



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC No. 64 OF 2015

LABAN MASINJILA1ST PLAINTIFF

HARRIET MASINJILA (Suing as a legal representative of the estate of

CLEMENT MASINJILA).....2ND PLAINTIFF

JOSEPH MAKARIOS MASINJILA (Suing as a representative of the late

BARNABAS AMBUTSI MASINJILA (DECEASED)).....3RD PLAINTIFF

VERSUS

JOSHUA ANDALA MASINJILA.....1ST DEFENDANT

DANIEL MWISUNJI MASINJILA.....2ND DEFENDANT

ZABLONI ANYULA WILIMISI.....3RD DEFENDANT

RULING

1. This ruling is in respect of two applications: Notice of Motion dated 10th June 2021 and Notice of Motion dated 25th June 2021.
2. Notice of Motion dated 10th June 2021 was filed by the first and second plaintiffs and seeks the following orders:
 - (a) *This Honourable Court be pleased to order that the 1st defendant Joshua Andala Masinjila, who is now deceased, be substituted by Robai Khanyerere, the widow of the 1st defendant.*
 - (b) *The costs of this application be in the cause.*
3. The application is supported by an affidavit sworn by the first plaintiff. He deposed that the 1st defendant passed away in May 2018 and that he issued a citation against Robai Khanyerere in Kakamega CM Citation Cause No. 7 of 2019 and that the subordinate court granted letters of administration to Robai Khanyerere in her absence. He annexed a copy of a ruling dated 5th May 2021.
4. Notice of Motion dated 25th June 2021 was filed by the third plaintiff and seeks the following orders:
 1. *This Honourable Court be pleased to Order that the 2nd defendant DANIEL MWISUNJI MASINJILA, who is now deceased be substituted by ROSELYNE SHITALI NAMUTALI, the widow of the 2nd defendant.*
 2. *The costs of this application be in the cause.*
5. The application is supported by an affidavit sworn by the third plaintiff. He deposed that Daniel Mwisunji Masinjila passed away in November 2016 and that he filed Kakamega High Court Misc. Succession Cause No. 9 of 2017. That the High Court granted letters of administration of the estate to Roselyne Shitali Namutali through a ruling dated 8th May 2019, a copy of which he annexed.

6. Roselyne Shisiali Amutabi opposed Notice of Motion dated 25th June 2021 a replying affidavit in which she deposed that the application ought to be struck out since she is not named as a party to it. She added that she cannot be said to be liable for the alleged fraud averred in the plaint against Daniel Mwisunji Masinjila and that any order made in the suit would affect the estate of Daniel Mwisunji Masinjila and not her.

7. In regard to Notice of Motion dated 10th June 2021, Robai Khayeleli filed a replying in which she deposed that Joshua Andala Masinjila was her husband and added that she is old, sickly and weak thereby unable to bear the obligations that go with litigation. That she does not have any information regarding the dispute and the subject parcel of land. She added that she cannot be said to be liable for the fraud alleged in the plaint against her late husband and that any order made in the suit would affect the estate of her late husband and not her.

8. The applications were canvassed through written submissions. The applicants referred to the citation proceedings as well as the orders made therein and urged the court to allow the applications.

9. In their joint submissions, Robai Khayeleli and Roselyne Shisiali Amutabi argued that orders made in the citation proceedings did not make them administrators of the respective estates since no substantive cases were filed. They further argued that the orders sought cannot be issued since the claims against the respective estates abated. They urged the court to dismiss the applications.

10. I have considered the applications, the affidavits and the submissions. The issues for determination are whether Robai Khayeleli and Roselyne Shisiali Amutabi are not parties to the applications and whether the orders sought should issue.

11. A reading of both applications shows that Robai Khayeleli and Roselyne Shisiali Amutabi were specifically mentioned in the prayers. They responded to the applications through replying affidavits and submissions. It must be remembered that they are not parties to the suit thus far. It suffices that they were mentioned in the prayers and that they were given an opportunity to be heard, which opportunity they seized and fully utilized. To insist that they ought to have cited in the title of the case would not only be absurd but would also be contrary to the overriding objective of the court which is to facilitate the just, expeditious, proportionate and accessible resolution of disputes without undue regard to technicalities See **Coast Development Authority v Adam Kazungu Mzamba & 49 others [2016] eKLR**. I therefore hold that Robai Khayeleli and Roselyne Shisiali Amutabi are parties to the present applications.

12. The applicants in both applications contend that the parties they want substituted are deceased. The material availed in support of Notice of Motion dated 10th June 2021 include a ruling delivered on 5th May 2021 in Kakamega CM Citation Cause No. 7 of 2019 in which it is stated that the 1st defendant herein passed away in May 2018. As regards Notice of Motion dated 25th June 2021, the third plaintiff who is the applicant in the said application deposed in the affidavit in support of the application that the 2nd defendant herein passed away in November 2016.

13. Notice of Motion dated 10th June 2021 was filed on 14th June 2021, over three years after the 1st defendant passed away. On the other hand, Notice of Motion dated 25th June 2021 was filed on 5th July 2021, over four and a half years after the 2nd defendant passed away. In view of the provisions of **Order 24 Rule 4 (3)** of the **Civil Procedure Rules**, the suit against the 1st defendant abated in June 2019 while the suit against the 2nd defendant abated in December 2017. The effect of abatement of a suit is that it brings proceedings against the deceased party to a close in the same way that a judgment would. The finality is such that in terms of **Order 24 Rule 7 (1)** of the **Civil Procedure Rules**, no fresh suit can be brought on the same cause of action.

14. The applicants herein have not sought reinstatement or revival of the abated suits even after Robai Khayeleli and Roselyne Shisiali Amutabi raised the issue of abatement. A court of law does not issue orders in vain. It would be futile to order substitution of the first and second defendants herein yet the suits against them are abated. Such an order would be a nullity. Even if reinstatement had been sought, the applicants would have had to satisfy the court that they deserve an order of revival.

15. In view of my finding that the suits against first and second defendants are abated, the orders sought in Notice of Motion dated 10th June 2021 and Notice of Motion dated 25th June 2021 cannot issue. I dismiss both applications. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF DECEMBER 2021.

D. O. OHUNGO

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

MR MACHAFU FOR THE 1ST AND 2ND PLAINTIFFS

MS ODECK HOLDING BRIEF FOR MR AMBUTSI FOR THE 3RD PLAINTIFF

MR MUKAVALE FOR THE 1ST AND 2ND DEFENDANTS

MR MINISHI HOLDING FOR THE 3RD DEFENDANT

COURT ASSISTANT: E. JUMA