



REPUBLIC OF KENYA



KENYA LAW
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**Mwangome & 5 others v Njuga & 14 others (Constitutional Petition
9 of 2014) [2023] KEELC 17808 (KLR) (7 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17808 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CONSTITUTIONAL PETITION 9 OF 2014

MAO ODENY, J

JUNE 7, 2023

**IN THE MATTER OF: THE ARTICLES 20, 23(30, 40, 47, 232, 258 AND 259 OF
THE CONSTITUTION OF KENYA, 2010.**

AND

**IN THE MATTER OF: PLOT NUMBER 438 PINGILIKANI ADJUDICATION
SECTION, CHONYI, KILIFI MEASURING
APPROXIMATELY 32 ACRES.**

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS
ENSHRINED IN THE BILL OF RIGHTS AND IN
PARTICULAR THE RIGHT TO ACQUIRE, POSSESS
AND OWN PROPERTY**

BETWEEN

SEBASTIAN MUYE MWANGOME 1ST PETITIONER
CYRIL SHUMAA MWANGOME 2ND PETITIONER
BARAWA JOSEPH SANGA 3RD PETITIONER
NICHOLAS NYAMAWI MWANGOME 4TH PETITIONER
MWANGANDI SHUMAA MWANGOME 5TH PETITIONER
WELLINGTON BENSON RIMBA 6TH PETITIONER

AND



NYAMAWI CHIMEGA NJUGA	1 ST RESPONDENT
FRANCIS CHILENGELI	2 ND RESPONDENT
BENSON MUNGA CHIMEGA	3 RD RESPONDENT
SAMSON MWAMUYE	4 TH RESPONDENT
DONALD MWATATA CHIMEGA	5 TH RESPONDENT
ALEX PILI	6 TH RESPONDENT
KAI PILI CHIMEGA	7 TH RESPONDENT
AMBROSE M. MWATATA	8 TH RESPONDENT
GABRIEL Z. MWATATA	9 TH RESPONDENT
THE DISTRICT REGISTRAR, KILIFI	10 TH RESPONDENT
THE DISTRICT ADJUDICATION AND SETTLEMENT OFFICER, KILIFI	11 TH RESPONDENT
THE CABINET SECRETARY, MINISTRY OF LANDS AND SETTLEMENT	12 TH RESPONDENT
DIRECTOR, LAND ADJUDICATION AND SETTLEMENT	13 TH RESPONDENT
CHIEF LAND REGISTRAR	14 TH RESPONDENT
THE ATTORNEY GENERAL	15 TH RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated December 1, 2022 by the Respondent/applicant seeking the following orders:
 - a. That the Petition herein filed against deceased persons namely Donald Mwatata Chimega, Kai Pili Chimega, Ambrose M Mwatata, Gabriel Z Mwatata and Nyamawi Chimega Njuga be struck out and dismissed.
 - b. That the Petition by Mwangandi Shumaa Mwangome and Wellington Benson Rimba be deemed as having abated and consequently be struck out.
 - c. That the costs of this Application be provided for.
2. The said Application was supported by the Affidavit of the 2nd Respondent Francis Chilengeli, and the grounds on the face of the application where he deponed that at the time of the institution of the Petition the 5th, 7th, 8th and 9th Respondents were already deceased and the Petitioners were aware of this fact and that the 1st Respondent died on the November 1, 2015, which was never communicated to this Honourable Court at that time, even to date.
3. The 2nd Respondent further deponed that Donald Mwatata Chimega sued as the 5th Respondent died on March 23, 2008, Kai Pili Chimega sued as the 7th Respondent died on August 4, 1999, while Gabriel



Z Mwatata sued as the 9th Respondent died on April 16, 1994 which facts the Petitioners were well aware of at the time of filing the suit.

4. The 2nd Respondent also deponed that subsequent to the filing of the Petition, the 1st Respondent died on November 1, 2015 while Mwangandi Shumaa Mwangome and Wellington Benson Rimba who are some of the Petitioners died in 2014 and 2021 respectively thus the petition herein by and against deceased persons is incompetent and or has abated and should be dismissed with costs.
5. The Petitioners stated that they were not aware of the demise of the 5th 7th 8th and 9th Respondents, and after they learnt of the same they instructed their Advocate to take the necessary steps to have them substituted but the Advocate's efforts have been frustrated by the surviving Respondents who have deliberately refused to take out Letters of Administration for the Estates of their departed relatives.
5. The Petitioners further averred that as a last resort, they filed Citations to compel the Family Members of the Deceased Respondents before the Chief Magistrate's Court Kilifi, to take up letters of Administration, detailed as follows: -
 - (a). Citation Number 34 of 2022 – Estate of Donald Chimega Mwatata.
 - (b). Citation Number 35 of 2022 – Estate of Ambrose M. Mwatata.
 - (c). Citation Number 36 of 2022 – Estate of Gabriel Ziro Mwatata.
 - (d). Citation Number 37 of 2022 – Estate of Nyamawi Chimega Njuga.
 - (e). Citation Number 38 of 2022 – Estate of Kai Piri Chimega.
6. That the citations have not been finalized hence the lack of substitution and stated that the best order will be to strike out and not both strike out and dismiss.
7. Counsel for the Applicant submitted stated that a Petition filed against a deceased person is a nullity in law and relied on the case of *Japhet Nzila Mwangi v Hamisi Juma Malee* [2022] eKLR.

Analysis And Determination

8. The issue for determination is whether the Petition was filed against Respondents who were deceased at the time of filing the suit. It is not in dispute that some of the Respondents were deceased at the time of filing the Petition.
9. It is on record that Donald Mwatata Chimega sued as the 5th Respondent died on March 23, 2008, Kai Pili Chimega sued as the 7th Respondent died on August 4, 1999, while Gabriel Z Mwatata sued as the 9th Respondent died on April 16, 1994 which facts the petitioners were well aware of at the time of filing the suit.
10. Order 24 Rules 3 (2) and 7(2) of the *Civil Procedure Rules*. Order 24 Rule 3 provides:
 - (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
 - (2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may



award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

11. Order 24 Rule 7(2) of the [Civil Procedure Rules](#) provides:
 - (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
 - (2) 2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.
12. The instant Petition was filed on November 17, 2014 and it is clear that at the time of filing the 5th, 7th, 8th and 9th Respondents were already dead. This position has not been challenged by the Petitioner. It is also on record that the 1st Respondent died on November 1, 2015 during the pendency of the suit. Again, this has not been controverted.
13. In the case of [Kenya Farmers' Cooperative Union Ltd Vs Charles Murgor \(deceased\) t/a Kiptabei Coffee Estate](#) (2005) eKLR the Court held that a Court of law has no jurisdiction to Order for substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of law.
14. To date no substitution has been made for the 1st Respondent who died on November 1, 2015. This suit had abated by November 1, 2016 as no application was made for substitution within the stipulated period.
15. I find that there is no case against the deceased persons who were sued while they were already dead without citing their legal representatives. The suit against them was a nonstarter and cannot be salvaged. The case against the deceased Respondents is hereby struck out.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF JUNE 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

