

RUPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA  
ELCC NO. 31 OF 2019

ESTHER  
.....PLAINTIFF

NZINGO  
KALUME

VERSUS

LUCY NYAMBURA  
DEFENDANT

AND

THE ESTATE OF WOBBE SVEND ERIK (DECEASED) .....  
INTERESTED PARTY

**RULING**

*[NOTICE OF MOTION DATED 20<sup>TH</sup> AUGUST 2025]*

1. The defendant filed the notice of motion dated 20<sup>th</sup> August 2025 seeking for inter alia:
  - a. *Striking out of the further amended plaint dated 1<sup>st</sup> July 2025 for being an abuse of court process, scandalous, frivolous, and vexatious in form and content.*
  - b. *Judgement be entered in favour of the defendant.*
  - c. *Costs.*

The application is premised on the ten (10) grounds on its face and supported by the affidavit of Lucy Nyambura, defendant, in which she among others deposed that after the plaintiff's application dated 4<sup>th</sup> June 2025 seeking to have Rashid

Odhiambo Oyinga substitute the plaintiff, was allowed on 19<sup>th</sup> June 2025, a further amended plaint dated 1<sup>st</sup> July 2025 was served upon her on 4<sup>th</sup> August 2025; that the further amended plaint introduced an entirely new cause of action contrary to the order of 19<sup>th</sup> June 2025; that the further amended plaint is therefore an abuse of the process of the court, scandalous, frivolous, and vexatious in form and content, and cannot be cured by Article 159 of the Constitution.

2. The application is opposed by the plaintiff through the replying affidavit of Harrison Muriithi, advocate, sworn on 23<sup>rd</sup> September 2025, in which he inter alia deposed that the suit was commenced through the plaint dated 25<sup>th</sup> February 2019; that in compliance with the court ruling of 10<sup>th</sup> May 2021, to strike out the name of Estate of Wobbe Svend Erik, 1<sup>st</sup> defendant, the amended plaint dated 24<sup>th</sup> May 2021 was filed; that the defendant's amended statement of defence dated 16<sup>th</sup> August 2021 was then filed on 6<sup>th</sup> October 2021; that on application and vide the ruling of 14<sup>th</sup> April 2022, the defendant introduced the Estate of Wobbe Svend Erik, as interested party vide a further amended defence dated 9<sup>th</sup> May 2022 and filed on 12<sup>th</sup> May 2022; that following the death of the plaintiff, the court allowed she be substituted with Rashid

Odhiambo Oyinga as the legal representative and a further amended plaint dated 1<sup>st</sup> July 2025 was filed; that the plaintiff has all through never sought to change the trajectory of the suit, and the defendant's application is unfounded and should be rejected.

3. The learned counsel for the defendant and plaintiff filed their submissions dated the 16<sup>th</sup> October 2025 and 20<sup>th</sup> October 2025 respectively, which the court has considered.

4. The application dated 20<sup>th</sup> August 2025 and the reply thereto raises the following issues for the court's determinations:

*a. Whether the further amended plaint dated the 1<sup>st</sup> July 2025 introduced a new cause of action.*

*b. Whether the further amended plaint is an abuse of court's process.*

*c. Who pays the costs?*

5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel, the record and come to the following findings:

a. After perusing the grounds on the notice of motion, the affidavit evidence and submissions for and against, I have found it necessary to trace a history of the parties' pleadings so as to appreciate the cause of action at

initiation and every other stage along the way. That way, it will be easier to see the previous challenges on the pleadings, applications made and rulings thereof.

b. The record confirms that Esther Nzingo Kalume commenced this suit through the plaint dated 25<sup>th</sup> February 2019, suing on her own behalf and on behalf of the Estate of Kavumbi Kalume Kitsaumbi, deceased. She sued the administrator of the Estate of Wobbe Svend Erik, deceased as 1<sup>st</sup> defendant and Lucy Nyambura as the 2<sup>nd</sup> defendant. It is crystal clear that prayers (1) & (2) for a declaration that the 1<sup>st</sup> defendant had abandoned and breached the lease agreement dated 30<sup>th</sup> November 2007, and order directing 1<sup>st</sup> defendant to pay plaintiff Kshs.86,400 being unpaid rent, were against the 1<sup>st</sup> defendant. Prayers (3) to (6) for declaration that 2<sup>nd</sup> defendant was unlawfully and illegally in occupation of subdivision No. 4595 (Original No. 3843/4) Section 111/MN, permanent injunction from remaining or continuing in occupation of the said land , general damages for trespass and order directing 2<sup>nd</sup> defendant to vacate were against the 2<sup>nd</sup> defendant. The last prayer was for costs and interests. The 2<sup>nd</sup> defendant (Lucy

Nyambura) filed a statement of defence and counterclaim dated 26<sup>th</sup> April 2019, denying the claim and counterclaiming that she is the eligible heir of Wobbe Svend Erik, as a daughter of the deceased, and prays for an entry to be made in the certificate of title for Subdivision No.45595 (Original No. 3843/4) Section 111/MN, CR. 33346/7 on the encumbrance section to reflect the existing list [sic] of 99 years from 1<sup>st</sup> January 2008. The plaintiff filed a defence to the counterclaim dated 10<sup>th</sup> May 2019 inter alia averring she is a stranger to the 2<sup>nd</sup> defendant claim that she is the eligible heir of Wobbe Svend Erik, and disputed that she had any legally recognisable claim over the plaintiff's property to warrant entering of the encumbrance. The plaintiff prayed for the counterclaim to be dismissed with costs.

- c. The record further confirms that the 2<sup>nd</sup> defendant filed the notice of motion dated 13<sup>th</sup> November 2020 seeking for entire suit to be struck out for being incompetent. The plaintiff opposed the application through the replying affidavit sworn on the 16<sup>th</sup> December 2020. The application was heard and vide the ruling delivered by

Justice Sila Munyao on 10<sup>th</sup> May 2021, the court inter alia directed as follows:

*“10. I cannot however strike out the suit against the 2<sup>nd</sup> defendant. she has been sued in her own capacity, and it is indeed the position of the plaintiff that she is a trespasser, who has no right to reside in the suit premises. The suit against the 2<sup>nd</sup> defendant is therefore competent and is one that can proceed to full hearing on merits. The burden will of course be on the plaintiff to prove that the 2<sup>nd</sup> defendant is a trespasser and in illegal occupation and the 2<sup>nd</sup> defendant will have a chance to demonstrate that she is legally in occupation of the suit property. those are issues that will go to trial for determination and I would not wish to say much at this stage.*

*11. Thus, save that I order the striking out of the name of the 1<sup>st</sup> defendant and any claim said to be against “The Administrator of the Estate of Wobbe Svend Erik”, and order the amendment of the plaint to reflect that position, I find nothing incompetent*

*against the rest of the suit and I am unable to strike out the whole suit.”*

The plaintiff in compliance with the above ruling filed the amended plaint dated 24<sup>th</sup> May 2021 essentially deleting the 1<sup>st</sup> defendant from the heading and paragraphs (3), (4), (5) to (10) and prayers (1) & (2) of the plaint that related to the 1<sup>st</sup> defendant. The plaintiff also deleted the words *(Suing on her own behalf and on behalf of the Estate of Kavumbi Kalume Kitsaumbi (Deceased))* that appeared after her name at the heading leaving her as the one suing in her own right/name against Lucy Nyambura as the only defendant.

d. That vide the notice of motion dated 9<sup>th</sup> September 2021, the defendant applied to have the estate of Svend Erick Wobbe as a party in the suit, as she had obtained a limited grant in the said estate. The application was heard and determined through the ruling delivered by Justice Sila Munyao on 14<sup>th</sup> April 2022, in which the court inter alia held that:

*“6. The plaintiff has not filed anything to oppose the motion. 7. I have considered it. It will be noted that the plaintiff is the lessor of the suit premises. The 2<sup>nd</sup>*

*defendant is an occupant and she claims to derive her right to occupancy from the claim that she is a daughter to the lessee. The lessee is deceased and but there is now an administrator of his estate. The situation here is akin to that of a lessor suing an occupant, and the lessee seeks to be joined to that suit, on the basis that he has interest in the disputed property. I am persuaded that the lessee would be an interested party to such dispute and would be permitted to adduce evidence either in favour of or against the defendant. It is on that reasoning that I allow this application. I direct that the applicant be joined to this suit as interested party. For avoidance of doubt, the applicant is neither plaintiff nor defendant and will not therefore be filing any pleadings but will be permitted to adduce evidence in the suit. If the applicant feels that she has a claim of her own, the avenue is for her to file a fresh suit. There is also liberty for the plaintiff to seek to sue the applicant if at all the plaintiff feels she has a cause of action against the applicant.”*

That pursuant to the directions of the court the defendant filed the further amended statement of defence and amended counterclaim dated the 9<sup>th</sup> May 2022 inter alia adding “The Estate of Wobbe Svend Erik, (Deceased)” as the Interested Party.

e. The plaintiff then moved the court through the notice of motion dated 4<sup>th</sup> June 2025 seeking inter alia to have the time to substitute the deceased plaintiff extended and Rashid Odhiambo Oyinga be substituted as the legal representative for the plaintiff. The defendant did not file any documents in opposition and was allowed on 19<sup>th</sup> June 2025 as prayed. The court further directed the amended plaint be filed and served in seven days and parties were granted 30 days to file and exchange any additional statements/documents with corresponding leave to reply upon service. In compliance the plaintiff filed on 4<sup>th</sup> August 2025 the further amended plaint dated 1<sup>st</sup> July 2025. I have perused the said further amended plaint dated 1<sup>st</sup> July 2025 and compared it to the amended plaint dated 24<sup>th</sup> May 2021 and contrary to the claim by the defendant, I have not seen any pleadings or prayers that connotes a change or variation in the cause

of action. The only change noticeable is on the heading where the name of Esther Nzingo Kalume is deleted as the plaintiff and replaced with the name of Rashid Odhiambo Oyinga as the plaintiff.

- f. From the summary of the history of the parties' pleadings as set out above, it should be obvious to all that the defendant's onslaught on the plaintiff's suit vide her notice of motion dated 13<sup>th</sup> November 2020 seeking for entire suit to be struck out for being incompetent, was unsuccessful as it was dismissed vide the ruling delivered by Justice Sila Munyao on 10<sup>th</sup> May 2021. The court at paragraph 11 of the said ruling held that:

*"11. Thus, save that I order the striking out of the name of the 1<sup>st</sup> defendant and any claim said to be against "The Administrator of the Estate of Wobbe Svend Erik", and order the amendment of the plaint to reflect that position, I find nothing incompetent against the rest of the suit and I am unable to strike out the whole suit."*

It is a fact that the plaintiff's pleadings in respect of the cause of action has not changed since the filing of the amended plaint dated the 24<sup>th</sup> May 2021 in compliance to

the ruling of 10<sup>th</sup> May 2021. That as I observed herein above the said amended plaint primarily deleted the 1<sup>st</sup> defendant from the heading and paragraphs (3), (4), (5) to (10) and prayers (1) & (2) of the plaint that related to the 1<sup>st</sup> defendant. The plaintiff also deleted the words *(Suing on her own behalf and on behalf of the Estate of Kavumbi Kalume Kitsaumbi (Deceased))* that appeared after her name at the heading leaving her as the one suing in her own right/name against Lucy Nyambura as the only defendant. There is nothing on record to show or suggest that any of the parties appealed against the ruling of 10<sup>th</sup> May 2021 or sought for a review of the same. The defendant's application dated 20<sup>th</sup> August 2025 that is subject of this ruling is more or less seeking what was declined through the ruling of 10<sup>th</sup> May 2021. The defendant is as it were, trying to have a second bite at the cherry. This court as constituted, and being of concurrent jurisdiction to the court that made the said ruling cannot sit on appeal against the decision or finding thereof..

- g. The defendant should have considered to pursue an appeal if she was dissatisfied, but did not. She instead

filed notice of motion dated 9<sup>th</sup> September 2021, seeking to join the estate of Svend Erick Wobbe as a party in the suit, as she had obtained a limited grant in the said estate. The application was heard and determined through the ruling delivered by Justice Sila Munyao on 14<sup>th</sup> April 2022, in which the court allowed the application and inter alia held that:

*“ ..... I am persuaded that the lessee would be an interested party to such dispute and would be permitted to adduce evidence either in favour of or against the defendant. It is on that reasoning that I allow this application. I direct that the applicant be joined to this suit as interested party. For avoidance of doubt, the applicant is neither plaintiff nor defendant and will not therefore be filing any pleadings but will be permitted to adduce evidence in the suit. If the applicant feels that she has a claim of her own, the avenue is for her to file a fresh suit. There is also liberty for the plaintiff to seek to sue the applicant if at all the plaintiff feels she has a cause of action against the applicant.”*

The court takes judicial notice that the defendant did not challenge the competency of the amended plaint dated 24<sup>th</sup> May 2021 through the joinder application. It is further noted that after the joinder application was granted by Justice Sila Munyao on 14<sup>th</sup> April 2022, the defendant proceeded to file the Further Amended Statement of Defence and Counterclaim dated 9<sup>th</sup> May 2022 incorporating the Estate of Wobbe Svend Erik (Deceased) as the Interested Party, without any challenge on the competency of the plaintiff's suit. The defendant's application dated the 20<sup>th</sup> August 2025 is therefore without merit and is for dismissal.

h. Under *section 27* of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the event unless where for good cause the court directs differently. In this instance, the defendant has failed in her application, and should bear the plaintiff's costs.

6. Flowing from the above conclusions on the defendant's notice of motion dated the 20<sup>th</sup> August 2025, the court finds and orders as follows:

*a. That the application is without merit and is hereby dismissed.*

*b. The defendant to meet the costs for the plaintiff.*

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF DECEMBER 2025.

S. M.  
Kibunja, J.  
ELC  
MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF : Mr Muriithi

DEFENDANT : Mr Mutugi

INTERESTED PARTY : No Appearance

KALEKYE-COURT ASSISTANT.

Kibunja, J.  
MOMBASA.

S. M.  
ELC