



Karisa & 49 others v Zani & another (Environmental and Land Originating Summons E004 of 2023) [2024] KEELC 13666 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13666 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2023
LL NAIKUNI, J
DECEMBER 4, 2024**

BETWEEN

JACKSON KARISA 1ST PLAINTIFF

MERCY WANJIKU 2ND PLAINTIFF

RAMA MWAKOMBE & 47 OTHERS & 47 OTHERS 3RD PLAINTIFF

AND

ZACHARIAH MWADEBWE ZANI 1ST DEFENDANT

TEREZA KADZO ZANI 2ND DEFENDANT

RULING

I. Introduction

1. This Honourable Court is tasked to make a determination of the Notice of Motion application dated 24th May, 2024. The Court was moved under Certificate of urgency by Nicholas Zani, the son of the Defendants/Applicants herein. The application was brought under the provisions of Order 24 Rules 1,2,3 & 4 Civil Procedure Rules 2010 & Sections 1A, 1B,3B of the *Civil Procedure Act* & Articles 159 & 162 of *the Constitution*, 2010 and all enabling provisions of the Law.
2. Despite of the application having been properly served, there was no responses elicited by the Respondents herein. Nonetheless, the Honourable Court will still proceed to make its decision on its own merit whatsoever.

II. The Applicant's case

3. The Applicant sought for the following orders:-
 - a. Spent.



- b. That the Honourable court dismiss all the Plaintiff/Applicant applications as both Defendants/Respondents are deceased.
 - c. That the suit relates to the estate of deceased persons and hence this Honourable Court lacks jurisdiction to entertain the current suit by the Plaintiff/Applicant.
 - d. That costs of the instant application be provided for and in case by borne by the Plaintiff/Applicant herein.
 - e. Such further and/or other orders be granted as the court may deem fit and expedient.
4. The application is premised on the grounds, testimonial facts and the averments on the face of the application and further supported by the 13 Paragraphed annexed affidavit of NICHOLAS ZANI, the son to the Defendants/Applicants herein sworn on the same day as the Application. The Applicant averred that:
- a. The Defendants/Respondents in this matter were both deceased. (Annexed in the affidavit and Marked as “NZ1 - a and b” were copies of the Certificates of death of the Defendants/ Respondents).
 - b. Since both Defendants/Respondents were deceased, service would definitely not had been able to be effected upon them.
 - c. A suit that was filed against the Defendant who was already dead at time of filing is a nullity and could not be amended and it was as if no suit was filed. (Annexed in the affidavit and Marked as “NZ - 2” a copy of case MOMBASA ELC NO.71 OF 2016 (OS)).
 - d. There appeared to be several different suits/applications in which the Plaintiffs/Applicants and Defendants/Respondents appear to be mixed up conveniently.
 - e. The order generated by this court under Certificate of Urgency dated 31st July 2023 had only three Plaintiffs namely JACKSON KARISA, MERCY WANJIKU AND 1 OTHER and one Defendant namely ZACHARIAH MWADEBWE ZANI. (Annexed in the affidavit and Marked as “NZ - 3” was a copy of the court order)
 - f. In the Originating summons filed by the Plaintiffs/Applicants the Plaintiffs were 50 in number and the Defendants were only 2. The said amendment was done without leave of the court.
 - g. The Plaintiffs/Applicants had recently attempted to invade the suit property.
 - h. The initial invasion attempt was reported to Mtwapa Police Station via OB number 30/07/2023.
 - i. The recent suit against the Defendants/Respondents was defective and could not be entertained by the fact that at the time of filing the suit against the Defendant/Respondent, they were both dead.
 - j. The makeshift structures the Plaintiffs/Applicants were attempting to build in July 2023 were destroyed by the estate of the Defendants/Respondents in a bid to protect the property from the invaders.
 - k. He swore the affidavit in support of the instant Application.



III. Submissions

5. On 14th October, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 24th May, 2023 be disposed of by way of written submissions. Unfortunately, by the time of penning down this Ruling the Honourable Court had not been able to accessed the submissions by either of the parties herein. The Honourable Court on 23rd October, 2024 proceeded to reserve a ruling date on 4th December, 2024 on its own merit accordingly.

IV. Analysis and Determination

6. I have carefully read and considered the pleadings herein and the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
7. In order to arrive at an informed decision, the Honorable Court has two (2) framed the following issues for determination.
 - a. Whether the Notice of Motion application dated 24th May, 2024 brought under the dint of Order 24 Rules 1,2,3 & 4 Civil Procedure Rules 2010 & Sections 1A, 1B,3B of the *Civil Procedure Act* & Articles 159 & 162 of *the Constitution* is merited.
 - b. Who will bear the Costs of Notice of Motion application 24th May, 2024.

ISSUE No. a). Whether the Notice of Motion application dated 24th May, 2024 brought under the dint of Order 24 Rules 1,2,3 & 4 Civil Procedure Rules 2010 & Sections 1A, 1B,3B of the *Civil Procedure Act* & Articles 159 & 162 of *the Constitution* is merited.

8. Under this sub – title, the main issue here is whether the Applicant has made out a case for the grant of the prayers sought in the application. In the application, the Applicant moved the Court under Order 21 Rules 1, 2, 3 and 4 of the Civil Procedure Rules, 2010 citing to the Court that the Defendants were deceased and that the suit as filed by the Plaintiffs should be dismissed. Further, the Applicant averred that the matter before this Court was one that related to the estate of the deceased persons and hence this Honourable Court lacked jurisdiction to entertain the current suit by the Plaintiffs.
9. The Applicant has expressed to bring this application under several provisions of the law. Within his application, he has also cited numerous legal provisions with the hope of obtaining orders for dismissal or striking out of this suit. It is incumbent upon this court to interrogate each legal provision and either affirm or negate its relevance. The applicant has apart from the provisions of law, also listed various grounds for striking out or dismissing the suit of the Plaintiff. I note that the words “striking out” and “dismissing the suit” have been used interchangeably. It instructive to note that though these words are often used interchangeably by litigants, they do not have the same meaning. It is upon the court to understand the context in which they have been used.
10. In the case of “Enock Kirao Muhanji – Versus - Hamid Abdalla Mbarak [2013] eKLR”, the Court held that:-

“The words “dismissed” and struck out” are terms of art and are not supposed to be used interchangeably in a Ruling or Judgment. However, more often than not, the terms are used interchangeably by the litigants and the courts. It is therefore incumbent that when the court is called upon, like in this case, to determine whether a party can file a fresh suit after the first one has been dismissed or struck court, the court should look at the circumstances of each case to arrive at a decision...”



11. In the present application, my deduction is that the Applicant is hoping that once this Honourable court issues the orders of striking out or dismissal, the Plaintiff shall be barred from approaching this court over the issues raised in his Plaintiff. While it is true, that a suit against a deceased person is a nullity from its inception. In “Viktar Maina Ngunjiri & 4 others – Versus - Attorney General & 6 others [2018] eKLR” the Learned Judge referred to the Indian Case of “Pratap Chand Mehta – Versus - Chrisna Devi Mehta AIR 1988 Delhi 267” in which the court while citing another decision observed as follows:-

“.....if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

12. According to the Certificates of death for the deceased Defendants; the 1st Defendant died on 22nd December, 2002 while the 2nd Defendant died on 20th November, 2014. This suit was filed on 28th July, 2023 clearly after the Defendants had been long deceased. In yet another Indian case of “C. Muttu – Versus - Bharath Match Works AIR 1964 Kant 293” the court observed,

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

13. The Court of Appeal has also had occasion to address the issue of a suit filed against a dead person in the case of “Geeta Bharat Shah & 4 Others – Versus - *Omar Said Mwatayari & Another, Court of Appeal at Mombasa, Civil Appeal No. 46 of 2008*, (2009) eKLR”. In that case, a suit was filed against two persons one of whom was already dead when the case was filed. Judgment was entered against the deceased. An application to set aside the Judgment was disallowed and the applicants appealed to the Court of Appeal. The Court of Appeal held that the Judgment could not be sustained as it was entered against a person who was already dead. The court stated as follows :-

“In the result, as Bharatkumar Nathalal Shah was already dead by the time the suit was filed, we hold the view that the suit was a nullity and Mr. Oddiaga, is with respect right in conceding the appeal in respect of him on that score. We see no merit in directing that he be allowed to file defence as he is not there to do so and the administrators to his estate cannot in law take over the matter as it was filed after he was already dead.”

14. I am bound by the above decision of the Court of Appeal. I have no option but to find that the suit against the Defendants was a nullity ab initio. Thus, in the given circumstances, I do hereby strike it out. As for the court lacking jurisdiction; by virtue of the fact that the Plaintiffs have sued parties who cannot defend themselves is enough to make this Court to immediately down its tools.



ISSUE No. b). Who will bear the Costs of Notice of motion application dated 24th May, 2024

15. 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 the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In the present case, I will not make any orders as to the costs of the suit but the applicants will have the costs of this application.

V. Conclusion & Disposition

16. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
- a. That the Notice of Motion application dated 24th May, 2024 be and is hereby found to have merit and is hereby allowed as per the Court’s discretion and the preservation of the suit property.
 - b. That the Honorable court be and is hereby strikes the suit as per the Originating summons filed on 28th July, 2023 dated the same day against the 1st and 2nd Defendants who were deceased before filing of the suit.
 - c. That pursuant to this, the orders granted by this Honourable Court on 18th September, 2024 be and are hereby henceforth set aside.
 - d. That the Applicants shall have the costs of the Application; there are no orders made as per the costs of the suit.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF DECEMBER 2024.

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

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. No appearance for the Plaintiffs/Respondents.
- c. Mr. Nicholas Ajani acting in person for the Defendants/Applicants.

