



REPUBLIC OF KENYA



**Aji & 3 others v Agunga & another (Environment and Land Case
E034 of 2025) [2025] KEELC 18521 (KLR) (17 December 2025) (Ruling)**

Neutral citation: [2025] KEELC 18521 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE E034 OF 2025
FM NJOROGE, J
DECEMBER 17, 2025**

BETWEEN

**MAIMUNA HASHAM AJI 1ST PLAINTIFF
YUSRA AHMED ABDALLA 2ND PLAINTIFF
HUSSEIN ABDALLA SALIM (ALL SUING AS ADMINISTRATORS OF THE
ESTATE OF AHMED ABDALLA BAKHSHWEIN) 3RD PLAINTIFF
ESTHER WAMAITHA MURIUKI 4TH PLAINTIFF**

AND

**ALFRED AGUNGA 1ST DEFENDANT
PAMELA AUMA OGOLA 2ND DEFENDANT**

RULING

1. The Motion dated 6th June 2025 seeks an order striking out or dismissing the entire suit and the underlying applications for non-compliance with provisions of the law. The application is supported by the affidavit of Alfred Nyadimo Agunga of even date, sworn with the authority of Pamela Auma Ogola, the 2nd defendant
2. The grounds on which the application is made are as follows: the 2nd plaintiff passed away on 14th January 2022. A Kenya Gazette notice, number of 2343 of 24th February 2025 issued vide Succession Cause Number E176 of 2024- Karatina Magistrates' Court is relied on for that ground. It is stated that any action involving a deceased person must be brought in the name of a legal representative or a representative of the estate of the deceased person in accordance with provisions of Sections 45 and 54 of the *Law of Succession Act* Cap 160 Laws of Kenya. Further, the verifying affidavit sworn by Yusra Ahmed Abdalla does not comply with a provisions of Order 4 Rule 1(3) of the Civil Procedure Rules which require that where there are several plaintiffs, one of them, with written authority filed with



the verifying affidavit, may swear the verifying affidavit on behalf of the others. It is stated that the two other plaintiffs, Maimuna Hasham Aji and Hussain Abdalla Salim together with the said allegedly deceased Esther Wamaitha Muriuki have not signed any authority giving Yusrah Ahmed Abdallah consent to swear the verifying affidavit on their behalf. It is also averred that as per the pleadings, it is apparent that the cause of action emanates from a sale and purchase transaction between Ahmed Abdalla Bakhshwein and whose estate the first 3 plaintiffs are administrators and the company known as Agunga and Company Limited vide an agreement dated and executed on 3rd May 2011 in respect of 5 acres of land; that the defendants, Alfred Agunga and Pamela Auma Ogola, have been wrongly sued in their personal capacity in respect of matters which arose out of transactions conducted by the said company, of which the defendants are neither directors nor shareholders; that the purported cause of action arose directly from the corporate activities and transactions of the said company and not from any personal actions of the 1st and 2nd defendants; that nevertheless, even if the defendant herein were directors or shareholders of the said company, the *Companies Act*, Number 17 of 2015 provides for a distinct legal identity between the company and its directors or shareholders, and issues arising from a company's transactions should be directed against the company and not the individual directors or shareholders; therefore, so argue the applicants, the suit is against the 1st and 2nd defendants who are not even associated with the said company and it offends Section 19 of the *Companies Act* which upholds the separate legal personality of a company.

3. Further, it is stated that going by the current company records vide a search certificate dated 28th May 2025, the said company is incorporated and registered in Kenya and has its known and identified director and company secretary respectively known as John Kazungu Mutsuga as director/shareholder and Lucy Mburu as company secretary. It is stated that the action cannot proceed legally against the 1st and 2nd defendants in their personal capacity, and who are also not related to the company, as the company itself has not been sued as the principal party to the transactions in dispute. The applicants say the suit is an abuse of the court process and ought not to be allowed to continue as it would be a waste of judicial time and resources.
4. The application is opposed. Yusra Ahmed Abdallah the 2nd plaintiff filed his replying affidavit, wrongly titled as “supplementary affidavit”, dated 11th June 2025. In that affidavit he states that the application is only a delaying tactic; that the issue of the demise of the second plaintiff, Esther, does not render the entire suit fatally defective as the cause of action substantially arises from the Estate of the late Ahmed Abdallah Bakhshwein and the 1st 2nd and 3rd plaintiffs have capacity to sue as administrators to his estate.
5. Further, the deponent states that the appropriate steps will be taken to substitute the deceased plaintiff in due course upon issuance of letters of administration or full grant to her personal representative in accordance with Order 24 of the Civil Procedure Rules, and such substitution does not defeat or extinguish the suit; that in any event, the suit herein is not founded solely on the person of the 2nd plaintiff but concerns broader proprietary interests over Plot Number 10585 Malindi and its subdivisions, which affect the estate of the late Ahmed Abdalla Bakshwein and not just the 2nd plaintiff; that failure to file a written authority under Order 4 Rule 3 of the Civil Procedure Rules is not fatal, and the verifying affidavit is validly sworn by the deponent as an administrator; that in any event, that defect can be regularized at any time with leave of court and no prejudice has been occasioned to the defendants. The deponent states that the defect in the verifying affidavit is a mere technicality curable under Article 159 2(d) of *the Constitution*. Regarding the claim that they were wrongly sued in their personal capacity instead of the company, it is stated that the pleadings expressly disclose the fraudulent acts and the personal involvement of the defendants in the trespass and demolition of structures on the suit properties, and so, that is a matter for determination at the trial. Finally, it is stated that in any event, the sale agreement of 3rd May 2011 relied upon by the defendants is contested and is the subject



of the current suit, its legality, validity, and enforceability being in dispute cannot be resolved at the present interlocutory stage; that in any event the 4th plaintiff is alive.

6. Another affidavit sworn by the 4th plaintiff and dated 11th June 2025 was also filed in response to the application. The deponent adopted the contents of the first replying affidavit sworn by Yusra Ahmed Abdalla. She denied that she is deceased. She attached her national identity card as proof of her existence and legal personality. She blamed the defendants for mischief that appears to be intended to unlawfully defeat her interests in the suit property. The deponent avers that she is ready to appear in court physically for the hearing in order to prove that she is alive and well. She also avers that the suit raises genuine triable issues of trespass and fraudulent interference with land rights and ought to be heard on the merits.
7. The plaintiffs filed submissions dated 26th September 2025 while the defendants filed nothing in terms of submissions.
8. I have considered the filed submissions.

Analysis And Determination.

9. The issue of whether the 4th plaintiff is alive or not has been settled by way of the affidavit sworn by one Esther Wamaitha Muriuki. When an allegation has been made that a party is deceased and someone going by the name of that party swears an affidavit stating that they are alive the court cannot in an interlocutory stage proceed to make any further inquiries as to whether that party is indeed deceased. It would be a matter to be explored at the hearing of the main suit, if it still pleases the doubter then, as to whether that is the proper party to the suit. The court must take it to be true, just the way it has presumed the other named parties to be alive, that the party is alive and well. Any further attempts at that stage to go into the evidence beyond that which has been presented by way of an affidavit, of their being alive, would be futile, or a premature attempt to try a substantive issue in a suit. In any event there was no further or supplementary affidavit sworn by the applicants to insist that the affidavit of Esther Wamaitha Muriuki sworn on 11th June 2025 or the national identity card attached thereto are forgeries. That issue has therefore been laid to rest.
10. The only issues remaining for determination are:
 - a. Whether the suit ought to be struck out or dismissed on the basis that the first and second defendants have been joined yet the transaction from which the suit apparently arose was executed by a company by the name Agunga and Company Limited of which the defendants are not shareholders or directors;
 - b. Whether the suit ought to be struck out on the basis of a defect in the verifying affidavit.
11. Regarding the first issue, it is noteworthy that the plaintiff claims that the 1st and 2nd defendants have been consistently trespassing into the suit property. The allegations of actions in paragraph 9 thereof is that of actions commenced or perpetrated by natural persons, for example, sending armed youth with crude weapons to destroy the fence belonging to the plaintiffs and destroying the structures and pit latrines on the site. Those are matters pleaded specifically against the 1st and the 2nd defendants. The court does not know whether or not they were involved in those actions. Where the suit has been filed against them, it is for the plaintiffs to eventually prove his case against them at the hearing, and if he does not do so the case will be dismissed at their risk as to costs. It is therefore for the plaintiff to take care not to join persons who are not liable for the actions that he alleges. The defendants have indicated that there is a company with which an agreement was executed. This is merely an averment from the defendants. It is not from the plaintiffs in the present case. If the plaintiffs eventually find out that there



was indeed that kind of agreement, it is for the plaintiffs to elect whether to join that company to the present suit or not, of course again at their own risk. For now, they have opted not to. Whether they can succeed without such joinder is an issue for their own contemplation and not the court. The court can not decide whom they ought to sue unless it is absolutely necessary. The court has not determined that it is necessary at this stage to do so as the pleading of the plaintiff seems satisfactory. Furthermore, the self-explanatory provisions of Order 1 Rule 5 of the Civil Procedure Rules state that a claim may not be dismissed for misjoinder or non-joinder of parties. On that ground alone, the request by the defendants to strike out the suit for failure to join Agunga and Company Limited fails.

12. The next issue is whether the suit should be struck out on the basis of a defect in the verifying affidavit. The applicants state that the affidavit of Yusra Ahmed Abdalla sworn in verification of the matters in the plaint has not complied with provisions of Order 4 Rule 1(3) of the Civil Procedure Rules.
13. Order 4 Rule 1(3) of the Civil Procedure Rules provides as follows:

“Where there are several plaintiffs one of them with written authority filed with a verifying affidavit may swear the verifying affidavit on behalf of the others.”
14. The plaintiffs do not deny that there is no authority filed authorizing the 2nd plaintiff to swear the verifying affidavit in the suit. What they say is that it is a curable defect which can be regularized at any time by leave of Court and that in any event no prejudice would be occasioned to the other party. They cite Article 159 2(d) of *the Constitution* which requires that justice shall be administered without undue regard to procedural technicalities. The question that arises is whether failure to attach authority is fatal to the suit or is a mere technicality that can be rectified.
15. It must be noted that the current situation the plaintiffs find themselves in is that in which the 1st the 3rd and the 4th plaintiffs is can be deemed not to have filed any verifying affidavit at all.
16. The purpose of a verifying affidavit is to affirm the correctness of the averments in the plaint and nothing more. In this case the plaint has already been filed. At least one of the plaintiffs has affirmed the veracity of the contents thereof. Noteworthy is the fact that he is one of the three administrators of the estate of Ahmed Abdallah Bakhshwein. No objection has been raised by any of the other two administrators. It is the presumption of the court that the three administrators are acting in concert in bringing this suit, and that failure to file verifying affidavit of the other 2 administrators is a mere technicality. By extension of that very argument, the 4th plaintiff is part of the team that has assembled itself to bring the suit against the defendants, and she must be presumed to be acting in concert with the 1st to the 3rd plaintiffs. When viewed in that light, the 4th plaintiff's failure to file her own verifying affidavit is reduced to a technicality. Article 159 2(d) of *the Constitution* frowns on the glorification of technicalities over substantive justice. It is not that this court condones lack of compliance with procedure, noting how much time objections premised thereon waste. However, in the present case, I would suppose that if this court struck out the suit on the basis of this technicality, the plaintiffs would be rendered to be without a suit and would be referred back to the drawing board, to file a fresh suit using the same contents of the very struck out plaint; all that on the basis that only verifying affidavits were missing. Those verifying affidavits, once filed, would not come to add anything to the suit except to affirm that the contents of the plaint are correct. I think there should be lenience in order to promote the expedition espoused by the overriding objective clause in both the *Civil Procedure Act* and Rules.
17. For that reason, I find that failure to file authority or failure to file a verifying affidavit for each of the remaining plaintiffs is not fatal to the suit. It is a defect that can be corrected through an order of this court directing the filing of verifying affidavits of the remaining plaintiffs.



18. In the light of the foregoing the motion dated 6th June 2025 lacks merit and it is hereby dismissed. Each party shall bear their own costs thereof.
19. I also order that the 1st, the 3rd and the 4th plaintiffs shall file their respective verifying affidavits in the suit within 14 days from the date hereof. This matter shall be mentioned on 19th February 2026 for further directions.

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

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

