



Ali v Said & 5 others; Mohamed & another (Applicant) (Environment & Land Case 37A of 2002) [2024] KEELC 13519 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13519 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 37A OF 2002
SM KIBUNJA, J
DECEMBER 4, 2024**

BETWEEN

ALI MOHAMED ALI PLAINTIFF

AND

ABDULHAMID MOHAMED ALI SAID 1ST DEFENDANT

ABDULMAJID FARAJ SAID BARAK 2ND DEFENDANT

FATHIYA HADI AHMED SALIM 3RD DEFENDANT

NASSIR ALI ABDALLA 4TH DEFENDANT

ALISHA OMAR ABDALLA 5TH DEFENDANT

REGISTRAR OF TITLES 6TH DEFENDANT

AND

JAMILA ALI MOHAMED APPLICANT

FARID ALI MOHAMED APPLICANT

RULING

[Notice Of Motion Dated 29th August 2024]

1. The applicants have filed two amended notices of motion both dated 29th August 2024. The first one was filed on 30th August 2024 and the second on 11th September 2024. The application filed on 30th August 2024 seeks for eviction orders against the 1st to 4th defendants while that of 11th September 2024 seeks for same orders against the 2nd and 3rd defendants only. I will consider the application filed on 11th September 2024, to be a replacement of the previous one, and the motion the applicants prosecuted and want a ruling on.



2. The amended notice of motion dated 29th August 2024 and filed on the 11th September 2024 seeks for inter alia orders that;
 - a. That the firm of Khatib & Co. Advocates be granted leave to act for the plaintiff alongside the firm of Wanjugu Waweru Advocates.
 - b. That this court do issue eviction orders against the 2nd and 3rd Defendants and or their agents and or servants.
 - c. That the officer in charge of Station Nyali Police Station be ordered to evict the 1st, 2nd and 3rd defendants, their agents or servants from the suit property being Plot No. 9084/I/MN and demolish any structure erected on the suit property and give vacant possession to the Plaintiff as ordered by the court on 10th June 2021.
 - d. That the officer in charge of station Nyali Police Station do execute this order.
 - e. That the costs of this application be met by the Respondents.

The application is premised on five (5) grounds on its face and supported by the joint supporting affidavit of Jamila Ali Mohamed and Farid Ali Mohamed, sworn on 29th August 2024, in which they deposed among others that they are administrators of the estate of Ali Mohamed Ali, the plaintiff; that on 10th June 2021, the court delivered a judgment in favour of the plaintiff in respect of the suit properties and directed the defendants to give vacant possession; that the decree thereof was registered on 12th August 2021, and title issued to the plaintiff; that the 2nd and 3rd defendants' agent or servant who are aware of the judgement have refused to vacate and or give possession of the suit property to the plaintiff and the 1st defendant; that the plaintiff was represented by the firm of Wanjugu Waweru & Company Advocates who are still on record, while the applicants have appointed the firm of Khatib & Co. Advocates, to act alongside Wanjugu Waweru Advocates; that it is in the interest of justice for the application to be allowed.

3. The affidavits of service of Nickson Nyange Rodgers Mabishi sworn on 11th September 2024 and 26th September 2024 show the 2nd and 3rd defendants were served with the amended notice of motion dated 29th August 2024 and a hearing notice dated 24th September 2024 at their house at Kongowea area on the 11th September 2024 and 25th September 2024 respectively. Despite service, neither the 2nd nor 3rd defendant has filed any replies to the application or attended court during the hearing.
4. The issues for determination by the court are as follows:
 - a. Whether the applicants have established a reasonable case for eviction order in the terms sought to issue.
 - b. Who bears the costs?
5. The court has considered the grounds on the amended notice of motion, affidavit evidence, the oral submissions by the learned counsel for the applicants, the record and come to the following determinations:
 - a. The instant application is undefended, but the court has to determine it on its merits. The record confirms that judgment in this suit was delivered on the 10th June 2021 and a decree thereof issued on 29th July 2021 to the effect that;

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- “ 1. That the Register of the Titles to the Plots. No. 9084 and 9086 be rectified by cancelling the registration of the 2nd and 3rd and 4th and 5th defendants as proprietors thereof, and title be restored into the names of the plaintiff and the 1st defendant as the position was before the registration of the 2nd and 3rd and 4th and 5th defendants. The 2nd and 3rd and the 4th and 5th defendants, now no longer having any interest in the land and must forthwith vacate and give vacant possession of those two properties to the plaintiff within 30 days from the date hereof.
2. That the plaintiff is granted costs against all defendants jointly and/or severally.”

The record further show that a party and party bill of costs dated the 2nd August 2023 was filed, but there is no indication whether it has been taxed.

- b. The copy of the certificate of death NO. 1692104 dated 21st November 2023, attached to the applicants’ supporting affidavit to the initial notice of motion sworn on 24th July 2024, shows that Ali Mohamed Ali, the plaintiff, died on the 18th July 2023. I have perused through the record of this suit and have not seen any application under Order 24 of Civil Procedure Rules seeking to substitute the plaintiff, from the date of his death. Even the notice of motion and amended notices of motion filed by the applicants herein do not contain a prayer to substitute the plaintiff.
- c. The applicants as daughter and son of the plaintiff have obtained limited grant of letters of administration Ad Litem dated 1st March 2024 and issued in Mombasa CM Misc. Succession Cause No. E042 of 2024, but for them to file and prosecute execution proceedings in this suit, they need to first seek to substitute the deceased in accordance with the law. Otherwise, they are strangers in this proceeding, and it matters not that their application is undefended, as the law must be followed.
- d. The prayer for the firm of Khatib & Co. Advocates to be granted leave to act for the plaintiff alongside the firm of Wanjugu Waweru Advocates, is without merit for the reason that the dead plaintiff could not have instructed the said firm to come on record for him alongside that other counsel. The purpose for an application invoking Order 9 Rule 9 of the Civil Procedure Rules was discussed in the case of *S. K. Tarwadi versus Veronica Mueblmann* [2019] eKLR where the court observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

This is not the situation in this instance. Ms. Khatib and Company Advocates, I believe, has been instructed by the applicants, who are administrators of the estate of the deceased plaintiff. The said counsel should be at liberty to proceed to file and serve the appropriate notices to represent the instructing clients/applicants.
- e. On the prayers (3a) and (3b) for eviction of the 2nd and 3rd defendants, and for OCS Nyali, to execute the same, I notice the prayers are directed to the “2nd and 3rd defendants and or their agents and or servants.” while the deposition at paragraph 4 of the supporting affidavit refers to the “2nd and 3rd defendants’ agent or servant”. The applicants may need to be clear as to



whom the eviction order sought is to be directed against. This is because in the orders issued through the judgement, and captured clearly in order No. 1 of the decree extracted thereof, the court stated that, “The 2nd and 3rd and the 4th and 5th defendants, now no longer having any interest in the land and must forthwith vacate and give vacant possession of those two properties to the plaintiff within 30 days from the date hereof”, which amounts to an eviction order. However, should the intention of the applicants be to evict any other person or persons, other than the above listed defendants, they may consider initiating a fresh suit against such individual(s), as they were not parties in this suit.

- f. The application herein is therefore, without merit and stands to be struck out. The applicants according to section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya should meet their own costs as the defendants did not file any replies or attend the hearing.
6. In view of the foregoing determinations in respect of the amended notice of motion dated the 29th August 2024, the court finds and orders as follows:
 - a. That for reasons that the applicants have not been substituted for the deceased plaintiff, and are therefore not parties in this suit, their application is struck out.
 - b. The applicants to meet their own costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 4TH DAY OF DECEMBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : No Appearance

Defendants : No Appearance

Applicants : M/s Mohamed

Leakey – Court Assistant.

