



**Shah & 6 others v Seif & 2 others (As Trustees of WAKF of Seif Bin Salim) (Environment & Land Case E006 of 2024) [2024] KEELC 6335 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6335 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E006 OF 2024  
SM KIBUNJA, J  
OCTOBER 2, 2024**

**BETWEEN**

**ANJA MUKESH SHAH ..... 1<sup>ST</sup> PLAINTIFF  
RENUKA AMRITRALAL SHAH (EXECUTOR OF THE ESTATE OF  
AMRITLAL DHATAMSHI SHAH ..... 2<sup>ND</sup> PLAINTIFF  
JATINKUMAR CHANDULAL SHAH ..... 3<sup>RD</sup> PLAINTIFF  
NEELA SHAH (EXECUTOR OF THE ESTATE OF KANTA HARILAL  
DHARAMSHI SHAH ..... 4<sup>TH</sup> PLAINTIFF  
RASIKLAL DHARAMSHI SHAH ..... 5<sup>TH</sup> PLAINTIFF  
VIBHIA SHAH (EXECUTOR OF THE ESTATE OF ARUNKANT MOHANLAL  
SHAH ..... 6<sup>TH</sup> PLAINTIFF  
ANILKUMAR MOHANLAL SHAH ..... 7<sup>TH</sup> PLAINTIFF**

**AND**

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

**RULING**

1. Vide the application dated 9<sup>th</sup> February 2024, brought under Order 40 Rule 1 and 2 of the [Civil Procedure Rules](#), Sections 1A, 1B and 3A of the [Civil Procedure Act](#), the plaintiffs sought for;

1. “Spent.



2. Spent.
3. An order of injunction restraining the defendants, their agents, servants and/or employees as well as their successors in title from interfering with the plaintiffs' quiet possession and enjoyment of all that parcel of land known as Plot No. Mombasa/Block XX/179 by evicting the plaintiffs therefrom, demolishing, alienating, disposing by way of sale, mortgage or otherwise and/or dealing with the said parcel of land in any other adverse to the plaintiffs' vested interest thereon pending the hearing and determination of this suit.
4. The plaintiffs be awarded the costs of this application."

The application is based on the ten (10) grounds on its face and supported by the affidavit of Jatinkumar Chandulal Shah, 3<sup>rd</sup> plaintiff, sworn on the 9<sup>th</sup> February 2024, in which he inter alia deposed that the defendants, and their successors in title are the trustees of the Wakf of the late Seif Bin Salim, the registered proprietor of Plot No. Mombasa/Block XX/179, suit property; that the plaintiffs are the registered lessees of the suit property for 99 years from 1<sup>st</sup> January 1937 with an annual rent of Kshs 1,500/=; that the plaintiffs have developed a commercial building on the suit property, which PKF Kenya LLP manages as the estate agents; that on 5<sup>th</sup> September 2023, the defendants demanded, through the firm of Obinju Rondo LLP Advocates, vacant possession on grounds of rent arrears of Kshs 9,000/=; that on 7<sup>th</sup> September 2023, the plaintiffs' agents, PKF Kenya LLP, forwarded a cheque for the sum of Kshs 9,000/= in favour of the defendants, through the firm of Obinju Rondo Advocates; that the said firm declined to receive the cheque and returned it, on the ground that they had no instructions to receive payment from the plaintiffs; that the plaintiffs had at all material times paid rent to the defendants through PFK LLP agents, and as such the defendants were estopped by law, and conduct from declining to receive rent from the said agents; that the plaintiffs will comply with any reasonable conditions that may be imposed by the court, including depositing Kshs 9,000/= with the court; that the defendants should not purport to terminate the lease whereas they were ready and willing to pay the arrears; that their eviction would cause irreparable loss not only to them but also to their tenants, and the prejudice cannot be compensated by monetary damages; that the actions of the defendants of refusing to receive rent, and insist on the plaintiffs vacating from the suit premises would cause irreparable damage to the plaintiffs.

2. The defendants opposed the application through their grounds of opposition dated 13<sup>th</sup> April 2024 stating inter alia that the application was fatally defective and an abuse of the court's process; that the defendants were said to be all deceased, and as the court does not act in vain, and the suit was a nullity, the application should be struck out with costs.
3. The defendants filed the application dated the 15<sup>th</sup> February 2024 that is brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 2 Rule 15, Order 51 rule 1 of the *Civil Procedure Rules*, seeking for orders:
  1. "That the plaintiff's suit against the defendants be stuck out.
  2. That the costs of this application be borne by the plaintiffs herein."

The application is premised 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, sworn on the 15<sup>th</sup> February 2024, in which he inter alia deposed that he manages the trust alongside his fellow trustees Zain Al-Abidin Saif Said Albusaidy, and Ashwyn Said Seif Busaidy; that he is the present legal holder in trust of the suit property that was formerly registered in the names of Said Bin Seif, Ali Bin Mohamed and Said Mohamed, who



- are now all deceased; that the defendants, Said Bin Seif, Ali Bin Mohamed and Said Mohamed were the previous trustees, and had passed on 23<sup>rd</sup> February 1999, 12<sup>th</sup> October 1975 and 3<sup>rd</sup> January 1987, respectively; that the suit is a nullity for suing persons who are deceased, and it ought to be struck out with costs.
4. The plaintiffs opposed the application vide the replying affidavit sworn Jatinkumar Chandulal Shah, the 3<sup>rd</sup> plaintiff, sworn on 11<sup>th</sup> March 2024, among others deposing that they sued the defendants under the mistaken belief they were alive, and were still the trustees of the Wakf of Sief Bin Salim; that though they were deceased, they were sued in their capacity as trustees, and not their personal capacity, and as such the claim is against the Wakf; that the Wakf can be sued and sue in its own capacity, and the change of trustees does not warrant a change in their capacity of instituting and defending a suit; that the court should allow the amendment of the plaint in the interest of justice as no prejudice will be occasioned on the estate of the deceased defendants.
  5. The defendants responded to the replying affidavit vide a supplementary affidavit sworn on 15<sup>th</sup> April 2024, by Saif Said Saif Al-busaidy, among others deposing that a trust is not a legal person that can be sued or sue in its name, and that the trustees are sued in their individual capacity; that the plaintiffs could have conducted a search at the lands office or inquired from the office of the Wakf on who the current trustee are, they have had a long-term lease since the 1930s; that a suit filed against a deceased person is a nullity and the court should find that it cannot be amended, but struck out.
  6. On 21<sup>st</sup> February 2024, the court directed that the two applications, dated 9<sup>th</sup> February 2024 and 15<sup>th</sup> February 2024, be canvassed simultaneously, through written submissions.
  7. The learned counsel for the plaintiffs and defendants filed their submissions dated the 13<sup>th</sup> May 2024 and 6<sup>th</sup> May 2024 respectively which the court has considered.
  8. The following are the issues for the court's determination on the two applications:
    - a. Whether the plaintiffs' suit is a nullity and ought to be struck out, as sought in the defendants' application dated 15<sup>th</sup> February 2024.
    - b. Whether the plaintiffs have met the threshold for a temporary injunction order to issue at this interlocutory stage restraining the defendants, their agents, servants and/or employees as well as their successors in title from interfering with the plaintiffs' quiet possession and enjoyment of all that parcel of land known as Plot No. Mombasa/Block XX/179, pending the hearing and determination of this suit, as sought in the plaintiffs' application dated 9<sup>th</sup> February 2024.
    - c. Who pays the costs.
  9. I have carefully considered the grounds on the two applications and of opposition, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following determinations:
    - a. The suit herein was instituted vide a plaint dated 9<sup>th</sup> February 2024 by the plaintiffs against the defendants, as the trustees of the Wakf of Seif Bin Salim, the registered proprietor of Land Parcel No. Mombasa Block XX/179. In his application dated 15<sup>th</sup> February 2024 Saif Said Saif Al Busaidy, deposed that he is the managing trustee of Seif Bin Salim Trust, and the other trustees are Zain Al-Abidin Saif Said Albusaidy and Ashwyn Said Seif Busaidy. He attached to his application a copy of the certificate of title for Mombasa/Block XX/179, suit property, that was registered in the name of Seif Said Seif as trustee of Seif Bin Salim Trust on 6<sup>th</sup> July 2022. He deposed that the persons sued as defendants, namely Said Seif Salim Busaidy, Mohamed



Said Al-Busaidy, and Ali Bin Mohamed died on 23<sup>rd</sup> February 1999, 3<sup>rd</sup> January 1987 and 12<sup>th</sup> October 1975, respectively, and therefore the suit against them is a nullity.

- b. The plaintiffs on the other hand, contended that they sued the defendants on the mistaken believe that they are alive, and were still the trustees of the said Wakf. They argued that the suit could be cured with an amendment, as the claim is against the defendants in their capacity as trustees of the Wakf, and not in their personal capacity. The defendants countered the plaintiffs' argument by urging that the mistake of suing deceased trustees cannot be cured by an amendment, since the Wakf was not a legal person. They urged the court to find the suit as fatally defective and strike it out with costs.
- c. From the available evidence, the plaintiffs have not disputed that the persons they sued as defendants were already dead by the time they filed the suit against them. The plaintiffs have however claimed that at the time of filing the suit, they were not aware of the fact that the defendants were deceased. As it is a fact that the three named defendants were not alive when this suit was filed against them, their respective estates cannot take over this proceedings against them, as would have been expected, had they have been alive at the time the suit was filed. It is trite that a suit instituted against a deceased person is a nullity, with no known cure in law, even amendment or substitution.
- d. In the case of *Viktar Maina Ngunjiri & 4 Others v Attorney General & 6 others* [2018] eKLR the court held that:

“It is common ground that the 7th defendant was not alive when the suit was filed against him. It is also inconceivable how a party who is deceased can instruct counsel and that counsel takes over instructions from a non-existent person. It follows therefore any action including the filing of the plaint, the extraction of the summons; the entering of appearance and filing of the defence were a nullity. The cases cited by counsel for the plaintiffs include, Benjamin Leonard Mc foy v United Africa Company Limited [1961] All ER 1169. In that case 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.”

- e. The plaintiffs further deposed that their claim against the Wakf is in order as they had sued the defendants in their capacity as trustees and not in their personal capacity. That the Wakf has capacity to sue and to be sued, and the change in the trustees does not affect the suit. Section 2 of the *Wakf Commissioners Act* chapter 109 of Laws of Kenya, and Waqf Act No. 8 of 2022 defines a trustee as a person who individually or jointly with another control/manages any property subject to a Wakf, while a Wakf is defined to mean a religious, charitable or benevolent endowment or dedication of any property under Muslim law. From the definition of what constitutes a Wakf and who a trustee is, it follows that a Wakf cannot be said to be a body corporate that can be sued or sue as a legal personality.
- f. In my considered view, the Wakf of Seif Bin Salim lacks the capacity to be sued in its name, but can be sued or sue through its trustees, but definitely not through deceased trustees. The fact



that the suit property was registered in the name of Sief Said Seif, who died on 23<sup>rd</sup> February 1999, is not a reason for a suit against the trust to be filed against him, in his name, after his death. For the reason that the Wakf is not a legal entity, a suit against or for it must be commenced by, or defended through, its trustees.

- g. The plaintiffs herein filed the suit against the named defendants, who had died long before the suit was instituted. The suit is therefore a nullity, and the application predicated upon it is invalid. The suit as filed cannot be cured through amendment or by substitution of the deceased trustees with the current ones, but ought to be struck out. The defendants' application dated 15<sup>th</sup> February 2024 is therefore, with merit, while that by the plaintiffs dated the 9<sup>th</sup> February 2024 is without merit.
- h. Under section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, the costs follow the event unless otherwise ordered for reasonable cause. In this instance, the plaintiffs will meet the costs in both applications.
  1. Flowing from the foregoing conclusions, the court finds and orders as follows:
    - a. That the plaintiffs' application dated the 9<sup>th</sup> February 2024 is without merit while that by the defendants dated 15<sup>th</sup> February 2024 has merit and is allowed.
    - b. The plaintiffs' suit, commenced through plaint dated 9<sup>th</sup> February 2024, and application of even date are hereby struck out.
    - c. That the plaintiffs will pay the costs to Saif Said Saif Al Busaidy, Zain Al-Abidin Saif Said Albusaidy and Ashwyn Said Seif Busaidy, the current trustees to Seif Bin Salim Wakf.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 2<sup>ND</sup> DAY OF OCTOBER 2024.**

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

**ELC MOMBASA.**

In The Presence Of:

Plaintiffs : Mr Otieno For Gikandi

Defendants : Mr. Obinju

Leakey – Court Assistant.

