



REPUBLIC OF KENYA



KENYA LAW
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Mugo v Mwaniki (Deceased) & 6 others; Ibara (Intended Defendant) (Environment & Land Case 72 of 2017) [2022] KEELC 13448 (KLR) (4 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13448 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 72 OF 2017

A KANIARU, J

OCTOBER 4, 2022

**IN THE MATTER OF SECTIONS 7, 37 AND 38 OF THE LIMITATIONS
OF ACTIONS ACT AND ORDER 37 RULE 7 AND 19 OF THE CIVIL
PROCEDURE RULES AND ALL OTHER ENABLING PROVISIONS OF THE LAW**

BETWEEN

EFUREITH IRIMA MUGO PLAINTIFF

AND

IBARA MWANIKI (DECEASED) 1ST DEFENDANT

PETERSON WAMBUGU 2ND DEFENDANT

MWANGI MUTHINJI ALIAS MOSES MWANGI MUTHINJI .. 3RD DEFENDANT

KAHARIRI BURI ALIAS KAHARERI BURI KARUGU 4TH DEFENDANT

**JOSIAH WAMBUA SILAS ALIAS JOSIAH KINYUA MUCHINA 5TH
DEFENDANT**

**DOUGLAS KIRUNYU MATHENGE ALIAS DOUGLAS KIRUNYU MWANGI
MATHENGE 6TH DEFENDANT**

MOFFAT MURIITHI KANGI 7TH DEFENDANT

AND

JOHNSON NGARI IBARA INTENDED DEFENDANT



RULING

The Application

1. The application before me for determination is a notice of motion dated February 8, 2021 and filed on February 10, 2021. It is expressed to be brought under the provisions of Order 1 Rule 10 of the [Civil Procedure Rules](#).
2. The application is filed by the plaintiff - Efutureith Irima Mugo - and it came with four (4) prayers, which are as follows:-

Prayer 1: That the court be pleased to strike out the name of Ibara Mwaniki (the 1st defendant) from these proceedings.

Prayer 2: That the court be pleased to enjoin Johnson Ngari Ibara as a defendant in these proceedings.

Prayer 3: That consequent to granting prayers 1 and 2 above the applicant be granted leave to amend the originating summons in terms of the annexed draft amended originating summons.

Prayer 4: That costs of the application be provided for.

3. As filed, the application is premised on grounds that the applicant was not aware that the 1st defendant, Ibara Mwaniki, was already deceased. It was deposed that the joining of his name in the suit was an inadvertent mistake. It was also deposed that one of the parcels was registered in the name of the deceased and in the circumstance it was necessary to join Johnson Ngari Ibara, the legal representative to the deceased estate, as a party to the suit. Further it was said that the amendments would be necessary to enable the court to effectually and completely adjudicate and settle all questions involved in the suit.
4. The motion on notice came with a supporting affidavit sworn by the applicant. She reiterated the grounds in the application and deposed that service of the pleadings had been done by way of newspaper advert. She deposed that for that reason she did not realise that the 1st defendant was deceased and only came to learn of this fact when the 7th respondent instructed his advocates to act on his behalf as an administrator to the estate of the deceased. She further deposed that the amendments sought would not prejudice any of the parties and that the court ought to exercise its discretion in her favour.
5. The application was opposed by the 3rd to 7th respondents by way of grounds of opposition. They accordingly raised three grounds of opposition to wit; that the application is defective ab initio, having been filed against a deceased person from inception; that the intended defendant lacks the locus to defend the suit as there is no grant of letters of administration on record authorising him to act on behalf of the 1st defendant (deceased); lastly that the honourable court should dismiss the application dated February 8, 2021 with costs as it was incompetent, frivolous and otherwise an abuse of the court's process.

Submissions

6. The 3rd to 7th respondents filed their submissions on May 11, 2022. They gave a summary of the application and the response filed. They submitted that the application lacked merit for reason that it had been filed against a deceased person and further that the amendment could not be effected as



the suit was void *ab initio*. It was also submitted that the intended party who was to be substituted with the deceased did not have a grant of letters of administration and for that reason could not be substituted with the deceased.

7. The 3rd to 7th respondents relied on the case of *Benjamin Leonard Mcfoy v United Africa Company Limited* (1961) ALL ER 1169 where it was stated that

“if an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order to set aside. It is automatically null and void and without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.....”
8. They submitted that a suit brought against a deceased person is a nullity and nobody can be joined to the suit as a legal representative. To buttress this issue, they relied on the case of *C.Muttu v Bharath Match works Air* 1964 Kant 293.
9. The applicant filed her submissions on 30.5.2022. She reiterated the averments in her application and submitted that she had filed a suit on adverse possession over suit parcels of land Mbeere/Kirima/2231; and the resultant subdivisions of land parcel Mbeere/Kirima/2232. She submitted that she had sued the 1st defendant for reason that he was one of the registered proprietors of suit parcel Mbeere/Kirima/2231; that she was not aware that he was deceased being that she obtained information of his details when she conducted a search; and finally that she had effected service of the pleadings by way of substituted service. She reiterated that she had inadvertently sued the deceased person and had now sought to do way with the deceased and join the legal representative to his estate.
10. She contended that the intended defendant had not opposed the application and that the defendants opposing it had been sued because of a different parcel of land. She said further that they had also failed to demonstrate any interest they had in the deceased’s parcel of land. With regard to the intended defendant, the applicant argued that as the intended defendant had stated that he was the legal representative to the estate, then it was prima facie evidence that he was indeed the administrator to the said estate. In relation to the issue of joining the intended defendant as a party to the suit, the applicant relied on the provisions of Order 1 Rule 10 of the *Civil Procedure Rules*. It was said that the court has the discretion to strike out the names of the parties improperly joined in a suit and to join the name of the party who ought to be sued.
11. The applicant relied on the case of *Gladys Nduku Nthuki v Letsbengo Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* (2020) Eklr where the court cited with approval the case of *Civicon Limited v Kivuwatt Limited and 2 Others* (2015) Eklr outlining the objective of the rules, which is to bring on record all persons who are parties to the dispute relating to the subject matter so that the dispute is determined in their presence at the time without any delay, inconveniences and to avoid multiplicity of proceedings.
12. It was said that inclusion of the 1st defendant in the suit was an honest mistake and his name should therefore be struck out. It was argued that contrary to the argument by the 3rd to 7th defendants, the dispute involved a parcel of land and the cause of action survives. It was submitted that the administrator to the deceased estate had not opposed the application to join him to replace the 1st defendant and the application ought to be allowed as the applicant had met the threshold for grant of the orders sought.



Analysis and determination

13. I have considered the application, the response made, rival submissions by the parties, and the material on the court record. In the suit, the applicant sought orders of adverse possession against the defendants who are the registered owners of the suit parcel of land. From the material on record, it is an undisputed fact that this suit was filed against the 1st defendant, yet at the time of filing the suit, he was already deceased. The application before me therefore seeks orders for striking out of the 1st defendant's name, joining of Johnson Ngari Ibara as a defendant in his place and amendment of the summons to reflect the changes.
14. According to the applicant, she filed a suit against the 1st defendant without knowing that he was deceased. She avers that she obtained details of the defendants from the land registry when she sought to conduct a search on the properties and that she had effected service by way of substituted service and she could therefore not have known that the 1st defendant was deceased. It was argued that the applicant only became aware that the 1st defendant was deceased when the intended defendant appointed an advocate to act on his behalf.
15. It is necessary to consider the issues raised in the grounds of opposition. From the 3rd to 7th respondents' perspective, the application is defective ab initio for having been filed against a deceased person. It is also said that the intended defendant lacks locus to defend the suit for reason he has not shown to have a grant of letters of administration authorizing him to act on behalf of the deceased. Lastly, it was said that application was frivolous, incompetent and an abuse of the court process. In my view, the 3rd to 7th respondents are expressing a valid legal position.
16. As already stated, at the time this suit was filed against the 1st defendant, he was already deceased. As such, the suit was commenced against a deceased person. Can a suit be sustained against a deceased person? The 3rd to 7th respondents are of the view that the summons filed against a deceased person and even the amendments sought can not be granted.
17. Courts of various jurisdictions have pronounced themselves on the issue of filing a suit against a deceased person and the effect of such a suit. Such a suit is the case of case of *C.Muttu v Bharath Match Works Air* 1964 Kant 293 as cited by the 3rd to 7th respondents. I have considered the said case, which was also cited in the case of *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others* [2018] eKLR. In that case, the court while dismissing a similar application as the one before me, cited with approval the Indian case of *C. Muttu v. Bharath Match Works AIR* 1964 Kant 293 where it was 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.”

18. That court went ahead to cite the case of *Pratap Chand Mehta v Chrisna Devi Meuta AIR* 1988 Delhi 267 where, while citing another decision, it 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.”

19. The Kenyan courts have also pronounced themselves on this issue. An example is the court of Appeal case in *Geeta Bharat Shah & Others – v- Jomar Said Mwatayari & Another* (2009) eKLR. In that case, the court was considering an appeal over a matter in which the suit was filed against a defendant who was dead at the time of filing suit. It stated thus;

“We have anxiously considered the appeal. This is a first appeal. We have no doubt whatsoever that the learned judge, in refusing to allow the application as in favour of the deceased against whom a suit was filed after his demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased’s estate to urge the court to do so for once the respondent also admitted he sued a dead person, the court was duly bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed. In any event, because the person cited in the plaint as the first defendant was already dead by the time the suit was filed meant that the plaintiff (now first respondent) did not tell the truth when he said in his verifying affidavit that he had read the plaint and verified the facts therein for how could he say that against undisputed fact later discovered that by the time he was saying so, the first defendant was long dead....”

20. From the authorities above, it is clear that such a suit cannot be sustained if the deceased was the only defendant in the suit. However, the circumstances are different when there are several defendants and only one was deceased at the time of inception of the suit. In the latter instance, the deceased name is struck out but no representative is joined in the suit to replace or substitute the deceased. This is for reason that the suit filed against such deceased is still a nullity but only as against the deceased person. It matters not that the one filing the suit made an honest mistake, was unaware of the death or the suit has bonafides. It is clear that a suit against a deceased is a nullity as the deceased person cannot defend a suit or participate in any legal proceedings. He can only do so through a legal representative who is mandated to act on behalf of the estate of the deceased in accordance with Section 82 of the *Law of Succession Act*.

21. The prayer to seek to have a person joined to replace or substitute a party who was deceased at the time of institution of the suit is likened to reviving something that is already dead and non existent. I will seek to rely on the case as cited by the 3rd to 7th respondents of *Benjamin Leonard Mcfoy v United Africa Company Limited* (1961) ALL ER 1169 where it was stated thus:

“if an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order to set aside. It is automatically null and void and without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.....”

22. In the circumstances the prayers sought for striking out of the name of the deceased name from the pleadings are allowed. However the issue of joining the intended defendant is disallowed for the reasons already stated above. Further, even assuming the law allowed such legal representative to be joined in the suit, in this matter, the person sought to replace and substitute the deceased, though stated to be the



legal representative to the deceased estate, has not offered proof that he has obtained the requisite grant of letters of administration to the deceased estate. It is only after being vested with the requisite legal capacity as provided for under the Succession Act that one is allowed to act in place of the deceased. It is my finding that the application as filed lacks merit and the same is dismissed. With regard to costs, it is trite law that costs follow the event. I therefore make orders that costs of this application shall be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 4TH DAY OF OCTOBER, 2022.

In the presence of Momanyi for Rose Njeru for plaintiff and in the absence of Ombachi for respondents.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

04.10.2022

