



REPUBLIC OF KENYA



**Menza & another v Kipoto & 8 others (Civil Suit 301 of 2013)
[2024] KEELC 4272 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4272 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 301 OF 2013
LL NAIKUNI, J
MAY 2, 2024**

BETWEEN

MOHAMED ALI MENZA 1ST PLAINTIFF

KAINGU ALI MENZA 2ND PLAINTIFF

AND

GEORGE NAMAI KIPOTO 1ST DEFENDANT

SAUMU CHARO 2ND DEFENDANT

KALECHE MINALO MTAMBUKU 3RD DEFENDANT

JUMAA KAI CHILUMO 4TH DEFENDANT

KATANA NGOWA 5TH DEFENDANT

NYEVU WANJE 6TH DEFENDANT

TABU WAMBUA 7TH DEFENDANT

KADZO ZIRO 8TH DEFENDANT

MNYAZI TSAMA 9TH DEFENDANT

RULING

I. Introduction

1. This rulings regards the amended Notice of Motion application dated 31st May, 2023 before the court for its determination. It was brought by the Plaintiff/Applicant under the provision of Order 24 Rule 3 of the *Civil Procedure Rules*, 2010. It is instructive to note that, initially the Plaintiffs/Applicants moved Court through filing of a Chamber Summons application dated 25th May, 2023 brought under



the provision of Order 1 Rule 14 of the Civil Procedure Rules, 2010 but which it was replaced by the aforesaid amended notice of motion application herein.

2. Upon service the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Defendants/Respondents filed their grounds of opposition dated 9th June, 2023. The Honourable Court shall be dealing with this issues at a later stage of this Ruling.

II. The Plaintiff/Applicant's case

3. The Plaintiff/Applicant sought for the following prayers:-
 - a. That the Plaintiff Ngumbao Ali Menza (now deceased) be substituted by Mohamed Ali Menza and Kaingu Ali Menza as the new Plaintiffs.
 - b. Costs of this application be in the cause.
4. The application is premised on the grounds, testimonial facts and the averments made out under the nine (9) Paragraphed jointly executed Supporting of both Mohamed Ali Menza and Kaingu Ali Menza, the 1st and 2nd Plaintiffs herein together with two (2) annexures marked as "KAM – 1" and "KAM – 2" annexed hereto. They averred that:-
 - a. They were the Applicants in this application herein.
 - b. The suit land known as parcel of land reference No. 29692 situate in the South East of Mariakani, Kokotoni within Kilifi County (Hereinafter referred to as "The Suit Property") was owned by their late father Biryu Masha, who died sometimes in the year 1990. (Hereinafter referred to as "The Deceased").
 - c. On or around the year 2007, their late brother and former Plaintiff in this suit, the late Ngumbao Ali Menza (Hereinafter referred to as "The Former Plaintiff") filed a civil suit High Court Succession No. 640 of 2007 and a Grant Letters of Administration was issued to him. Annexed herein and marked as 'KAM - 1' was a copy of the said grant.
 - d. In the said grant subject parcel of this suit was itemized as an unregistered parcel of land known as Msufini situated at Kokotoni, Mariakani in Mombasa.
 - e. All the brothers were entitled to equal share as per the above grant;
 - f. Their the late Ngumbao Ali Menza registered the grant on 8th October, 2013.
 - g. However, the parcel of land was registered in his sole name but was actually family land to which everyone was entitled to an equal share.
 - h. They obtained a grant dated 28th March, 2023 in place of the late Ngumbao Ali Menza and attached the grant as 'KAM - 2'. It was prudent to note that the grant to replace their deceased brother was a rectified grant issued on 28th March, 2023.

III. The responses by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Defendants/Respondents

5. While opposing the application, the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Defendants/Respondents filed their grounds of opposition dated 9th June, 2023 based on the following grounds:
 - a. That the Plaintiff named in this suit was deceased.



- b. That the suit herein as it stood abeyance and not active to entitled the filing and prosecution of the Amended Notice of Motion application dated 31st May, 2023.
 - c. That the application offends the express provisions of Order 24 Rule 4 of the [Civil Procedure Rules](#) 2010.
 - d. That the present suit was instituted by Ngumbao Ali Menza (deceased) in his personal capacity and as the registered owner of parcel of land reference No. 29692 situate in the South East of Mariakani, Kokotoni within Kilifi County and not on behalf of the estate of Birya Masha as its being agitated.
 - e. That the application was an abuse of the court process and the same should be dismissed with costs.
6. The basis of the application was that the Plaintiffs were the sons of the late Birya Masha who died sometime in year 1990 and was the registered owner of an unregistered parcel of land known as Misufini situated at Kokotoni, Mariakani in Mombasa District within Coast province.
 7. Furthermore, that the late Ngumbao Ali Menza, who was the former Plaintiff was the Plaintiff's brother who was issued a full grant through High Court Succession No. 640 of 2007.

IV. Submissions.

8. On 29th May, 2023, while in the presence of all parties, the court directed that the application be canvassed by way of written submissions. By the time the Honourable court was penning down the Ruling, none of the parties had complied. For that reason, the Court proceeded to deliver the Ruling on its own merit and the filed pleadings herein.

V. Analysis and Determination

9. I have carefully considered the application herein, the affidavits in support thereof and in opposition as well as the grounds of opposition filed by the Defendant/Respondent, the relevant provision of the [Constitution](#) of Kenya, 2010 and the statutes.
10. In order for the Honourable Court to arrive at an informed, reasonable and equitable decision, it has framed the following three (3) salient issues for its consideration. These are:-
 - a. Whether the Notice of Motion application dated 31st May, 2023 has merit.
 - b. Whether the parties herein are entitled to the reliefs sought.
 - c. Who will bear the costs of the application.

Issue No. a). Whether the Notice of Motion application dated 31st May, 2023 has merit.

11. The main substratum of this matter is the legal efficacy and effect of substituting a party for one who has passed on while in the pendency of the suit. The saying goes that the dead are more protected in law than the living. The issue of substitution or appointment of legal representative to a party in a suit is governed by the provision of Order 24 Rule 3 of the [Civil Procedure Rules](#), 2010 or the [Laws of Succession](#), Cap. 160, Probate and Administration Rules, of the Laws of Kenya. Order 24 Rule 3 provides as follows;



1. Where one of 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.
2. Where within one year no application is made under sub - rule (1), the suit shall abate so far as the deceased Plaintiff is concerned, and, on the application of the Defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased Plaintiff:

Provided the court may, for good reason on application, extend the time.”

12. Based on the provision of Sections 55 to 71 the [Laws of Succession](#) Cap. 160 and the [Probate and Administration Rules](#), upon the occurrence of death of a party, either testate or intestate, there can be appointment of the Legal Administrators to the Estate of the deceased through petitioning for the issuance of Grand Letters of Administration and Certificate of Confirmation of the Grant. Alternatively, a Legal Representative may be appointed for a particular purpose by obtaining “Ad Colligenda” or “Ad Litem” (Limited Grant) from the Honourable Court to deal with Court cases. Specifically, the Legal Representatives have exact roles and responsibilities in as far as the management of the Estate of the Deceased is concerned and in particular on dealing with any pending suits before Courts of law. Indeed, the provision of Section 82 (a) the [Law of Succession](#) Act, Cap. 160 provides as follows:-

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;”

13. Additionally, in “[the Precedents of Pleadings 12th Edition \(1975\), PP 159 – 160 by I.H Jacob, Sweet and Maxwell](#) it provides as follows: -

“..... the overriding principle governing parties to an action may be stated to be that all necessary and proper parties, but no others, should be before the court, so as to ensure that all matters in dispute in the proceedings may be effectively and completely determined and adjudicated upon.”

Trouistik Union International & Another v Jane Mbeyu & Another (2008) I KLR (G&F) 730 the Court held that:-

“To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the [law of succession Act](#). That section confers that power on personal representatives and on them alone”

14. Legally speaking, and as already pointed out, the Plaintiffs were on the right trajectory in as far as moving Court for the substitution of the party is concern. As Court will point out herein below, the major hitch was on the issue of the *locus standi*. Resultantly, it diluted the legal effect and merits of the impugned application hereof.



Issue No. b). Whether the parties herein are entitled to the orders Sought.

15. Under this sub – heading, and the above conclusion notwithstanding, the Honourable Court will proceed to apply these legal principles to the instant case in order to strength the said decision. From the surrounding facts and inferences of this instant case, the Plaintiff are seeking for the substitution of the former Plaintiff who was their elder brother and a duly appointed Legal Administrator to the Estate of their father, the deceased. Their quest is to enable them make a claim of the suit land which they claim belonged to the family. As a counter to the claim, the Defendants claim that the suit herein was already in abeyance and could not sustain filing of the instant application. Therefore, this means that more than one year must have passed since the passing of the former Plaintiff.
16. Although no Certificate of Death had been produced, the proceedings of 17th October, 2022 show that the Plaintiff was deceased around that time. Therefore by the time of the instant application one year had not lapsed. Thus, the argument meted by the Defendant that the suit had abated was misleading.
17. The Defendants also argued that the Plaintiffs never had “*locus standi*” (legal capacity) to seek the substitution of the former Plaintiff. From the pleadings in the suit, there was a Certificate of Lease granted to the late Ngumbao Ali Menza on 1st April, 2012 for a term of 99 years. This title was being challenged and would form part of the issues for determination in the main suit. Hence, the Plaintiffs and rightfully so, need to have obtained an ad litem or a full grant with respect to the estate of the deceased Plaintiff.
18. The Plaintiffs in this instance opted for a full grant under the provision of Section 82 of the [Law of Succession Act](#). To me this was right thing to do. However, the only mishap from the laid down procedure, it is evident that the full Letters of Administration obtained by the Plaintiffs herein is in respect to their father Biryia Masha – the deceased and not the late Ngumbao Ali Menza, the deceased. By all means, despite of the deceased having been the initial legal and registered proprietor to the suit property, this right was extinguished upon the Former Plaintiff obtaining the Grant letters of Administration to the Estate of the Deceased. Subsequently, it is the Former Plaintiff and not the deceased who is a party in this suit. In all fairness, under the provision of Article 159 (1) and (2) of the [Constitution](#) of Kenya, 2010, this Court is bound by the Judicial authority state and guide the Applicants to the effect that they ought to have obtained either the Grant Letters of Administration Grant to the Estate of the Former Plaintiff or better still Ad Litem, Limited Grant to enable them move Court for the Substitution of the Former Plaintiff.
19. Simply put the Plaintiffs never had “*locus standi*” to make an application for substitution although the suit was still active at the time of filing the same. In saying so, I have relied on the decision of: “[Alfred Njau & Others v City Council of Nairobi](#) [1982 - 88] 1 KAR 229 the Court of Appeal gave meaning to the term locus-standi by stating:-

“to say he has no *locus standi* means he cannot be heard, even on whether or not he has a case worth listening to.” See [Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another](#) (1982-99) 1 KAR, [Morjaria v Abdalla](#) [1984] KLR 490.
20. For these very reasons, therefore, I discern that the application cannot see the light of the day as it is not only defective, null and void but also bad in law. Hence it must fail outrightly. However, it is instructive to note that, in the meantime, the suit by the Plaintiffs is still pending before this Court and has to be disposed off in one way or the other.



Issue No. b). Who bears the costs of this application

21. It is now well established that the issue of costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of a legal action or proceedings in any litigation. The proviso of the provision of Section 27 (1) of the Civil Procedure Act, Cap 21 provides as follows: -

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”

22. On this legal point, I seek refuge from the cases of:- “Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co - operative Society Ltd this court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

23. Further, I am guided by the following passage from the Halsbury’s Laws of England; 4th Edition (Re-issue), {2010}, Vol.10. para 16

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”

24. Still on the same subject Mr. Justice (Retired) Kuloba in ‘Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa) 2011’, page 94 stated: -

“Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”

25. With respect to the instant application, the Honourable Court has found that the application by the Plaintiffs bears no merit. Thus the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Defendants/Respondents are entitled to costs for their participation in the proceedings accordingly.

IV. Conclusion & Findings.

26. The upshot of the above and having caused an indepth analysis of the framed issues herein, the Honourable Court on the Preponderance of Probability and the balance of Convenience, proceeds to make the following directions/orders:



- a. That the Notice of Motion application dated 31st May, 2023 be and is hereby found to lack merit and hence dismissed.
- b. That in the meantime, taking that the suit instituted by the Plaintiffs is still pending hearing and final determination before this Honourable Court, there shall be a mention on it on 12th June, 2024 to ascertain the actual status of the matter and further direction.
- c. That costs of the Notice of Motion application dated 31st May, 2023 to be awarded to the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Defendants/Respondents herein.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA ON THIS 2ND DAY OF MAY, 2024.

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**HON. JUSTICE L.L. NAIKUNI,
ENVIRONMENT & LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:-

- a. M/s. Firdaus, the Court Assistant.
- b. No appearance for the Plaintiffs.
- c. No appearance for the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th Defendants/Respondents.

JUSTICE L.L. NAIKUNI

