



**Madressa El Mohamediah Education Society Registered Trustees v  
Seif & 2 others (As Trustees of Wakf) (Environment & Land Case  
E098 of 2024) [2025] KEELC 4363 (KLR) (11 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4363 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E098 OF 2024**

**SM KIBUNJA, J  
JUNE 11, 2025**

**BETWEEN**

**THE MADRESSA EL MOHAMEDIAH EDUCATION SOCIETY REGISTERED  
TRUSTEES ..... PLAINTIFF**

**AND**

**SAID BIN SEIF ..... 1<sup>ST</sup> DEFENDANT  
ALI BIN MOHAMED ..... 2<sup>ND</sup> DEFENDANT  
MOHAMED SAUD ..... 3<sup>RD</sup> DEFENDANT  
AS TRUSTEES OF WAKF**

**RULING**

**(Notices of Motion Dated 19th November 2024 & 2nd December 2024)**

- The plaintiff moved the court through the notice of motion dated the 19<sup>th</sup> November 2024, seeking for inter alia injunction restraining the defendant from evicting the plaintiff from their premises on Mombasa/Block xx/184, and 185, suit premises, pending the hearing and determination of the suit. The application is based on the fourteen (14) grounds and supported by the affidavit of Karim A. Chakera, a trustee, sworn on the 19<sup>th</sup> November 2024 inter alia deposing that the defendant is the registered owner of the suit properties and the plaintiff is the lessee under the indenture dated 9<sup>th</sup> March 1946 as per the certificate of lease; that on the suit properties is constructed the building known as Abhani, and there have several tenants they have sublet offices to as per the encumbrances on the certificate of lease; that they have been in peaceful and quiet possession until recently when the defendant started frustrating them and on 24<sup>th</sup> May 2024 issued them with a notice of forfeiture for allegedly failure to pay rent for six years; that the forfeiture notice required the plaintiff to give vacant possession in six months that lapsed 24<sup>th</sup> November 2024; that their efforts to be provided with names



- of the current trustees and account details through which to pay the rent has not been provided by the defendant, and hence the instant application.
2. The application is opposed by the defendant through the five grounds of opposition dated the 2<sup>nd</sup> March 2025 summarized as follows;
    - a. That the plaintiff has sued dead person as defendant, and the suit is a nullity, and the application is a non-starter, fatally defective and an abuse of court process, as the plaintiff has sued dead persons.
    - b. That as courts do not act in vain, and the injunctive orders sought cannot issue against dead person.
    - c. That asking the court for amendment of their plaint through the application dated 2<sup>nd</sup> December 2024 is tantamount to engaging the court in the futile labors sisphus which is untenable.
  3. The defendant filed the notice of motion dated the 2<sup>nd</sup> December 2024 seeking for inter alia the application dated the 19<sup>th</sup> November 2024 and the plaint of even date to be struck out. The application is based on four (4) grounds on its face and supported by the affidavit of Saif Said Saif Al Busaidy, managing trustee of Seif Bin Salim Trust, inter alia deposing that he manages the affairs of the trust alongside fellow trustees, namely Zain Al-Abidin, Saif Said Albusaidy and Ashwyn Said Seif Busaidy; that he is the present legal holder in trust of Mombasa/Block XX/184 & 185, suit properties, formerly registered in the names of Said Bin Seif, Ali Bin Mohamed & Said Mohameed, who died on 23<sup>rd</sup> February 1999, 12<sup>th</sup> October 1975 and 3<sup>rd</sup> January 1987 respectively; that as the suit properties currently vest in him and his co-trustees, the plaintiff's suit against the deceased is therefore a nullity.
  4. The application is opposed by the plaintiff through the replying affidavit of Karim A. Chakera, one of the plaintiff's trustees, sworn on the 17<sup>th</sup> January 2025, inter alia deposing that the filing of the suit against the defendant was based on the facts and documents in their possession including the certificate of lease dated 16<sup>th</sup> December 1986 that was issued to them; that the plaintiff did not know that the defendant's trustees had changed; that their lawyers had on 3<sup>rd</sup> June 2024 sent an email to the defendant's lawyers asking for the names of the current trustees and evidence of change of names but the information was not provided in their letter of response dated 26<sup>th</sup> June 2024; that the filing of the suit against the named defendant was a bonfide mistake that can be corrected through amendment, and their suit should not be defeated by reason of joinder or misjoinder of parties.
  5. The court gave directions on the 5<sup>th</sup> December 2024 on filing replies and for both applications to be canvassed together through submissions. The learned counsel for the defendant and plaintiff filed their submissions dated the 2<sup>nd</sup> March 2025 and 3<sup>rd</sup> March 2025 that the court has considered.
  6. The issues for the court's determinations on the two applications are as follows:
    - a. Whether the plaintiff has met the threshold for the injunctive order sought to issue at this interlocutory stage.
    - b. Whether the plaintiff's suit is defective for suing deceased trustees as defendant, or conversely put whether the defendant has made a reasonable case for the plaintiff's suit and application to be struck out.
    - c. Who pays the costs?



7. The court has after considering the grounds on the two applications, affidavit evidence, grounds of opposition, submission by the learned counsel, superior courts decisions cited, and the pleadings come to the following determinations:

- a. The striking out prayer sought in the defendant's application dated 2<sup>nd</sup> December 2024, if granted would determine this suit and application thereof, and there would be no need to consider the plaintiff's notice of motion dated 19<sup>th</sup> November 2024. However, should the defendant's application fail, then the court will proceed to consider the plaintiff's notice of motion dated 19<sup>th</sup> November 2024.
- b. The main basis of the defendant's notice of motion dated 2<sup>nd</sup> December 2024 is that the plaintiff's application dated the 19<sup>th</sup> November 2024 is premised on the suit filed through the plaint of even date that is against deceased persons, and therefore, a nullity. The defendant has submitted that a suit filed against deceased person(s) is a nullity from inception, and orders issued therefrom are nullities. In the defendant's grounds of opposition, the defendant cited the decision in the case of Japhet Nzila Muangi versus Hamisi Juma Malee [2022] eKLR, to buttress their position, that it is immaterial that the suit was brought bona fide and in the ignorance of the death of the named defendant(s). the counsel also cited the case of Kenya Chemical and Allied Workers Union versus Milly Glass Works Ltd [2020] eKLR, in support of their contention that courts of law do not act in vain, and that granting the injunctive order sought by the plaintiff would be tantamount to the court engaging in the futile labors of Sisyphus, which is untenable prospect.
- c. The Counsel for the defendant submitted that the striking out of pleadings power under Order 2 Rule 15 of the Civil Procedure Rules is discretionary and ought to be exercised with the greatest of caution, as seen in the court's dictum the case of Jones M. Musau & Another versus Kenya Hospital Association & Another [2017] eKLR, in which the court quoted with approval the court's views in the case of Crescent Construction Company Ltd versus Delphis Bank Ltd [2007] eKLR, where the court held that:

“...one thing is clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant, however weak his case may be, from the seat of justice. This is the time honoured principle.....”

- d. The learned counsel further submitted that the copies of the certificates of death attached to the supporting affidavit is evidence enough to show that the three trustees sued by the plaintiff had died long before the suit against them was filed. That as trustees run the trust in their personal capacity, and had since been replaced as evinced by the copy of the documents of title, the suit against them was null and void. The counsel cited the case of Japhet Nzila Muangi versus Hamisi Juma Malee [2022] eKLR where the court stated as follows about suing of a dead person:

“The issue was comprehensively addressed by Mbogholi Msagha J, as he then was, in the case of Viktar Maina Ngunjiri & 4 Others versus Attorney General & 6 Others, High Court at Nairobi, Civil Suit No. 21 of 2016 (2018) eKLR, where he reviewed various authorities as follows:-



In the Indian case of *C. Muttu versus Bharath Match Works* AIR 1964 Kant 293, the court observed:

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

In yet another Indian case of *Pratap Chand Mehta versus Chrisna Devi Meuta* AIR 1988 Delhi 267, the court citing another decision observed as follows:

“...if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons, one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person, then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed to bring about amendments.”

- e. The counsel also relied on the case of *Geeta Bharat Shah & 4 Others versus Omar Said Mwatayari & Another*, Mombasa Court of Appeal Civil Appeal No. 46 of 2008, (2009) eKLR, where a suit had been filed against two persons, one of whom was already dead when the case was filed. Judgement was entered against the deceased. An application to set aside the judgement was disallowed, and the applicants appealed to the Court of Appeal, which held that:

“In the result, as Bharatkumar Nathalal Shah was already dead by the time the suit was filed, we hold the view that the suit was a nullity and Mr. Oddiaga is with respect right in conceding the appeal in respect of him on that score. We see no merit in directing that he be allowed to file defence as he is not there do so and the administrators to his estate cannot in law take over the matter as it was filed after he was already dead.”

- f. The learned counsel for the plaintiff submitted that the defendant’s application is misconceived and ought to be dismissed for courts should sustain suits, including where allegations of misjoinder and non-joinder of parties arise, and where the defects can be cured by way of amendments, as opposed to striking out pleadings. The counsel relied on the case of *D. T. Dobie & Company (Kenya) Ltd versus Joseph Mbaria Muchina & Another* [1980] eKLR, in which the court held that:

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



cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

- g. It is the position of the plaintiff that he had relied on the certificates of lease dated 16<sup>th</sup> December 1986, that had the names of the persons sued as defendant because the defendant had declined to respond to the letters dated 3<sup>rd</sup> June 2024 and 26<sup>th</sup> June 2024 seeking for the names of the trustees. The plaintiff’s counsel submitted that by seeking for the suit and application to be struck out, the defendant’s sole intention is to steal a match on the plaintiff, and the application should not be allowed. The counsel relied on the case of Local Building and Construction Ltd versus Institute of Blessed Virgin Mary Loreto Msongari & 2 Others [2019] eKLR, where the court held that:

“In the instant case the plaintiff should not be penalized for the errors of misdirection of his opponents to the dispute. Also, in the same vein I found it a violation of non-disclosure principle by the defendant counsel which led to the lost opportunity for the amendment of pleadings to deal exhaustively with the issues in this notice of motion.

The motion challenging the legality of the proceedings on misjoinder of the defendant did not attack the subject matter jurisdiction of the claim. In a nutshell what the defendant is looking for in such a motion for judgement on the pleadings is winning the case without a trial. ....

These principles augur well for the sustenance of pleadings and fair administration of justice. I hold the view that the applicant herein failed to comply with statutory duty of disclosure and discovery when they withheld the fact on misjoinder which they were well aware of at the time of filing the suit. in that regard, this court cannot allow the applicant herein to benefit from their own mischief.”

The learned counsel further submitted that under Order 1 Rules 9 & 10 of the Civil Procedure Rules, a suit should not be defeated by reason of misjoinder or non-joinder of parties, as the court can order the striking out of the person who is improperly joined as defendant, and addition of the person who ought to be joined. Counsel also referred to Order 8 Rule 1 that allows a party to amend pleadings once without leave before closure of pleadings and submitted that that the defendant will not suffer any prejudice if the plaintiff is allowed to amend the plaint, as they will defend the suit by filing their defence.

- h. I understand the defendant to be saying that as the plaintiff’s suit is against deceased trustees, it does not fall in the category of a weak case that can be amenable to amendments to salvage it. On the other side the plaintiff is saying the inclusion of deceased the trustees as defendant was bona fide and not intentional, and in any case the defendant should bear the blame for failure to disclose the details of their death and replacement. That the court should aim to sustain the suit instead of striking it out as the defect the defendant has complained of, can be rectified through amendments to substitute the deceased defendants with their replacements.
- i. From the foregoing case law, and noting that it is not disputed that the persons named as defendant in the plaintiff’s suit had died years before the suit was filed, and had in addition been replaced as trustees before the suit was filed, the suit is beyond redemption as it is a nullity ab initio. Unlike in the case of Local Building and Construction Ltd versus Institute of Blessed Virgin Mary Loreto Msongari & 2 Others, the defendant cannot be blamed for any



non-disclosure as the plaintiff could easily have obtained the details of the current trustees by conducting official searches on the suit properties from the Land Registrar's office before filing the suits. It is inconceivable the plaintiff relied on the details on the 1986 certificate of lease without confirming the suit properties' registration status when filing the suit.

- j. It is trite that the Court of Appeal decisions are binding on this court. The decision in the Court of Appeal case of Geeta Bharat Shah & 4 Others versus Omar Said Mwatayari & Another, leads the court to hold that the defendant's application dated 2<sup>nd</sup> December 2024 has merit and there is no need to determine the notice of motion filed by the plaintiff dated 19<sup>th</sup> November 2024 as it falls by the way.
- k. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the events, unless where for good cause the court orders otherwise. In this case, I find no reasonable cause to deviate from that legal edict and the defendant, as the victorious party, will have costs.
- l. Flowing from the foregoing determinations on the two applications, the court finds and orders as follows:
  - a. That the defendant's notice of motion dated the 2<sup>nd</sup> December 2024 has merit and is allowed.
  - b. Consequently, the plaintiff's application dated the 19<sup>th</sup> November 2024 and the plaint of even date are hereby struck out.
  - c. That the defendant is awarded costs.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 11<sup>TH</sup> DAY OF JUNE 2025.**

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

**ELC MOMBASA.**

In the presence of:

Plaintiff : Mr. Muriithi

Defendant : M/s Mulongo for Obinju

Shitemi-Court Assistant.

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

**ELC MOMBASA**

