



**Maridadi & 2 others v Panesar; Elms & another (Defendant) (Applying as
Executors of the Estate of Pritam Singh Panesar - Deceased) (Environment &
Land Case E002 of 2021) [2023] KEELC 722 (KLR) (6 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 722 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E002 OF 2021
AE DENA, J
FEBRUARY 6, 2023**

BETWEEN

MOHAMMED RUWA MARIDADI 1ST PLAINTIFF

ANTHONY MICHAEL MWANZIA MULWA 2ND PLAINTIFF

AHMED OUMA RANDA 3RD PLAINTIFF

AND

PRITAM SINGH PANESAR DEFENDANT

AND

GUY SPENCER ELMS DEFENDANT

NILESHKUMAR SHAH DEFENDANT

**APPLYING AS EXECUTORS OF THE ESTATE OF PRITAM SINGH PANESAR -
DECEASED**

RULING

1. This application was filed under Certificate of Urgency and is brought under the provisions of section 1A,1B,3,3A and 63 of *Civil Procedure Act*, Order 24 Rule 4, Order 22 Rule 22, Order 10 Rule 10, Order 12 Rule 7 of the *Civil Procedure Rules 2010* and all other enabling provisions of the law. The application is filed by the executors of the estate of Pritam Singh Panesar (the Applicants) through the firm of Litoro & Omwebu Advocates.
2. On June 20, 2022, the court certified the application urgent and issued stay of execution of the judgement/decree issued on May 24, 2022 pending the hearing and determination of the instant application. The application seeks the following orders;



1. Spent.
 2. Spent.
 3. That Guy Spencer Elms and Nileshkumar Shah be joined herein or substituted as legal representatives of executors of the estate of Pritam Singh Panesar [deceased defendant herein].
 4. Spent
 5. That the judgement/decreed delivered on April 21, 2022 and all consequential orders proceeding and arising therefrom be reviewed and set aside.
 6. That the defendants/applicants be granted unconditional leave to defend the suit herein by filing of necessary defence and pre trial documents within 21 days of the order
 7. That cost of this application be provided for.
3. The application is set upon grounds on its face and briefly that the Defendant died on July 28, 2018 testate and the Applicants obtained grant of probate of the will of the deceased on March 26, 2019 which was confirmed on July 17, 2019. That before death the deceased was in occupation of the land parcel no Kwale/Msambweni 'A' 3390 (hereinafter referred to as the suit property) as registered proprietor. The applicants state that on May 17, 2022 they were informed that the court had delivered a judgement against the estate of the deceased granting the respondents plaintiffs orders of adverse possession of the suit property.
 4. The application is supported by the affidavit of one Guy Spencer Elms an Advocate and the executor/legal representative of the estate of Pritam Singh Panesah with authority by his co-executor. It is deponed that the deceased had since acquisition of the suit property and until his demise been in occupation of the suit property with a caretaker living thereon. An affidavit sworn by Suleiman Yusuf Tani the alleged caretaker is attached to the supporting affidavit. That the caretaker was at all times under the supervision of one Wilson Gichuhi and an affidavit sworn by him is also attached. It is averred that the suit property was acquired sometime in the year 2009 with a borehole and immediately after its purchase, a stone block perimeter wall was built and a metal bar gate put up. That the suit property was at all material times without any structures thereon and was bushy and it was the caretaker that was using the land to graze his goats. That a makeshift makuti structure was built thereon for use by the caretaker but it got worn out. It is stated that the estate spends a total of Kshs 22,500/- per month to pay two caretakers.
 5. According to the deponent, I & M bank of Kenya has an informal charge on the suit property since 2009 which in 2016 the deceased authorised the bank to advertise and sale. The Applicants state that on May 17, 2022 they were informed by the Bank that through an online newspaper they had learnt of the judgement herein. It is also stated that the executors of the deceased were unaware of the suit as the same was filed without joinder of the legal representatives and it will be just and fair to allow the applicants to be allowed to defend this suit.
 6. The Applicants state that the probate proceedings of the deceased were duly published and gazetted giving the address of the executors to the whole world and therefore the Plaintiffs knew the address of the executors of the defendant deceased estate for purposes of joinder and service of summons or notices of the suit but failed to disclose the same. Further that there was no service of summons or any notices on the applicant or his servants or affixed on any part of the suit property as required by the *Civil Procedure Act* and order 5 of the Civil Procedure Rules prior to the said judgement and decree as no stranger was on the property.



7. The Applicant states that they have an arguable defence which raises triable issues and the same should be heard on merit. That they were ready to abide by the just and reasonable terms of the court attendant to the reliefs sought; no prejudice will be suffered.

Response

8. In response to the application, the Respondent filed an affidavit sworn by Mohamed Ruwa Maridadi. It is averred that the application dated June 15, 2022 has no merit whatsoever, is a gross abuse of the court process, tainted with malafides and the same ought to be dismissed. That the Plaintiffs/ Respondents Advocate on record perused Nairobi Succession Cause No 1619 of 2018 relating to the grant of probate herein. That they obtained the will which they subjected to examination by a forensic document examiner who reported he had examined the signatures on the purported will and compared the same with the known signature of the late Pritam Singh Panesar and found no agreement between the signatures. Consequently, the signature on the will was a forgery. The report was attached. That the said fraud was previously extended on the claim over the suit property Title No Kwale/ Msambweni 'A'/3390. A formal complaint in the matter has been made with the directorate of criminal investigations.
9. It averred that the will herein is therefore a forgery and does not clothe the applicants with the locus standi to claim any property of Pritam Singh Panesar. The respondent also raised claims that the 1st Applicant acquisition of several properties through forgery among other similar allegations highlighted in paragraph 14 of the affidavit. The respondent state that before the court rendered its judgement on April 21, 2022 a ground status report was prepared by the District Land Surveyor Kwale and which report confirmed that the Respondents were in physical occupation of the suit property. The Respondents aver that the originating summons dated May 12, 2021 was served upon the Defendant by way of substituted service by advertisement in a local newspaper with a nationwide circulation and in particular the Standard Newspaper of October 9, 2022. That the applicants cannot therefore claim that they were not served. The respondents oppose the application herein and pray that the same be dismissed with costs.
10. The allegations above were denied by the applicants supplementary affidavit dated November 7, 2022. It is stated that the Plaintiffs have acknowledged that the deceased was the registered owner of the property. That the fact that the plaintiffs failed to sue the legal representatives of the estate of the deceased and proceeded to sue the deceased himself renders the suit incurably and fatally defective and hence the consequential decree arising from the same is irregular and a nullity. That the grant of probate of written will of the deceased defendant issued on March 26, 2019 and confirmed on July 17, 2019 confers the applicants with the locus standi to file suit on behalf of the deceased. It was further stated the deceased defendant gave the suit property as an equitable security to I& M Bank for loans and overdrafts of Kshs 1,471,858,573.03/- and the bank currently has the original title to the suit property pursuant thereto.

Submissions

11. The application was canvassed by way of written submissions and parties filed and exchanged the same.

Defendant /Applicant's submissions

12. The Defendant/Applicants submissions were filed before court on November 23, 2022. On the prayer for joinder of the applicants, it is submitted that it is not disputed the defendant is deceased and infact died on July 28, 2018. That under Order 24 Rule 24 of the Civil Procedure Amendment Rules permits substitution of a deceased person with the legal representative of the estate of the deceased.



It is submitted that no reasonable challenge has been raised against the Applicant for joinder of the applicants to exercise their powers in this suit as set out in Section 82 of the Law of Succession Act. The court is urged to grant the prayer for substitution for purposes of prosecuting the suit prayer 5, 6, and 7 of the application.

13. On setting aside the impugned decree of the court, it is submitted that there is no evidence of participation of the defendant and service of the summons and notices to the defendant's legal representative. That for that reason a judgement was obtained against the defendant who was deceased without full disclosure of this fact to the deceased legal representatives. Counsel for the applicants referred this court to authorities where it was held that a suit prosecuted against a deceased person without substitution is null and void ab initio.
14. On setting aside of the ex parte judgement /decree it is submitted that the applicants are obligated to set aside the impugned judgement/decree and lodge necessary defense particularly on the defectiveness of the suit as well as the necessary application. That the court has the inherent power to prevent abuse of court processes. The court is urged to strike out the suit as enabled by section 3A of the Civil Procedure Act. The applicants seek that the application dated June 15, 2022 be granted as prayed.

Plaintiffs/Respondents Submissions

15. The Plaintiff's /Respondents submissions are filed before court on December 19, 2022. It is submitted that the application subject of this ruling is a gross abuse of the court process and the same ought to be dismissed by the court. The contents of the respondents replying affidavit in response to the application are reiterated. It is submitted that the two document examination reports presented before court are uncontroverted and unchallenged. That the applicants have come before court with unclean hands and should not be heard by the court.
16. Counsel for the Plaintiff respondents submits that service was effected upon the applicants through advertisement and they cannot therefore deny service. Further that the claim for adverse possession runs against the title and not necessarily against the current holder of the title. That the death of a registered owner does not affect the running time for purposes of adverse possession as was held in Peter Okoth Versus Ambrose Ochido Andajo & Benedict Odhiambo Oketch [2021] eKLR. The respondents state that no material has been placed by the Applicants to warrant the court to review the judgement issued and further that there have been no triable issues raised. The court is urged to dismiss the applicant's application with costs to the Respondents.

Determination

17. The Applicants have filed the application in their capacity as the legal representatives of the estate of the late Pritam Singh Panesar. The documents filed before court indicate that the deceased died on July 28, 2018 testate. To me it is not in dispute that Pritam Singh Panesar is deceased. The applicants obtained a grant of probate of the will of the deceased on March 26, 2019 and the same was confirmed on July 17, 2019. I have noted the robust arguments by the respondents to this application on the allegations of fraud and forgery with regard to the will and to me these are immaterial at this point in time and should await hearing on merit if at all. What I have is evidence which prima facie demonstrate that the applicants are the legal representatives of executors of the estate of Pritam Singh Panesar.



18. Section 2 of the *Civil Procedure Act* defines legal representative as follows;

'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 the estate devolves on the death of the party so suing or sued'.

19. The applicants pray that Guy Spencer Elms and Nileshkumar Shah be joined herein or substituted as legal representatives of executors of the estate of Pritam Singh Panesar [deceased defendant herein]. I will deal with the first limb of this prayer which in my view is for joinder as I recognise that they must be joined to this suit for the purpose of the estate telling its story to the court that the judgement herein was issued against a deceased person and that they are interested parties for all purposes being the legal representatives thereof. To me they are parties who ought to have been joined ab initio or infact sued as the respondents/defendants in this suit. I will therefore invoke the provisions of order Order 1 Rule 10 (2) of the Civil Procedure Rules and the inherent powers of the court and they shall be deemed as duly added as Interested Parties to these proceedings for purposes only of the application that is before this court.
20. The next issue I will deal with is whether the suit was a nullity having been filed against a deceased person in this case Pritam Singh Panesar. The Applicants arguments in this regard have already been highlighted earlier and I need not belabour them. The respondents who are the applicants/plaintiffs in the main suit do not agree and state that a claim for adverse possession runs against the title and not necessarily against the current holder of the title. That the death of a registered owner does not affect the running of time for purposes of adverse possession. My understanding of the Applicants objection is the filing of the suit against a person who is deceased and not on limitation and or who is the current owner of the suit property. Matters on who is the current owner of the suit property and how they acquired it are matters to be addressed at a full hearing when the estate is properly sued. The respondent Plaintiff is clearly wrong. It is trite that a suit cannot be filed against a deceased person. The law provides that it is the estate of the deceased through the legal representative of that particular estate that is sued in the event of any proceedings being brought against a deceased. I have read the ruling in Japhet Nzila Muangi Vs Hamisi Juma Malee in Mombasa ELC No 71 of 2016 (OS) delivered by my brother Justice Sila Munyao cited by the Applicants. The learned judge referred to the decision of Mbogholi Msagha J (as he then was) in the case of *Viktar Maina Ngunjiri & 4 Others Vs Attorney General & 6 Others, High Court at Nairobi Civil Suit No 21 of 2016 (2018) eKLR* which case reviewed various authorities on this point and where the learned judge found that a suit as against the 7th Defendant who was dead when the case was filed was null and void ab initio. In the said ruling Justice Munyao goes further to cite the court of Appeal decision on a similar issue in *Geeta Bharat Shah & 4 Others Vs Omar Said Mwatayari & Another, Court of Appeal at Mombasa, Civil Appeal No 46 of 2008 (2009) eKLR* where the court held that 'the judgement could not be sustained as it was entered against a person who was already dead.
21. Based on the foregoing it is my finding that the suit herein commenced by way of Originating Summons by Mohammed Ruwa Maridadi, Anthony Michael Mwanzia Mulwa and Ahmed Ouma Randa against Pritam Singh Panesar was a nullity ab initio. The judgement herein therefore must collapse with the suit and for the avoidance of doubt it is hereby set aside.
22. Having made the above finding I do not deem it necessary to deal with the other reliefs sought by the Applicants for there is no suit to defend. I will however render myself on costs. Assuming that the respondent's plaintiffs may not have been aware of the death of the deceased I will direct that each party shall bear their own costs.



Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 6TH DAY OF FEBRUARY,2023

A.E. DENA

JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr. Litoro for the Defendant /Applicant

Mr. Githinji for the Plaintiffs /Respondents

Mr. Daniel Disii- Court Assistant.

