



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 212 OF 2017

(Formerly Kisii HCC No. 82 of 2010)

SAMWEL OKACH ANDINGLI.....PLAINTIFF/RESPONDENT

VERSUS

ODODA ERICK MIYOGI, sued as the legal

Administrator of the Estate of YUNIA AOKO MIYOGI.....DEFENDANT

AND

JOSHUA OKUMU MIYOGI.....APPLICANT

RULING

1. On 2nd April, 2019, the defendant(applicant) through the firm of Osiemo Wanyonyi and Company Advocates filed an application dated 1st April, 2019 under Order 2 Rule 15 (a), Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act (Chapter 21 Laws of Kenya) against the plaintiff(respondent). He is seeking two (2) orders that:-

i. This suit be struck out as it discloses no reasonable cause of action against the defendant.

ii. Cost of the suit and application to the defendant/applicant

2. The application is anchored on grounds (a) to (i) on it's face which include that by a ruling dated 17th January 2011 the court (Asike – Makhandia J, as he then was) completely and definitively pronounced itself on all the issues which are capable of being framed for trial and that the decision remains unchallenged. That the application is brought in the interest of justice and the promotion of overriding objective of the court.

3. The respondent through M/s Oguttu, Ochwangi, Ochwal and Company Advocates, opposed the application by way of statement of grounds of opposition dated 16th July, 2019 which I need not reproduced herein. Simply put, the respondent termed the application an abuse of the court process, non suited, does not disclose any reasonable cause and devoid of merits as it has been mounted by a stranger without requisite locus standi. That the purported applicant is deceased since 2016 hence the application is alien, misconceived and untenable as the same has been filed by a busy body.

4. On 2nd April, 2019, this court directed that the application be canvassed by way of written submissions pursuant to **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 (a) and (b) of the Environment and Land Court Practice Directions, 2014**. Accordingly, learned counsel for the applicant and learned counsel for the respondent filed submissions dated 30th May 2019 and 16th July, 2019 respectively.

5. Learned counsel for the applicant submitted that the respondent's suit does not disclose any reasonable cause of action against the applicant and urged this court to strike it out. Counsel principally emphasized the grounds of the application and relied on **Order 2 rule 15 (1) (a) and (2) of the Civil Procedure Rules, 2010** as well as the case of **Kivanga Estate Ltd -vs- National Bank of Kenya (2017) eKLR**, to buttress his submissions.

6. Learned counsel for the respondent submitted on four (4) issues for determination including whether the applicant has the requisite locus standi to move the Honourable court and whether the application is merited in law for grant of orders sought therein. Counsel asserted, inter alia, that the purported applicant, Mr. Joshua Okumu Miyogi, died sometimes in the year 2016 hence has no locus standi in this matter. That before his death, the purported applicant was the administrator of the estate of Yunia Aoko Miyogi (deceased) who was the original defendant in the main suit. That a grant of letters of Administration in respect of the estate of Yunia Aoko Miyogi (deceased) was issued to

Mr. Ododa Erick Miyogi in Migori CMCC Succession number 200 of 2017 on 18th December 2017.

7. Counsel further asserted that the application lacks merit in law and the purported applicant can not get the orders sought. That the entire application be struck out to pave way for hearing of the main suit on merits. Reliance thereof was made on the decisions in **Isaya Masira Momanyi –vs- Daniel Omwoyo and another (2017) eKLR and Johana Nyokwoyo Buti –vs- Walter Rasagu Omariba** (suing through his Attorney Bentah Onsomu Rasugu and 2 others) (2011) eKLR.

8. I have thoroughly considered the entire application, the grounds of opposition and submissions by both counsel. I embrace the issues, in the respondent's submissions and condense them into whether the applicant has the requisite locus standi to mount the instant application and whether the orders sought therein are merited.

9. On the issue of locus standi, the application is based on the grounds, among others, that the suit by way of an amended plaint dated 15th May 2013 is against the defendant/applicant namely Joshua Okumu Miyogi. That there is no substantive amendment to the plaintiff's/respondent's claim capable of redefining his cause of action.

10. On his part, the respondent contended that the said applicant is deceased since 2016 and could not give out instructions from the grave. It is so discernable from grounds 2 and 3 of his statement of grounds of opposition.

11. Moreover, it is quite clear from grounds (g) and (h) on the face of the notice of motion dated 28th March 2019 for substitution of the defendant that the purported applicant herein is deceased. In his affidavit sworn on even date in support of the said motion, the respondent herein averred at paragraphs 8 and 9 averred thus :-

a) THAT nevertheless, the said Joshua Okumu Miyogi, passed on sometimes in the year 2016.

b) THAT be that as it may, on the 18th day of December 2017, fresh Grant of Letters of Administration Ad Litem was issued to the interested party/administrator herein. Annexed hereto and marked "SOA 3" is a copy of said grant.

12. The proceedings of 2nd April, 2019 herein plainly show that learned Counsel, Esther Angawa holding brief for Osiemo Wanyonyi for the defendant did not object to the motion dated 28th March 2019. Thus, the said motion was allowed accordingly.

13. It has emerged from the foregoing that the purported applicant is deceased. So, is he is the legal representative of the estate of the original defendant, Yunia Aoko Miyogi, deceased?

14. I take into account the definition of the term legal representative under **Section 2 of the Civil Procedure Act (Cap 21 Laws of Kenya)**. The powers of personal representatives are set out under **section 82 of the Law of Succession Act (Chapter 160 of the Laws of Kenya)** and as noted by Mutungi J in **Isaya Masira momanyi case (supra)**.

15. It is trite law that the estate of the deceased person is vested in the legal representative; see also the case of **Trouistik Union International and another –vs- Jane Mbeyu and another (1993) eKLR**.

16. I am aware of the provisions of **Order 3 Rule 9 of the Civil Procedure Rules, 2010** on declaratory judgment and that the court has discretionary powers to strike out pleadings. There are clear laid down guiding principles thereof under **Order 2 rule 15 of the Civil Procedure Rules, 2010** which provides that :-

“At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that-

a) It discloses on reasonable cause of action or defence in law; or

b) It is scandalous, frivolous or vexatious; or

c) It may prejudice, embarrass or delay the fair trial of the action; or

d) It is otherwise an abuse of the process of the court.” (Emphasis laid)

17. In the instant application, the applicant ceased to be a legal representative of the estate of the deceased original defendant, Yunia Aoko Miyogi upon his death as revealed in the record herein. To that end, the purported deceased applicant Joshua Okumu Miyogi lacked standi ab initio to institute this application. The statement grounds of opposition thereto is solid and sound. Thus, the orders sought in the application are not available in the circumstances.

18. Accordingly, I strike out the application dated 15th April, 2019 in it's entirety.

19. Costs of the application be in the cause.

DELIVERED, DATED and SIGNED at MIGORI this 17th day of SEPTEMBER 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. P. Ochwangi Learned counsel for the plaintiff/respondent

Tom Maurice – Court Assistant.