



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KWALE**

**ELC MISC. CIVIL APPLICATION NO. 28 OF 2021**

**(FORMERLY NO. 632 OF 2011 (ORIGINATING SUMMONS))**

HAMISI TSUMA MWERO.....	1 <sup>ST</sup> PLAINTIFF
CHARLES MLOLE SHANGA.....	2 <sup>ND</sup> PLAINTIFF
KACHONGO EDWARD BEKWEKWE.....	3 <sup>RD</sup> PLAINTIFF
JOSEPH BEMWERO KOBO.....	4 <sup>TH</sup> PLAINTIFF
SULEIMAN KALUME KEAH.....	5 <sup>TH</sup> PLAINTIFF
BARAKA KEA BEJIRA.....	6 <sup>TH</sup> PLAINTIFF
SUDI KEAH BEJIRA.....	7 <sup>TH</sup> PLAINTIFF
NYAYE LOYA TUMBIRE (DECEASED).....	8 <sup>TH</sup> PLAINTIFF
MBODZE KALUME.....	9 <sup>TH</sup> PLAINTIFF
MWERO MTOI MLIIJA (DECEASED).....	10 <sup>TH</sup> PLAINTIFF
MWANYIRO TOI MLIZA (DECEASED).....	11 <sup>TH</sup> PLAINTIFF
MICHAEL KOBO NDORIGINATING SUMMONSHO (DECEASED).....	12 <sup>TH</sup> PLAINTIFF
<b>VERSUS</b>	
COLFAX HOLDINGS LIMITED.....	1 <sup>ST</sup> DEFENDANT
COUNTY COUNCIL OF KWALE.....	2 <sup>ND</sup> DEFENDANT

**RULING.**

**INTRODUCTION.**

1. The 1<sup>st</sup> Defendant has filed a Notice of Motion dated 24<sup>th</sup> November 2020 under certificate of urgency for the following orders; -

- 1) That the Applicants be granted vacant possession of Plot No. LR. NO.4526, CR.8727,
- 2) The 1<sup>st</sup> Applicant be declared a stranger to the suit,
- 3) The Court do issue an order expunging the names of the deceased applicants herein,

4) The Amended ORIGINATING SUMMONS be strike out for being incurably defective and bad in law.

5) Costs of the Originating Summons be borne by the applicants.

The main ground for the certificate of urgency is that the 1st Defendant being the legal proprietor of the suit continues to suffer irreparable damage having been kept out of the suit property and also further delaying development plans scheduled for the area.

2. Since directions had been adopted under order 37 to treat the suit as if it were commenced by plaint and for clarity, this Court for the purpose of this ruling shall refer to the Applicants under the instant Notice of Motion as Defendants/Applicants and the other parties as Plaintiffs/Respondents.

3. The application is premised on the grounds set out on its face and supported by the affidavit of Harji Govind Ruda a director of the 1<sup>st</sup> Defendant/Applicant, sworn on the 24<sup>th</sup> November 2020. It is contended that the 8<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Plaintiffs are deceased and cannot therefore apply for adverse possession. That the Court confirmed vide site visit and ruling delivered on 3<sup>rd</sup> April 2014 that the 1<sup>st</sup> Plaintiff who purports to claim on behalf of the other non-existent Plaintiffs does not reside on the suit property. That Hamisi Tsuma Mwero, Kachungo Edward Bekwekwe, Charles Mulole Shanga have filed different suits over different parcels of land claiming adverse possession, which raises doubt over which parcels of land they were living in.

Copies of burial permits and pleadings in ELC No.302, 405 of 2017, 273 of 2017, 39 of 2019 and ELC constitutional Petition No.18 of 2016 were provided.

4. It is also urged that the Amended ORIGINATING SUMMONS in the absence of a supporting affidavit is a nullity, cannot be used to assert a claim for the suit property and should be struck out. Moreover, both the ORIGINATING SUMMONS and amended ORIGINATING SUMMONS are based on falsehoods and material non-disclosure. It is also pointed that the Plaintiffs have not been keen in prosecuting the matter. That the application should be allowed to uphold the dignity of the Court and in the interests of justice.

5. The application is opposed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 9<sup>th</sup> Plaintiffs/Applicants by way of grounds of opposition dated 24<sup>th</sup> November 2020.

#### **SUBMISSIONS**

6. Leave was granted for this application to be canvassed by way of written submissions. The Defendants filed theirs on dated 20<sup>th</sup> May 2021 and the Plaintiff 12<sup>th</sup> July 2021.

#### **Defendants/Applicant case**

7. Mr. Borona argued there was lack of diligence on the part of the Plaintiff in prosecuting the matter and were in clear breach of the Court ruling and orders issued on 26<sup>th</sup> July 2020. That the amended ORIGINATING SUMMONS was not properly on record having included the deceased Plaintiffs. Being an independent pleading, a fresh supporting affidavit ought to have been filed in support thereto, yet no justifiable explanation has been furnished for this failure.

8. Provisions of Order 24 Rule 3 have been cited as to the requirement for substitution of a deceased party with their legal representative within one (1) year, in default of which the suit as against the deceased party should abate. It is contended that no such application has been made and no reasons have been advanced as to why the suit should not be considered as having appropriately abated.

9. Counsel further moved the Court to invoke its inherent power under Order 2 Rule 15(1) to strike out the ORIGINATING SUMMONS since it may prejudice, embarrass or delay the fair trial of the action as demonstrated by the lack of diligence which was prejudicial to the Defendant. Further that while the powers to strike ought to be exercised sparingly, clearly the Plaintiffs had intentionally included the deceased despite the earlier court ruling on the same issue.

10. Based on the definition of locus standi as given in **Ernest Chaba & Another Vs. Jane Mboga Aniale (2018) eKLR** Counsel urged that the 1<sup>st</sup> Plaintiff lacked locus to sue in this case since he was not and has never been in possession of the suit property, evident in the ruling of Justice Mukunya herein.

#### **Plaintiff's submissions**

11. Mr. Asige Counsel for the Plaintiffs reiterated the grounds of opposition filed herein and submitted on each as follows; -

1) The Court has no jurisdiction and cannot grant vacant possession of the suit property without a trial and full hearing of the suit. This would amount to a final determination of the Originating Summons. This prayer was intended to circumvent and short circuit a trial before the determination of the matter.

2) The Court cannot declare the 1<sup>st</sup> Applicant herein the 1<sup>st</sup> Plaintiff, a stranger to the suit property without evidence and appropriate lawful application for the same reasons as advanced above.

3) The Court cannot issue an order expunging the names of the deceased herein since the Court has already expressed itself on the same in the ruling dated 29<sup>th</sup> July 2020, where clear directions were made on what was to be done.

4) The Amended Originating Summons filed on 26<sup>th</sup> August 2020 is regular and lawful pursuant to the Order made in the Ruling of the Court herein. The Originating Summons is not defective or incurably defective and upon the admission made in the current Notice of Motion, the Originating Summons as amended ought to be granted by the Court. Counsel further urged that this prayer was not founded on any provision of the law or precedent, the defects were not highlighted. That Mr. Borona's advice to his client was mistaken.

5) The Notice of Motion is frivolous, vexatious, and scandalous and an abuse of the court process and should be dismissed.

12. It is further submitted that Order 37 which is the foundation of pleadings commenced by Originating Summons has no requirement for an amended Originating Summons to be supported by an affidavit. Moreover, the nature, content and form of an amended Originating Summons is not given by the 1<sup>st</sup> Defendant.

13. It is Counsels view that the affidavit in support of the Notice motion herein offended Order 9 Rule 2(c) as it was not backed with any authority of the 1<sup>st</sup> Defendant under Seal and ought to be struck out and the Motion dismissed additionally on this ground.

## ANALYSIS AND DETERMINATION

14. I have considered the Motion, its supporting affidavit and Counsels submissions thereto as well the grounds of opposition, Originating Summons and the rival submissions. I have also had occasion to study the history of this file including the ruling delivered herein on 29<sup>th</sup> July 2020.

15. The key issues are whether the suit has abated in respect of the deceased Plaintiffs; whether Orders for vacant possession can be granted at interlocutory stage; Whether the Originating Summons is incurably defective for want of a supporting affidavit.

16. The ruling delivered on 29<sup>th</sup> July 2020 was in respect of the Notice of Motion dated 14<sup>th</sup> June 2018 brought by the Plaintiffs and has been heavily relied upon by the 1<sup>st</sup> Defendant. I'm therefore inclined to recap the relevant prayers as they relate to the instant Motion. These were, expunging the 16<sup>th</sup> Applicant and all others who had withdrawn from the pleadings and striking out the Originating Summons as it had abated. It is here that disclosure of the demise of the 11<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Plaintiffs was made and admitted by the 2<sup>nd</sup> Plaintiff. The Court in its ruling made orders expunging the names of 16<sup>th</sup>, 5<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 17 Plaintiffs from the suit. It is noteworthy that the 16<sup>th</sup> Plaintiff had sworn an affidavit in support of his removal and the rest of the plaintiffs whose names were removed had filed notices of withdrawal. Parties were to amend their pleadings within 30 days of the date of the ruling. Relying on the principles laid out in **DT Dobie & Company (Kenya)Ltd Vs Muchina (1982) KLR** that a court should aim at sustaining rather than terminating a suit unless it was beyond redemption and incurably defective– the Court declined to strike out the suit.

17. Indeed there are similarities with some of the prayers being sought in the current Motion. The instant Motion seeks for an order expunging the names of the deceased applicants herein and to declare the suit abated. The Court in the previous ruling clearly declined to grant this prayer. It is the defendants contention that the 8<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> Plaintiff are deceased and cannot therefore apply for adverse possession. In my view this is a matter for determination at the main suit as long as we still have Plaintiffs who are surviving and have not withdrawn from this case. I therefore note that this matter has already been canvassed under the previous application, including the issue of the suit abating and the best I can do is to reiterate that parties should amend their pleadings appropriately. I hereby invoke the Courts inherent powers under Sec. 3A of the Civil Procedure Act and extend the time for parties to comply with the orders of the Court issued on 29<sup>th</sup> July 2020.

18. Can the order for vacant possession of Plot No. LR. NO.4526, CR.8727, to the 1<sup>st</sup> Defendant be granted at interlocutory stage as prayed by the Defendant in this application? Each party must have its day in court and as long as there are still parties on both sides of the suit, each must be given an opportunity to tender evidence in support of their respective cases. Each party also shall have an opportunity to test the evidence in cross examination. This court shall stand for the dictates of substantive justice and hear both parties on merit. The same principles advanced in the case of DT Dobie as to issuance of a mandatory injunction to the extend that it amounts to a final determination of the case should apply in this instant. I therefore find the orders sought can only be given upon this court hearing the parties at a full hearing herein.

19. The Court has also been urged by Counsel to the 1<sup>st</sup> Defendant to declare the 1<sup>st</sup> Applicant (Plaintiff) a stranger to the suit. The basis is that the Court confirmed vide site visit and ruling delivered on 3<sup>rd</sup> April 2014 that the 1<sup>st</sup> Plaintiff does not reside on the suit property. I have perused the proceedings of the court of the 3<sup>rd</sup> April 2014. On that date the Court delivered a ruling on status quo. In my view a site visit goes along way into assisting the court familiarize with the locus in quo. No hearing takes place during a site visit. To use the courts observations to strike out a party would be in my view condemning the party without being heard. For the same reasons I have given in declining to grant the orders for vacant possession, I also decline this prayer.

20. Is the amended ORIGINATING SUMMONS incurably defective and bad in law to warrant its striking out? Counsel for the Plaintiffs has submitted that in the absence of a specific requirement for a supporting affidavit to accompany an amended ORIGINATING SUMMONS under order 37, the amended ORIGINATING SUMMONS should be strike out on this basis. I have considered the provisions of Order 37 and requirement for supporting affidavit to an ORIGINATING SUMMONS is emphasized. I note from the court file that there is annexed to the amended ORIGINATING SUMMONS an amended affidavit sworn on the 8<sup>th</sup> August 2016 and received by the court registry on 9<sup>th</sup> August 2016. For this reason and the need to uphold substantive justice as against technicalities as envisaged in article 159 (2) (d) of the Constitution, this prayer must fail.

21. The upshot of the foregoing is that the Application is dismissed. Costs shall follow the event.

**DATED AND DELIVERED THIS 29<sup>TH</sup> DAY OF NOVEMBER 2021**

**JUSTICE ADDRAYA E. DENA**

**JUDGE ENVIRONMENT AND LAND COURT**

**KWALE**