



**Kanyi v Estate of Stephen Kanini Wang'onde & another (Miscellaneous Application E017 of 2022) [2024] KEHC 6604 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6604 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
MISCELLANEOUS APPLICATION E017 OF 2022**

**MA ODERO, J**

**JUNE 6, 2024**

**BETWEEN**

**SUSAN KANYI ..... APPLICANT**

**AND**

**THE ESTATE OF STEPHEN KANINI WANG'ONDU ..... 1<sup>ST</sup> RESPONDENT**

**THE REGISTRAR OF LANDS NYERI COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the court for determination is the Notice of Preliminary Objection dated 1<sup>st</sup> August, 2023 filed by the 1<sup>st</sup> Respondent The Estate Of Stephen Kinini Wang'onde seeking to have the entire suit struck out.
2. The Applicant Susana Kanyi opposed the Preliminary Objection. The matter was canvassed by way of written submissions. The 1<sup>st</sup> Respondent filed the written submissions dated 28<sup>th</sup> December, 2023 whilst the Applicant relied upon her written submissions dated 1<sup>st</sup> February, 2024.

**BACKGROUND**

3. This succession cause relates to the estate of the late Joseph Kanyi (hereinafter 'the Deceased').
4. The Applicant who is a daughter to the Deceased filed a Summons dated 14<sup>th</sup> July, 2022 seeking various orders. The 1<sup>st</sup> Respondent in response filed this Notice of Preliminary Objection dated 1<sup>st</sup> August, 2023 seeking to have the entire Summons struck out on grounds that

“The 1<sup>st</sup> Respondent christened the Estate of Stephen Kinini Wang'onde (Deceased) is not a legal person capable of being sued/suing which divests the jurisdiction of the court to entertain the Miscellaneous Application in its entirety”



5. As stated earlier the Preliminary Objection was opposed.

### **ANALYSIS AND DETERMINATION**

6. The 1<sup>st</sup> Respondent submits that the estate of a Deceased person cannot sue or be sued. That the Applicant ought to have sued the ‘legal representative (s)’ of the estate of the Deceased.
7. On her part the Applicant submits that this court has jurisdiction to hear and determine the matter. She asserts that the 1<sup>st</sup> Respondent waived the right to claim it was not a legal person through acquiescence by participating in the suit upto the present time.
8. The Applicant urges that the issue raised in the Preliminary Objection is mere technicality which the court ought to overlook. She urges that the Preliminary Objection be dismissed.

### **ANALYSIS AND DETERMINATION**

9. I have considered the Notice of Preliminary Objection filed in this matter as well as the written submissions filed by both parties. The only issue for determination is whether the Preliminary objection has merit.
10. The definition of a Preliminary Objection was given in the case of  
In Mukhisa Biscuit Manufacturing Co. ltd -vs- West End Distributors ltd (1969) EA 696, where Sir Charles Newbold defined a Preliminary Objection as follows:-  
  
“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.
11. In the case of *Oraro Vs Mbaja (2005)* 1KLR 141, it was held that:-  
  
“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”
12. It is not in dispute in the suit instituted on 14<sup>th</sup> July, 2022 that, the Applicant named the 1<sup>st</sup> Respondent as  
  
“The Estate of Stephen Kinini Wang’ondū.’ This certainly amounts to a misdescription of the 1<sup>st</sup> Respondent.
13. The 1<sup>st</sup> Respondent submits that the Applicant ought to have sued ‘the Legal Representative [s]’ of the estate of Stephen Kinini Wang’ondū.
14. Notwithstanding this misdescription itself the 1<sup>st</sup> Respondent did enter appearance in this matter and appointed the firm of Mahugu Mbarire Advocates to act for it. The 1<sup>st</sup> Respondents then filed a Notice of Preliminary Objection dated 18<sup>th</sup> October, 2022 challenging the locus standi of the Applicant. The Honourable Court delivered a ruling on 27<sup>th</sup> July, 2023 dismissing the Preliminary Objection.



15. The question which would then arise is whether by entering appearance and participating in the suit the 1<sup>st</sup> Respondent is now estopped from raising any objection to the mis-description of itself. Is this a mere technicality which can be cured by reference to Article 159(2) (d) of *the Constitution* of Kenya 2010.
16. In any proceedings the correct party must be sued or named as a Defendant. There can be no legal action against an estate of a Deceased person. The estate is at all times represented by the Executors and/or Administrators and it is they who must be sued.

In *Phares Omondi Okech & 3 others (Suing for and on behalf of Kasgam Community - Wadhari Clan) v Victory Construction Co. Ltd & Kisumu Water & another (2015)* eKLR the Court held as follows:-

“... That the issue of capacity to sue cannot be a matter of procedure as counsel for the plaintiffs submitted to be cured through Article 159 of *the constitution* by the consideration of substantive justice. The lack of capacity cannot be cured by Article 159 of *the constitution* that emphasizes on substantive justice or by applying the oxygen principle under Section 1A, 1B and 3A of the Civil Procedure Act...” [Own Emphasis]

17. The above authority relates to ‘the capacity to sue’ which is not the matter in issue here. The question the court is considering here is the misdescription of the 1<sup>st</sup> Respondent.
18. In the case of *Fubeco China Fushun -vs- Naiposha Company Limited & Others [2014]* eKLR Hon Justice Gikonyo held that:-

“Such misdescription of the plaintiff [or indeed the Defendant] is not factual to the proceedings and does not default a party’s cause of action. In taking this decision the court is guided by the constitutional desire to serve justice which is the very reason why courts have been given unfettered discretion in ordering an amendment in such cases. In order to reflect and have the correct parties before the court I hold and find that this is not the case of a non-existent or faceless entity that would be invariably be incapable of suing or being sued. It is a case of pure misdescription of a party and it is governed by the law on misdescription of parties in a contract.” [own emphasis]

19. There is no doubt that an entity known as the Estate of Stephen Kinini Wang’ondu does exist. The estate is represented by Administrators/Executors who ought to have been sued in that capacity.
20. It is pertinent to note that this Preliminary objection comes rather late in the day. The 1<sup>st</sup> Respondent did enter appearance in the matter and by filing and prosecuting a Notice of Preliminary Objection did proceed to participate in the suit. There can be no doubt that the Preliminary Objection now being raised is an afterthought.
21. Striking out of a suit has been declared to be a draconian measure. Courts ought to aim at keeping a suit alive to allow parties the opportunities to ventilate their cases. In *Uchumi Supermarkets Limited & Another -vs- Sidbi Investments Limited [2019]* eKLR the court of Appeal emphasized that:-

“The striking out of a pleading has time and time again been described as draconian and an order of last resort.”

22. The court is guided by Article 159 (2) (d) of *the constitution* of Kenya 2010 which exhorts court to administer substantive justice without undue regard to procedural technicalities.



21. I find that this misdescription of the 1<sup>st</sup> Respondent is not fatal. The court may and hereby does direct the plaintiff to amend their pleadings.
22. Accordingly I find no merit in this Notice of Preliminary Objection dated 1<sup>st</sup> August, 2023. The Plaintiff's are directed to amend their pleadings to reflect the correct description of the 1<sup>st</sup> Respondent.
23. Costs are awarded to the 1<sup>st</sup> Respondent.

**DATED IN NYERI THIS 6<sup>TH</sup> DAY OF JUNE, 2024.**

.....  
**MAUREEN A. ODERO**

**JUDGE**

