



Awino v Okela & 3 others (Environment and Land Civil Miscellaneous Application E001 of 2024) [2024] KEELC 13529 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13529 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND CIVIL MISCELLANEOUS APPLICATION E001 OF 2024
GMA ONGONDO, J
DECEMBER 4, 2024**

BETWEEN

JOHN NYAMBOK AWINO APPLICANT

AND

OCHANJA OKEMBO OKELA 1ST RESPONDENT

REGISTRAR OF LANDS, HOMABAY REGISTRY 2ND RESPONDENT

COUNTY SURVEYOR, HOMA-BAY REGISTRY 3RD RESPONDENT

THE HON ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The present ruling is in regard to the preliminary objection dated 11th April 2024 by the 1st defendant through Quinter Adoyo and Company Advocates on the grounds infra;
 - a. The 1st defendant is since deceased; having died in December 2023, and the Applicant was even present during his burial, the Applicant being his neighbor.
 - b. That the present Application was filed on the 1st February 2024 while the 1st defendant, as the Applicant has put it, died in December 2023 and the Applicant personally attended his burial
 - c. This suit is incompetent for being lodged against the Deceased, whose estate has not been succeeded and whose dependents have not even been cited.
 - d. The Plaintiff filed Misc. ELC Application No. E002 of 2023 at Homa-Bay Law Courts (The HB CMC case herein) currently pending before Court 2 (Hon. Mutai) pitting the same parties on the very similar facts and which case is coming up for hearing on the 21st day of May, 2024.
 - i. The parties to this case are the same as those in the HB CMC case.



- ii. The cause of action is the same.
 - iii. The subject property /subject of the suit is the same.
 - iv. The plaintiff herein is represented by H. Obach & Partners in that case, while in this case which is similar, they are now represented by O.H Bunde.
 - v. That as a result, this matter is sub judice, and should be struck out with costs.
2. The applicant through O.H Bunde and Company Advocates, did object to the preliminary objection by grounds of opposition dated 11th June 2024, *inter alia*;
 - a. That the 1st respondent's advocate has no basis in law to raise a preliminary objection by acting on behalf of the defendant by virtue of lacking capacity and instructions thereof to act on behalf of the said defendant.
 - b. That it is common ground that the 1st defendant 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 that any action by the deceased defendant's advocate is a nullity. In the case of *Benjamin Leonard MCfof v United Africa Company Limited* 91961) 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 something on nothing and expect it to stay there. It will collapse.' This is exactly what is the instructing party to the counsel now on record for the deceased person in attempting to do so. In the words of the cited case above, this is an attempt to place something on nothing and expect it to retain ground.
 - c. That the entire application by the 1st defendant is bad in law, an abuse of the court process and the preliminary objection should be dismissed.
3. On 25th July 2024, the court directed that the preliminary objection be heard by written submissions.
4. In the submissions dated 1st July 2024, learned counsel for the 1st defendant set out the grounds of the preliminary objection, the plaintiff/applicant's notice of motion dated 31st January 2024 for, *inter alia*, interim order of maintaining status quo over the suit land reference number Kanyada/Kanyango/Kalanya/4295 and delineated three issues for determination including whether the suit is a nullity and sub-judice. It was submitted in part that in light of the 1st defendant who is deceased and HB CMC case, this suit is sub judice and incompetent. To fortify the submissions, counsel cited *Benjamin Leonard MC Foy v United Africa Company Limited* (1961) ALL ER 1169, [Kenya Bankers Association v Kenya Revenue Authority](#) (2019) eKLR and [Nancy Musili-vs Joyce Mbele Katisi](#) (2018) eKLR and other authoritative pronouncements.
5. By the plaintiff's submissions dated 23rd July 2024, reference was made to the suit initiated by a plaintiff dated 31st January 2024, the preliminary objection, the grounds of opposition, section 6 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya, [Black's Law Dictionary](#) 9th Edition on sub judice and the case of [Naisiano Olonge Jek another v Salau Ole Sokon and another](#) (2020) eKLR, Counsel for the plaintiff submitted in part that the HB CMC Case and this suit are different thus sub judice principle does not apply thereof. That since the 1st defendant is deceased, his counsel has no client and lacks capacity



- to act for the deceased. That therefore, the preliminary objection is unmeritorious and the same be dismissed with costs.
6. The 2nd, 3rd and 4th defendants did not file submissions on the preliminary objection.
 7. Notably, the applicant/plaintiff through O.H Bunde and Company Advocates, originated the present suit by way of the plaint for the orders infra;
 - a. An order to implement the 2nd Defendant's report.
 - b. An order compelling the 2nd and 3rd Defendant's to amend the Registry Index Map in respect of the suit land Kanyada/Kanyango/Kalanya/4295 with view of implementing report in respect to the boundaries with LR NO. Kanyada/Kanyango/Kalanya/6170 (the other Parcel of Land) in so far as the access road is concerned.
 - c. The plaintiff further seeks an order of permanent injunction against the 1st defendant, restraining either by himself or his agents from entering upon, the 2nd Respondents report and/or otherwise detrimental to the interest of the Plaintiff.
 - d. An order be issued amending the Registry Index Map with a view of aligning it with the depiction on the ground.
 - e. Costs of this suit be borne by the Defendants.
 - f. Such further and/or other relief as the Honourable court may deem fit and expedient so to the grant.
 8. The 1st defendant opposed the suit and the notice of Motion of even date by the preliminary objection.
 9. The 2nd, 3rd and 4th defendants through Lorna Orege Senior Litigation Counsel, termed the plaintiff's claim strange in their statement of defence dated 11th September 2024. They stated that the 2nd and 3rd defendants visited the suit land and the other parcel of land on 23rd October 2013, took measurements and an access road thereof. Therefore, they prayed that the suit be dismissed with costs.
 10. In the foregone, are the grounds of the preliminary objection sustainable?
 11. The preliminary objection pertains to locus standi and sub judice which are points of law in line with the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* (1969) EA 696 at page 700 paragraphs D-F where Law JA remarked;

‘.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation.....’
 12. The preliminary objection discloses that the 1st defendant died in December 2023. In view of the 3rd ground of opposition as stated in paragraph 2 (b) hereinabove, it is common ground that the 1st defendant
 (The deceased) died before this suit was lodged against him and that his estate has not been succeeded.
 13. It is trite law that the estate of the deceased person is vested in the legal representative; see *Trouistik Union International and another v Jane Mbeyu and another* (1993) eKLR



14. In the case of *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* (2014) eKLR, the Court of Appeal held;

’.....A litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in cases of intestate succession.....’
15. It is pretty clear that there is no legal representative of the estate of the Deceased in this suit. In section 2 of the *Civil Procedure Act* Chapter 21 Laws of Kenya, the term ‘legal representative’ means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom devolves on the death of the party so suing or sued.
16. It is claimed in the preliminary objection that this suit is sub judice in light of the parties, the cause of action and the suit land in HB CMC case herein. This court is guided by section 6 of the *Civil Procedure Act* Chapter 21 Laws of Kenya on the principle of sub judice.
17. In HB CMC case, Charles Nyambok Awino sued the deceased and the other 3 defendants herein over the suit land which borders the other parcel of land. The record in HB CMC case reveals that on 22nd October 2024, the case was set for mention on 23rd January 2025. Further, judgment delivered on 13th November 2019 in Migori ELCC No. 12 of 2018 (O.S) the applicant versus Julius Okolo Anyimbi for adverse possession over the suit land (JNA-1C), is annexed to a notice of motion dated 10th January 2023 by the applicant for restriction order and that the 3rd defendant to amend map regarding the suit land in HB CMC case, discerns previous litigation involving the applicant over the same matter.
18. In the circumstances, this suit is sub judice and incompetent. I concur with the submissions of the 1st defendant’s counsel in that respect.
19. Therefore, it would not be right for the same matter to be heard simultaneously by Homa-Bay Chief Magistrate’s Court and this court
20. Accordingly, this entire suit is hereby struck out with costs to the defendants.
21. It is so ordered.

DATED AND DELIVERED AT HOMA-BAY THIS 4TH DAY OF DECEMBER, 2024.

G. M. A ONG’ONDO

JUDGE

Present;

1. H. O Bunde learned counsel for the plaintiff
2. Jack Otieno instructed by Quinter Adoyo learned counsel for the 1st defendant/respondent
3. Malachi, court assistant

