



**Magwanga & another v Aluoch (Environment & Land Case
E18 of 2020) [2023] KEELC 21224 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21224 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E18 OF 2020
E ASATI, J
NOVEMBER 2, 2023
IN THE MATTER OF LAND PARCEL NO. KISUMU/WATHOREGO/2449**

BETWEEN

HELLEN AWELLE MAGWANGA 1ST APPLICANT

ALFRED OKOTH OLANG 2ND APPLICANT

AND

GRACE ROMBO ALUOCH RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion application dated 11th May 2023 brought by the Defendant pursuant to the provisions of Order 24 Rule 4 and Order 10 Rule 11 *Civil Procedure Rules* and Sections 1A, 1B, 3,3A of the *Civil Procedure*. The application seeks for orders that: -
 - a. George Kollicks Odhiambo the personal representative of the estate of the deceased Respondent do substitute the Respondent herein.
 - b. The final Judgment entered herein on 19th January 2023 together with all the consequential exparte proceedings thereon be set aside unconditionally
 - c. That the Respondent be granted leave to file a Replying Affidavit in her defence and to defend the suit.
 - d. Costs of the application.
2. The application was based on the grounds the applicant is the personal representative of the estate of the deceased. That no proper service of the Originating Summons and pleadings because as at the time of the alleged service, the defendant was already deceased. That the right to defend oneself and have



- the suit determined on merit in any judicial proceedings is an unqualified and unlimited fundamental right under the constitution of Kenya. That the Defendant has a good defence to the claim.
3. The application was supported by the contents of the Supporting Affidavit of George Kollics Odhiambo sworn on 11th May 2023 and the annexures thereto.
 4. In reply to the application, the Respondent filed the 1st and 2nd Respondent's Replying Affidavit sworn by Alfred Okoth Olang the 2nd Respondent on 8th June 2023. He deposed that the application is suspicious for reasons that the grant was issued on 31st of March 2023 and the death certificate in respect of the deceased on 23rd July 1988. That the suit was filed against Grace Rombo Aluoch and not Grace Rombo Oweke and that there is no evidence that the two names belong to one and the same person. That the supporting Affidavit is full of falsehoods and is meant to unjustly enrich the applicant and prevent the Respondents from enjoying their right. That the Respondent in the Originating Summons Grace Rombo Aluoch was served via substituted service as ordered by the court. That the applicant and her assigns are outright strangers to the property and that Grace Rombo Aluoch may be alive and kicking somewhere and that the court should summon and punish the applicant.
 5. The Respondent also filed a Preliminary Objection *vide* the Notice of preliminary objection dated 22nd May 2023 on the grounds that;-
 - a. That the orders sought in the application cannot issue as the action as regards to the subject matter which is land is time barred in accordance with Limitation of Actions Act.
 - b. That the application and Letters of Administration are misconceived bad in law, incompetent the same having been taken out long after the court made its final decision
 - c. The entire proceedings are therefore null and void *ab initio*.
 6. Directions were taken that both the Preliminary Objection and the application be heard together and argued by way of written submissions.
 7. It was submitted that the principles for handling Preliminary Objection were settled in the case of *Mukisa Biscuits Manufacturing Company Ltd. Vs West End Distributors Ltd* (1969) EA 696. That for a preliminary objection to succeed it must consist of a point of law which has been pleaded or which arises by clear implication out of pleadings and which is argued as a Preliminary point may dispose of the suit. That whether Grace Rombo Aluoch and Grace Rombo Oweke is one and the same person is a matter of evidence. That as to whether the claim is time barred or not, all applicant seeks is to defend the suit and have it determined on merit which is a right guaranteed by the Constitution.
 8. Relying on the provisions of Order 10 Rule 11 of the Civil Procedure Rules Counsel for the applicant submitted that the court has unfettered discretion to set aside an expert Judgment on terms that the court deems just. That the Originating Summons and pleadings that gave rise to the Judgment entered on 19th January 2023 were never served upon the Respondent since at the time of the purported service the Respondent was long deceased. Counsel referred the court to certificate of death filed to show this. That the Respondent in the Originating Summons should not be condemned unheard.
 9. It was submitted on behalf of the Respondent that the suit was filed against one Grace Rombo Aluoch who upon service neglected to enter appearance and defend the suit despite proper service. That the application has been brought by Grace Rombo Oweke who is a stranger to these proceedings. Relying on the case of Moiwo Matanya Ole Keiwa Vs Chief Justice of Kenya & 6 others (2008) eKLR Counsel submitted that the affidavit by George Kollics Odhiambo who is stranger to the proceedings should be expunged.



10. Counsel submitted that the applicant's locus has been extinguished in law as they intend to respond to a suit to recover land of a deceased who passed in 1988 which is beyond the time provided by law. That the right the applicant may have had on the suit property has been extinguished due to the time requirements by the statute of limitation. Counsel relied on the case of *Payko Plantations Limited Vs National Bank of Kenya Limited and 2 Others* (2019) eKLR to submit that lack of standing in a matter is fatal to the case counsel prayed that the application be struck out with costs.
11. The main ground for the application is that the Respondent in the Originating Summons was not served as she had long died before the suit was filed. Certificate of death annexed to the application in respect of Grace Rombo Oweke died shows that she died on 10th May 1988. That the death was registered on 23rd July 1988 but certificate issued on 16th March 2023. The Limited Grant of Letters of Administration *Ad – Litem* attached to the application shows that the same was issued on 4th April, 2023. The applicant is the personal representative of the deceased. The Respondent in the application has raised an issue that there is no evidence that Grace Rombo Aluoch who is the Respondent in the Originating Summons is one and the same person as Grace Rombo Oweke. However, in my view this is a matter for evidence to be adduced during the hearing.
12. I have perused the draft Replying Affidavit annexed to the Application to demonstrate that the applicant has a defence that raises triable issues. Considering all the circumstances of this case, the provisions of Sections 1A 1B and 3B of *Civil Procedure Act* and Article 159 of the *Constitution* I find that it is in the interest of justice to give the estate of the deceased an opportunity to defend the suit.
13. I find that the application has merit and allow it as follows: -
 - a. George Kollicks Odhiambo the personal representative of the estate of the deceased Respondent do substitute the Respondent.
 - b. The judgment entered herein on 19th January 2023 together with all the consequential orders and the *ex parte* proceedings thereon are hereby set aside.
 - c. The Respondent is granted leave to file a Replying Affidavit to the Originating Summons and to defend the suit. Replying Affidavit be filed and served within 14 days hereof.
 - d. Costs in the cause.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 2ND DAY OF NOVEMBER 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

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E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Buluma for the Plaintiff.

Abira for the Applicant.

