

07.04.2021. He further stated that alongside his mother Rupri Dogra, they were appointed as the executors of his father's will dated 21.11.2024. The court in Nairobi High Court Succession Cause No. E1235 of 2022 subsequently issued a certificate of confirmation of grant on 12.03.2024. That after the confirmation of the grant, the suit property LR No. 2855/VI/MN was transferred to Rupri Dogra as indicated in the certificate of postal search dated 20.03.2025. It was contended that the suit was filed against a deceased defendant thereby rendering it a nullity. It was argued that a suit is fatally defective and cannot be cured by an amendment.

B. The plaintiff's application

3. By a notice of motion dated 02.06.2025 filed pursuant to *Sections 3, 13 (1) (2 d & e) and (5) of the ELC Act and Order 8 Rules 3, 4 and 5 of the of the Civil Procedure (Amendment) Rules 2020 and all other enabling provisions of the law*, the plaintiff sought leave to amend the originating summons dated 15.03.2024.
4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Peter Muriungi on 02.06.2025. The deponent contended that at

the time of filing the suit, he was not aware that the defendant was deceased and that he only became aware of this through the application dated 24.04.2025. He argued that at the time of filing the suit he genuinely believed the defendant was alive since he was the registered owner of the suit property as per the certificate of postal search dated 12.10.2023. He urged the court to allow him to amend the summons to substitute the deceased with his executors and proceed with the suit to its logical conclusion.

C. Directions on Submissions

5. When the application was listed for *inter partes* hearing it was directed that both applications shall be disposed of simultaneously by way of written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The defendant filed submissions dated 03.06.2025 in support of his application whereas the plaintiff had not filed any submissions by the time of writing this ruling.

D. Issues for determination

6. The court has perused the applications, the response thereto and the material on record as well as the submissions made by

counsel. The court is of the view that the following key issues arise for determination herein:

- a. Whether the suit ought to be struck out for being a nullity.*
- b. Whether the plaintiff should be granted leave to amend the originating summons.*
- c. Who shall bear the costs of the applications.*

E. Analysis and determination

a. Whether the suit ought to be struck out for being a nullity

7. On the first issue, it is trite law that a suit against a deceased person is a nullity from inception. In this case it has been established that Parmindar Singh Dogra died on 07.04.2021. Three years later the plaintiff filed an originating summons dated 15.04.2024 seeking to acquire by way of adverse possession Plot No. 2855/VI/MN. The court in *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others* [2018] eKLR held:

“It is common ground that the 7th defendant was not alive when the suit was filed against him. It is also inconceivable how a party who is deceased can instruct counsel and that counsel takes over instructions from a non-existent person. It follows therefore any action including the filing

of the plaint, the extraction of the summons; the entering of appearance and filing of the defence were a nullity. The cases cited by counsel for the plaintiffs include, Benjamin Leonard Mc foy vs. United Africa Company Limited [1961] All ER 1169. In that case the court stated as follows,

“If an Act is void, then it is in Law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void 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.”

b. Whether the plaintiff should be granted leave to amend the originating summons

8. The plaintiff's suit has been declared a nullity by the court for being brought against a deceased person. The attempt by the plaintiff to amend his originating summons to substitute Parmindar Singh Dogra with his executors is untenable. The plaintiff's suit against the deceased cannot be sustained even by amendment. It is immaterial that the same was brought in good faith and in ignorance of the death of Parmindar Singh Dogra. The

court cannot join the deceased's legal representatives into the plaintiff's suit which was filed after his death hence the application for amendment is declined.

c. Who shall bear the costs of the applications

9. Regarding the issue of costs, the general rule is that costs shall follow the event in accordance with the proviso to *Section 27 of the Civil Procedure Act (Cap 21)*. A successful party should ordinarily be awarded the costs of an action unless the court, for good reason, directs otherwise. However, since the suit was incompetent for being brought against a deceased defendant the latter is not entitled to costs.
10. The upshot of the foregoing is that the court finds and holds that the defendant's application dated 24.04.2025 is merited while the plaintiff's application dated 02.06.2025 is unmerited. Accordingly, the court shall make the following orders for disposal thereof;
- a) The entire suit is hereby struck out for being a nullity.*
 - b) The plaintiff's notice of motion dated 02.06.2025 is hereby dismissed.*
 - c) There shall be no order as to costs on the suit and the applications.*

Ruling dated and **signed** at **Mombasa** and **delivered** virtually via Microsoft Teams on this 4th **day** of December **2025**.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

No appearance for the plaintiff

Ms. Nzisa for the defendant

ORIGINAL