed the Advocate – Client bill of costs arising from legal services offered in this suit for the defendants; that he entered appearance for the respondents in the taxation matter and vide letter dated 18<sup>th</sup> January 2021, Oddiaga advocate notified him of a consent dated 11<sup>th</sup> December 2020, where parties had agreed to compromise the bill of costs at Kshs.950,000; that through the letter dated 23<sup>rd</sup> October 2021, Oddiaga advocate forwarded a consent letter to have the matter settled in terms of the consent dated 11<sup>th</sup> December 2020, and on 23<sup>rd</sup> November 2021, served him with hearing notice for the bill of costs on 9<sup>th</sup> March 2022; that the bill of costs was on 11<sup>th</sup> May 2022 taxed at Kshs.950,000 in terms of the 11<sup>th</sup> December 2020 consent; that through letter dated 27<sup>th</sup> July 2022 he forwarded to Oddiaga advocate a cheque for Kshs.950,000, which counsel rejected alleging that it was issued out of time and was based on a consent entered before the Kadhi's court; that they then filed notice of change of advocate and application dated 6<sup>th</sup> December 2022, and directions were issued on 9<sup>th</sup> December 2022, including setting hearing date for 19<sup>th</sup> January 2023, and allowed on 22<sup>nd</sup> January 2023, for inter alia the Kshs.950,000 to be deposited in court; that the amount was deposited in court and receipted; that this court had on 11<sup>th</sup> July 2018, issued injunction orders against the defendants from dealing with the suit property, and stayed the proceedings in Kadhi Succession Cause No. 112 of 2014 dealing with the suit property, but Oddiaga advocate proceeded to the said court and obtained the order dated 26<sup>th</sup> July 2021, that inter alia directed that plot Nos. 20452, 20453 and 20454 be transferred to himself to cover his fees payable by the trustees on behalf of the estate, while all along the said plots were in the name of the plaintiff; that by that date the bill of costs had not been taxed as that happened on 11<sup>th</sup> May 2022; that using the Kadhi court's order, Oddiaga advocate obtained provisional titles for all the plaintiff's plots; that the Kadhi's court order was without jurisdiction to revoke titles and order issuance of provisional titles to land; that the application is frivolous vexatious and an abuse of court process as Oddiaga advocate has taxed his bill of costs which has been settled; that Oddiaga advocate ceased acting for the defendants after filing the bill of costs and Ms. Omondi Waweru & Company Advocates has come on record for them after filing the notice of change of advocates, and the application dated 2<sup>nd</sup> March 2023 should be struck out with costs.
4. Directions on filing and exchanging submissions were given on the 2<sup>nd</sup> October 2024. The learned counsel for the defendants/applicants filed their submissions dated the 31<sup>st</sup> January 2025, that the court has considered. The learned counsel for the plaintiff's notified the court on the 5<sup>th</sup> February 2025 that they will not file submissions.
5. The issues for determinations by the court are as follows:
  - a. Who the applicant(s) in the application dated 2<sup>nd</sup> March 2023 is(are)?
  - b. Whether the threshold for joinder or substitution of parties has been met.



- c. Whether reasonable basis has been presented for reviewing and or setting aside orders sought to issue.
  - d. What orders should be issued under the circumstances.
  - e. Who bears the costs?
6. The court has carefully considered the grounds on the notice of motion dated 2<sup>nd</sup> March 2023, affidavit evidence, submissions by counsel, the record and come to the following determinations:
- a. The learned counsel has in his submissions dated 31<sup>st</sup> January 2025, made reference to the application dated 5<sup>th</sup> February 2024 by the firm of Omondi Waweru seeking to cease acting for the defendants that, was granted on the 8<sup>th</sup> February 2024, and submitted that prayers 4 & 5 in the instant application are therefore spent. The court will therefore treat the two prayers to have been abandoned, and will not pronounce itself on the two prayers.
  - b. According to the plaint, the suit property is plot 382/I/MN CR2397/1, measuring 1.2 acres, which was subdivided into sixteen plots from L.R NO. 20440/I/MN CR 60496 to 20455/I/MN CR 60511. The firm of Ms. Stephen Oddiaga & Company Advocates, entered appearance for the defendants and filed a Defence and Counterclaim dated 6th December 2017. There was no activities in the suit until the learned counsel for the plaintiff entered into consent judgment with the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants in person on 7th May 2020. On 24th July 2020, the Deputy Registrar listed the matter for mention on 5th November 2020. The court was also informed that the 1st and 2nd defendants had died on 24th February 2019 and 31st May 2017 respectively. On the mention date of 5th November 2020, Mrs Waswa, learned counsel for the state, informed the court that they had entered into consent to have the suit against the Attorney General and Kadhi's court withdrawn. It is instructive to note that there were succession proceedings filed in 2014, three years before the filing of this suit, which purported to distribute the suit property. That may have been the reason why the plaintiff filed this suit to stop it. There was no objection against the said consent, and in addition, Mr. Musyimi, the plaintiff's counsel, then informed the court about a consent to withdraw suit against the 1st and 2nd defendants and a similar notice of withdrawal of suit against the 3rd, 4th and 5th defendants. Mr. Musyimi also informed the court that they had been served with a notice of withdrawal of the counterclaim by the 3rd, 4th and 5th defendants. Ms. Mwanzia holding brief for Mr. Oddiaga objected to the consents, stating that they had not been served upon them. The court placed the file aside for service, and later Ms. Mwanzia acknowledged service, and agreed that the matter be marked as settled. Subsequently, an application dated 13<sup>th</sup> November 2020 was made by the plaintiff's counsel who requested the court to set aside the withdrawal against the 3<sup>rd</sup>, 4th and 5th defendants, to enable the adoption of a consent which had been entered into earlier, but had been forgotten by Mr. Musyimi who was holding brief. The application was never determined as it was overtaken by the application dated 6th December 2022.
  - c. The instant application is indicated to be brought pursuant to sections 1A, 3A, 63(c) & 80 of *Civil Procedure Act* and Order 1 Rule 3, Order 45 & Order 51 Rule 1 of the Civil Procedure Rules. Sections 1A, 3A, 63(c) & 80 deals with the objective of the Act, inherent powers of the court, supplemental proceedings and review respectively. Order 1 Rule 3 provides on who may be joined as defendants, while Order 45 guides on review applications and Order 51 Rule 1 sets out the procedure on applications. Looking at prayer 2 of the application dated 2<sup>nd</sup> March 2023, it seeks for "Mwinyi Hussein Jumaa and Fatuma Hussein Jumaa to be allowed to join



this suit as defendants in place of Juma Abdalla Nguzo and Mwanajuma Juma Omari who is sued as Mwanjuma Juma who are both now deceased.” I have perused the said application and supporting affidavit and have not seen any deposition by the said Mwinyi Hussein Jumaa and Fatuma Hussein Jumaa, to the effect that they intend to be joined in this suit in place of the two named deceased defendants.

- d. I have also not seen any notice of advocate filed by counsel coming on record for Mwinyi Hussein Jumaa and Fatuma Hussein Jumaa in this matter, and it cannot be said that the instant application was filed on their behalf and or through their instructions. Further, even though the names of Mwinyi Hussein Jumaa and Fatuma Hussein Jumaa are among those appearing in the paragraph after prayer 6 that states inter alia that “Which application is supported by the affidavit of Mwalimu Shaibu Juma, Mwinyi Hussein Jumaa, Juma Shee, Masai Shaibu and Fatuma Hussein Jumaa and on the grounds below and other grounds to be adduced at the hearing hereof” the deponent to the supporting affidavit is Mwalimu Shaibu Juma, the 3<sup>rd</sup> defendant, alone.
- e. That the application dated 2<sup>nd</sup> March 2023 being an application to substitute the 1<sup>st</sup> and 2<sup>nd</sup> deceased defendants ought to have been brought under Order 24 Rule 4 (1) of the Civil Procedure Rules. Sub-rule 3 thereof provides that:

“(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.”

The court has perused the proceedings of 23<sup>rd</sup> november 2023 and noted that one Mwinyi Hussein Jumaa of identity card number 235510051 informed the court that the 1<sup>st</sup> defendant was his elder brother and had died about two or three years ago. Fatuma Hussein Jumaa of identity card number 243381235 told the court that the 2<sup>nd</sup> defendant was her mother and had died about ten years ago. Even though no documentary evidence on the two deaths has been availed to the court, the information by the said Mwinyi and Fatuma on the dates of their death has not been disputed. That would mean by the time this suit was filed in 2017, the 2<sup>nd</sup> defendant was already dead, and it follows that the suit against her was null and void ab initio. One wonders then how counsel who purported to come on record for the 2<sup>nd</sup> defendant and to act for her in this proceedings without first having her substituted with a legal representative were instructed. That as the instant suit dated the 2<sup>nd</sup> March 2023 was filed years after the death of the 1<sup>st</sup> defendant, and no prior leave to file the application for substitution was sought for and or obtained, the said application is therefore a non-starter. One is left wondering how the 1<sup>st</sup> and 2<sup>nd</sup> defendants participated in entering and or giving instructions on the two consents that have been entered so far in this suit.

- f. Substitution and addition of parties under Order 1 Rule 10 of the Civil Procedure Rules, should be done during the subsistence of suit. It has however, been held in several superior courts decisions that it is possible to join parties even after judgment. In the case of JMK versus MWM & another [2015] KECA 524 (KLR) the Court of Appeal cited with approval TANG GAS DISTRIBUTORS LTD versus SAID & OTHERS [2014] EA 448, and held:

“...the court stated 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.”

That had the court been moved properly for joinder of parties, as opposed to substitution of deceased parties, the court would have considered the request under the said provision subject to the required threshold being met. The net effect of joining parties post judgement would amount to a challenge of the plaintiff’s ownership of the suit properties. Some of the said properties have reportedly been transferred to various persons before the injunctive orders of this court issued on 11th July 2018, and others on the strength of the Kadhi Court orders issued on 26th July 2021.

- g. The consent entered into on 19th January 2023 only affected the 3rd, 4th and 5th defendants. It did not affect the 1st and 2nd defendants, as they were already deceased. This consent was as a result of a request made in the application of 6th December 2022. In the instant application and replying affidavit, none of the parties addressed the notice of withdrawal of the suit by the plaintiff against the 1st and 2nd defendants. There is on record the notice of withdrawal of suit dated 28th May 2020. It beats logic as to who gave instructions to the firm of Ms. Omondi Waweru & Company Advocates to represent the two deceased defendants. It is also not lost on the court that the firm of Ms. Omondi Waweru & Company Advocates was also representing the plaintiff in RMCC No. 78 OF 2020, as can be seen from Annexure MSJ 10. In the replying affidavit, the plaintiff has tried to explain that the defendants have a habit of jumping from one advocate to another, and later denying giving instructions. Based on the fact that they entered into the consent dated 28th May 2020, while the firm of Ms. Stephen Oddiaga & Company Advocates was still on record, that claim may not be far from the truth.
- h. Though, the firm of Ms. Omondi Waweru & Company Advocates were allegedly having instructions to represent the defendants, it baffles the court that they never applied for substitution of the two deceased defendants before proceeding to enter into the subsequent consent on 19th January 2023. Further, the court is of the view that the plaintiff, having already withdrawn the suit against the two deceased defendants, could not turn around and purport to enter into a consent with them. They had not resurrected.
- i. The conduct of Mr. Oddiaga Advocate is equally wanting, in the sense that his firm having entered into a consent dated 26th May 2021, with the firm of Omondi Waweru Advocates to mark the matter settled and await for payment of Kshs. 950,000, turned around about two month later, on 26th July 2021, and proceeded to the Kadhi’s court to seek vesting orders over the suit properties. The court is not impressed, by the conduct of the all the parties and counsel in the suit and in the application herein, and refuses to be sucked into the circus that is unfolding herein. The court has the power and indeed, obligation under sections 1A, 1B, 3A of *Civil Procedure Act*, section 19 (1) of *Environment and Land Court Act* NO. 19 of 2011, and Article 159 (2) (b) & (d) of *the Constitution* 2010 to among others, do justice without undue technicalities and delay. It is the considered finding of the court that it will be fair and just that all the orders and or consents that led to this suit being either marked settled and or conferred any legal rights or interests over the suit property and or subdivisions thereof be vacated and or set aside to allow this suit be heard afresh/denovo.
- j. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event, unless where directed differently for good cause. Due to the unfolding circus and apparent deceit by all parties and counsel, I find it fair and just that parties and counsel bears their own costs.



7. From the foregoing determinations, the court finds and orders as follows:
- a. That the notice of motion dated the 2<sup>nd</sup> March 2023 is without merit and is struck out.
  - b. That the court on its own motion and for reasons set out above directs as follows:
    - i. That all the orders and or consents that led to this suit either being marked settled and or conferred any legal rights or interests over plot number 382/1/MN, CR. 2397/1 and the subdivisions thereof being numbers 20440/1/MN, CR.60496 to 20455/1/MN, CR. 60511, the suit property, be vacated and or set aside to allow this suit be heard afresh/denovo.
    - ii. That to safeguard the legal status of the said suit property, an inhibition order under section 68 of the [Land Registration Act](#) No. 3 of 2012, is hereby issued to be registered by the Land Registrar, Mombasa, upon presentation of a copy of this order, against the above suit property, and or subdivisions thereof, pending the hearing and determination of this suit.
    - iii. That a date for trial conference and further directions to be fixed after sixty (60) days to allow parties and their counsel to consult on the way forward.
  - c. That the counsel and parties to bear their own costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12<sup>TH</sup> DAY OF MARCH 2025.**

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**S. M. KIBUNJA, J.**

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**ELC MOMBASA.**

In The Presence Of:

Plaintiff : M/s Wasike For Musyimi

Defendants : M/s Mwanzia For Oddiaga For 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> And 5<sup>th</sup> Defendants.

Shitemi- Court Assistant.

**S. M. KIBUNJA, J.**

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**ELC MOMBASA.**

