



**Ndungu v Kingori & another (Environmental and Land Originating
Summons E5 of 2023) [2024] KEELC 349 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 349 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E5 OF 2023
A OMBWAYO, J
FEBRUARY 1, 2024**

BETWEEN

KAMAU DAVID NDUNGU PLAINTIFF

AND

SERAH NYAMBURA KINGORI 1ST DEFENDANT

DANIEL MAHIRI GICHAGA 2ND DEFENDANT

RULING

Brief Facts

1. On 27th June, 2023 this court was informed that the Plaintiff had died on 17th June, 2023. On 23rd October, 2023 the court directed the parties to submit on the issue of abatement of suit upon the death of the plaintiff.

The Plaintiff's Submissions

2. The Plaintiff's counsel filed submissions on 11th January, 2024. Counsel submitted that the deceased plaintiff had commenced the present proceedings *vide* the Originating Summons dated 2nd March, 2023 and set out the prayers sought. Counsel also submitted that the Plaintiff died on 17th June, 2023 before the originating summons could be heard and determined. On whether the suit abated following the death of the plaintiff, counsel for the plaintiff relied on Order 24 Rule 1 of the [Civil Procedure Rules](#), Section 2(1) of the [Law Reform Act](#) and submitted the deceased Plaintiff had transferred the suit property to the 1st Defendant in contemplation of his death. Counsel further submitted that the deceased plaintiff lawfully exercised his rights under Section 31 of the [Law of Succession Act](#) by revoking the said gift. The effect of that was that the suit properties reverted back to the Plaintiff the moment he requested for them to be returned and therefore they form part of his estate. Counsel concluded



his submissions by stating that the suit survives the deceased plaintiff and that it is only fair that the Originating Summons be heard and determined on merit.

The Defendants submissions

3. The defendants submitted on whether the suit abated upon the death of the Plaintiff. The defendants' counsel relied on the cases of *David Sironga Ole Tukai v Francis Arap Muge & 2 Others* [2014] eKLR, *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002, Section 31 of the *Laws of Succession*, Order 24 Rule (1), (2) and Order 24 Rule 7 (2) of the *Civil Procedure Rules* and submitted that the court has to determine whether the cause of action in the present suit survives.
4. Counsel further submitted that in the present case, the cause of action does not survive because the plaintiff gave out the suit properties to the defendants in contemplation of death which death has now taken place. The defendants sought that the present suit be marked as closed with no order as to costs.

Analysis and determination

5. Upon considering the submissions of the parties, the only issue that arises for determination is whether the course of action survives the death of the plaintiff.
6. Order 24 Rule 3(1) of the *Civil Procedure Rules* provides as follows;

“3.

- (1) Where one or two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.”

7. The plaintiff's counsel argues that since the plaintiff gifted the suit properties to the defendants in contemplation of death, the moment he demanded that the properties be returned back to him, the properties automatically reverted and so they form part of his estate. Therefore the course of action survives the death of the plaintiff.
8. The defendants on the other hand admit that the plaintiff gifted them the suit properties in contemplation of death and since he has now died, then the gifts have passed by virtue of his death and therefore the course of action no longer exists. The plaintiff commenced the present proceedings vide the Originating Summons dated 2nd March, 2023 where he sought the following orders;
 - a. That a declaration be and is hereby issued that the Plaintiff is entitled under Section 31 of the Law of Succession Act Cap 160 of the Laws of Kenya to request, during the Plaintiff's lifetime, for the return of the gift that the Plaintiff had previously given to the 1st Defendant by transferring Title Number Nakuru/ Moi Ndambi/4262 and Title Number Nakuru/Moi Ndambi/4263 to the 1st Defendant, in contemplation of his death.
 - b. That a declaration be and is hereby issued that the Plaintiff has requested his 2 children, the defendants herein, to return the gift back to him but the defendants have refused to willingly return the gift of title number Nakuru/Moi Ndambi/4262 and title number Nakuru/Moi Ndambi/4263 that was given by the Plaintiff to the 1st Defendant in contemplation of the Plaintiff's death and subsequently from the 1st Defendant to the 2nd Defendant.



- c. That this honourable court be pleased to order the 2nd Defendant to execute transfer documents in favour of the Plaintiff or the Plaintiff's Nominee for Title Number Nakuru/Moi Ndambi/4262 and title number Nakuru/Moi Ndambi/4263, which titles are currently registered in the 2nd Defendant's name, within 7 days of making this court.
 - d. That in the 2nd Defendant's default of order No. 3 above, this honourable Court be pleased to direct that the Deputy Registrar of this court signs transfer documents for title number Nakuru/Moi Ndambi/4262 and title number Nakuru/Moi Ndambi/4263 in favour of the Plaintiff or his nominee forthwith.
 - e. That this honourable court be pleased to order the release of the original titles for Title Number Nakuru/ Moi Ndambi/4262 and Title Number Nakuru/Moi Ndambi/4263 to the Plaintiff for purposes of registration of the transfer of the suit properties back to the Plaintiff or the Plaintiff's nominee.
 - f. That further and in the alternative to order No. 5 above, this honourable court be pleased to direct the Land Registrar, Naivasha to dispense with the production of the Original Title Deeds for Title Number Nakuru/Moi Ndambi/4262 and Title Number Nakuru/Moi Ndambi/4263 (the suit properties) before registering the Plaintiff of the Plaintiff's nominee as the proprietor of the suit properties.
 - g. That the costs of this Originating Summons be borne by the Defendants.
 - h. That this Honourable court be pleased to grant any further additional orders to meet the ends of justice.
9. The grounds on the face of the application were that the deceased Plaintiff was the registered owner of land parcel No's Nakuru/ Moi Ndambi/4262 and 4263. In the year 2020 he transferred the suit properties to the 1st Defendant in contemplation of death since he had just been diagnosed with prostate cancer. That the 1st Defendant later transferred the suit properties to the 2nd Defendant. That the plaintiff requested the defendants to return the suit properties to him so that he could sell them and raise funds for his medical treatment.
 10. The court of appeal in *Karl Webner Claasen v Commissioner of Lands & 4 others* [2019] eKLR held as follows;
 - “(13) Causes of action of a personal nature do not survive for the benefit of a deceased's estate. The legal maxim *actio personalis moritur cum persona* (a personal action dies with the person) applies to such causes of action. The excluded causes of action in the proviso to section 2(1) of the Law Reform Act are an illustration of the application of the legal maxim.”
 11. As has been indicated before, the deceased plaintiff's claim revolved around the return of the suit properties to the plaintiff. He had gifted the defendants the suit properties in contemplation of death and he sought that the properties be returned to him so that he could sell them and get money for medical treatment. The plaintiff is now dead. It is my finding that the deceased plaintiff's suit was personal to the plaintiff and considering the orders sought in the originating summons, the maxim "*actio personalis moritur cum persona*" ("a personal right of action dies with the person") is applicable in this case. Consequently, it is my finding that the course of action did not survive the death of the plaintiff. The originating summons is dismissed with no order as to costs.

DATED AND DELIVERED VIRTUALLY ON THE 1ST OF FEBRUARY 2024.



A.O.OMBWAYO
JUDGE

