



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Okello & 11 others v Letting & another (Environment & Land
Case 136 of 2015) [2022] KEELC 73 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 73 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 136 OF 2015**

SM KIBUNJA, J

MAY 4, 2022

BETWEEN

BOAZ OKELLO 1ST PLAINTIFF
JEREMIAH ABINA ONGARO 2ND PLAINTIFF
DUKE NYABUTI 3RD PLAINTIFF
JAIRO OMWOYO 4TH PLAINTIFF
STEPHEN OMBATI 5TH PLAINTIFF
JOSEPH OGETO 6TH PLAINTIFF
PETER NDUNGU 7TH PLAINTIFF
RASHID TOO 8TH PLAINTIFF
JAMES NYANGAU 9TH PLAINTIFF
SIMON SOMBO 10TH PLAINTIFF
NICHOLAS LIBERA 11TH PLAINTIFF
SAMWEL NDUNGU MUCHERU 12TH PLAINTIFF

AND

DAVID KIMELI LETTING ALIAS KOKWAS 1ST DEFENDANT
EQUITY BANK (K) LTD 2ND DEFENDANT



RULING

1st Defendant's Notices of Motion dated the 7th May, 2021 and 7th June, 2021

1. The 1st Defendant filed the application dated the 7th May, 2021 for orders that:
 - i) “The suit by the 10th and 12th Plaintiffs be struck out for being incompetent as the 10th and 12th Plaintiffs died before the suit was filed;
 - ii) In the alternative, the court find that the 10th and 12th Plaintiffs’ suit has abated;
 - iii) Costs of the application be borne by the Plaintiff’s advocate.”

The application is based on the five (5) grounds on its face marked (a) to (e), and supported by the affidavit sworn by David Kimeli Leting, the 1st Defendant, on the 7th May, 2021, in which he inter alia deposed that the suit was filed in 2015, when the 10th and 12th Plaintiffs were already dead, having passed on the 20th August, 2009 and 20th January, 2013 respectively. He annexed the certificate of death which confirms that Samuel Ndungu Mucheru, the 12th plaintiff, had died on 20th January, 2013.

2. That the application is opposed by the plaintiffs through the replying affidavit sworn by Peter Ndungu, the 7th plaintiff, on the 10th December, 2021 *inter alia* deposing that he is the son to the 12th plaintiff; that even if the suit by the 12th plaintiff has abated, he still holds the same interests over the suit land; that he is the one in custody of the original death certificate for the 12th plaintiff, and the one annexed by the 1st defendant is a forgery.
3. The 1st defendant also filed the notice of motion dated the 7th June, 2021 seeking for orders that;
 - a. “The suit of the 1st Plaintiff be struck out for being incompetent.
 - b. Costs of the suit be borne by the 1st Plaintiff.”

This application is based on the five (5) grounds on its face marked (a) to (e) inter alia that as at 2005, the suit land was in the name of Christina Cherubet; that the 1st Plaintiff had no dealings with the deceased, but allegedly dealt with persons who were not owners, being himself and Joseph Rotich; that the sale agreements resultant thereof are unenforceable, incompetent, invalid and the suit is therefore an abuse of the court process and unsustainable. The application is supported by the affidavit sworn by David Kimeli Leting, the 1st defendant, on the 7th June, 2021 in which deposing to facts reiterating the grounds on the application.

4. The application is opposed by the plaintiffs through the replying affidavit sworn by Boaz Okello, the 1st plaintiff, on the 10th December, 2021, among others deposing that he had bought the suit land vide sale agreement dated the 25th October, 2005, from the 1st defendant after consultations with the original registered proprietor, in the presence of her children, Joshua Kipyego Cheruiyot and Eliza Cheruiyot Kipkoech, deceased; that the suit should not therefore be struck out but heard and determined on merit.
5. That following directions issued on the 9th February, 2022, the learned counsel for the 1st defendant and the plaintiffs filed their written submissions dated the 14th February, 2022 and 10th April, 2022 respectively.
6. That in respect of the notice of motion dated the 7th May, 2021, the issues for the court’s determinations are as follows;



- a. Whether the 1st defendant has made a reasonable case for striking out or making as abated the case against him by the 10th and 12th defendants who are reportedly to have died before the filing of the suit.
 - b. Who pays the costs of the application.
7. Having considered the grounds on the application, the affidavit evidence, and the written submissions, the court finds as follows;
- a. That despite the plaintiffs’ protestations through their replying affidavit that the copy of the death certificate annexed to the 1st defendant’s affidavit is a forgery, the documentary evidence presented by both parties confirm that the 12th plaintiff died on the 20th January 2013. That as it is not disputed that this suit was filed on the 14th May 2015, it is then obvious that none of the parties herein had the requisite legal capacity to sue on behalf of that estate, at that time and even now.
 - b. That further, the 1st defendant’s deposition that the 10th plaintiff had died before this suit was filed has not been rebutted by the plaintiffs in their replying affidavit. That as no grant has been availed in respect of the estate of the 10th plaintiff, it is then the finding of the court that none of the parties herein has the legal capacity to sue for that estate.
 - c. That in view of the foregoing, the only way the beneficiaries of the 10th and 12th Plaintiffs estate could be pursuing this claim is through legal representatives duly appointed by the court on behalf of their estates in accordance with the *Law of Succession Act* chapter 160 of the Laws of Kenya. This position was indeed been confirmed by the Court of Appeal, in the case of *Barnes Muema v Francis Masuni Kyangangu* [2019] eKLR, wherein the court confirmed the High Court’s position on first appeal that the Appellant required the Letter of administration to commence action on behalf of the estate of the deceased. The court held that;

“41. In the instant appeal, it is evident that the appellant did not institute proceedings on his own behalf but on behalf of the interest purportedly held by his grandfather who was long deceased. His claim was that the suit property was “family land”. His claim was therefore based on Trust.

Could he sue on behalf of the family of his late grandfather? He does not dispute the fact that he had no grant of letters of administration to enable him sue on behalf of his late grandfather. The law is very clear on this point. The learned Judge was correct in his enunciation of the law on the issue of locus standi in succession matters. He cannot be faulted for the said finding. That ground therefore fails.”
 - d. That equally herein, the claim by the 10th and 12th Plaintiffs could only be sustained through authority granted by a probate and succession court. None of the Plaintiffs has produced such authority or contested the 1st defendant’s assertion that they lack that legal capacity.
 - e. That whereas Article 159 of *the Constitution* provides that Courts should be guided by among other principles, the principle that ‘justice shall not be delayed’, which is echoed under section 1B of the *Civil Procedure Act* chapter 21 of Laws of Kenya, that provides that the court is under a duty to handle all matters presented before it for the purpose of attaining the following aims:



- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties;

the court is of the considered view that the said provisions cannot come to the assistance of the plaintiffs in this matter. That the plaintiffs' lack of standing goes to the heart of whether this court will properly exercise jurisdiction over the 10th and 12th Plaintiffs' claim against the 1st Defendant. Therefore, the 10th and 12th Defendants names are to be struck off as plaintiffs in this suit in exercise of this court's powers under Order 1 Rule 10(2) of the Civil Procedure Rules.

- f. That having come to the finding that the 10th and 12th plaintiffs had died long before the filing of the suit, then it follows that the two could not have instructed counsel to file this suit against the 1st defendant. That as the 1st defendant is entitled to costs of the application under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, the same should be paid by the counsel for the plaintiffs.
8. That in respect of the notice of motion dated the 7th June 2021, the court has after considering the grounds on the application, affidavit evidence, and submissions come to the following conclusions;
- a. That though the 1st defendant main basis for seeking for the suit of the 1st defendant to be struck out is on grounds that the said plaintiff did not have any dealings with Christina Jerubet, the deceased, but with David Kimeli Leting and Joseph Rotich, the pleadings in the plaint dated the 30th April, 2015, as amended, and further amended on the 20th March, 2018, and 14th December 2018 respectively, discloses a reasonable cause of action that deserves to be decided on its merit after hearing of the parties.
 - b. That the mischief in the application aside, and the court being aware that it should not appear to be making final determinations on the issues to be canvassed through the main hearing, the 1st defendant's position in the notice of motion is to say the least, misguided. The 1st Plaintiff's cause of action does not automatically get extinguished by virtue of the fact that the 1st defendant believes that he dealt with the wrong person(s).
 - c. That in terms of section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya that costs follow the event unless for reasonable cause the court orders otherwise, the 1st defendant will pay the 1st plaintiff costs of the application.
9. That in view of the foregoing findings, the court orders as follows;
- a. That the 1st defendant's application dated the 7th May, 2021 has merit and is granted in terms of prayer (1) with costs to be paid by counsel for the plaintiffs. That for avoidance of doubts, the names of the 10th and 12th plaintiffs, who had died before this suit was commenced, are hereby struck from the proceedings.
 - b. That the 1st defendants notice of motion dated the 7th June, 2021 has no merit and is dismissed with costs to the 1st plaintiff.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 4TH DAY OF MAY, 2022



S.M.KIBUNJA,J.

ELC ELDORET.

In the Virtual Presence of;

Plaintiffs: Absent.....

Defendants: Absent.....

Counsel: Mr. Odhiambo for Plaintiffs.....

Mr. Momanyi for 1st Defendant.....

Court Assistant: Oniala

S.M.KIBUNJA,J.

ELC ELDORET

