

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT KENYA

AT KWALE

ELC CASE NO. E095 OF 2025

OMAR SAID MWATAYARI.....

.....PLAINTIFF

- VERSUS -

VIPINKUMAR NATHALALA SHAH

BHARATKUMAR NATHALALA SHAH

SOUTH COAST BEACH PROPERTIES LIMITED

COASTLAND PROPERTIES LTD.....

....DEFENDANTS

AND

SAMPA INVESTMENTS LTD.....INTERESTED

PARTY

RULING/DIRECTION

I. Introduction

1. Before this Honourable Court for its determination in form of providing legal direction was in relation to three broad legal issues primarily moved orally by the Legal Counsels herein. These were mainly:-

a)The substitution of parties upon being deceased;

- b) The fate of the Counter - Claim instituted by a party who was now deceased;
 - c) The issue of conflict of interest by legal professionals.
 - d) The joinder of parties at this stage.
2. Firstly, on the issue of substitution, the 1st and 2nd Defendant's oral application made by the Learned Counsels on record on 18th February, 2026 to substitute the 1st Defendant. Upon the oral application by the 1st and 2nd Defendants, the Interested Party contended that the application by the 1st and Defendants, ought to have been made through a formal application being that the said 1st Defendant had been deceased for 3 years and that the Interested Party required as provided by the law to respond to the said application for substitution
3. Secondly, on the issue of Counter - Claim - according to the Interested Party, the 1st Defendant had filed a Counter - Claim and as far as the Counsel for the Interested Party was concerned, it had abated a while ago upon the demise of the 1st Defendant.

4. Thirdly, on the conflict of interest, whereby the Interested Party contested the Legal representation of the Plaintiff by his Legal Counsel, Mr. Stephen Oddiaga on record who seemingly acted for the Plaintiff and the Interested Party in the transaction involving the suit property.
5. The Fourth issue on joinder of parties, the matter was settled as a compromise was attained to be joined as a 2nd Plaintiff herein.
6. Clearly, these being weighty legal propositions. Further, the Court takes cognisance of the fact this matter has protracted having been heard and determined by the Superior Court. Being aggrieved by its decision, some parties preferred an appeal before the Court of Appeal but where for some peculiar circumstances, the proceedings from the Superior Court mysteriously disappeared from the record compelling the Appellate court to refer the matter back for re - trial.
7. Arising from the afore stated rather awkward situation, the Honourable Court offered to render this brief direction accordingly.

II. Analysis and Determination

8. I have considered the issues raised herein and find that the following issues three (3) are up for determination in these directions: -

- a) Whether substitution of the 1st Defendant (Now the deceased) can be allowed by oral application?***
- b) Whether the Counter - Claim filed by the 1st Defendant (Now Deceased) has abated or not.***
- c) Whether duly appointed Legal Counsel for the Plaintiff is conflicted and ought to be disqualified from representing the Plaintiff.***

ISSUE No. a). Whether substitution of the 1st Defendant - (Now Deceased) can be allowed by oral application

9. Under this Sub-heading, the Honourable Court will decipher on the substratum of the matter is whether an application to substitute a deceased 1st Defendant can properly be made and granted by oral application in open court, or whether the law and established practice require a formal written application supported by evidence and service on interested parties.

10. The law on substitution is clear. The provision of Order 24 Rule 4(1) of the Civil Procedure Rules, 2010 provides that where a Defendant dies and the cause of action survives,

the court shall, on application, cause the legal representative of the deceased to be made a party. Importantly, the provision of Order 24 Rule 4 (3) stipulates that such application must be made within one year of the death, failing which the suit abates as against the deceased Defendant.

11. It is trite law that where a party to civil proceedings where a party to civil proceedings dies and the cause of action or defence survives, the usual and accepted practice is that substitution is effected by a formal application to the court identifying the proposed substitute (usually the personal representative or executor/administrator), supported by evidence of the death and of the authority of the person seeking to be substituted. The court has a discretion to allow substitution on such terms as it considers just, but that discretion is exercised on the basis of evidence and after giving interested parties an opportunity to be heard.

12. The jurisprudence has consistently emphasized that substitution is not a casual procedural step but one that affects substantive rights. In the case of:- ***“Mungai & 3 others - Versus - Mbugua & another [2024] KECA 1752***

(KLR)”, the Court of Appeal held that substitution must be by formal application supported by affidavit evidence, and that oral applications are insufficient to safeguard the rights of all parties. Similarly, in **“Karanja & another - Versus - Gichini & another; Muriithi (Applicant) [2025] KEHC 8224 (KLR)”**, the High Court reiterated that substitution cannot be effected orally, as it denies the opposing party the statutory right to respond.

13. Recent High Court rulings in this jurisdiction of substitution as seen in the case of **“Kikaya - Versus - Mango & 2 others (Civil Suit 51 of 1984) [2023] KEHC 23205 (KLR) (Civ) (5th October 2023) (Ruling)”** have emphasised that substitution applications must ordinarily be brought by motion supported by affidavit evidence and that the court will not make substitution orders in the absence of proof of death and identification of the proposed substitute. Where courts have allowed substitution without full formalities, it has been on clear evidence being placed before the court and with the consent of all interested parties or where the circumstances made strict compliance impracticable and no prejudice would result.

14. The Honourable Court also notes that the lapse of three years since the demise of the 1st Defendant far exceeds the statutory one-year period. In the case of: **“Republic - Versus - Land Registrar, Kisumu & another Ex - Parte Onyango [2023] KEHC”**, the court observed that abatement is automatic upon expiry of the statutory period, unless a formal application for revival is made under the provision of Order 24 Rule 7(2).
15. It is common ground on the record that the 1st Defendant died close to three years ago. The 1st and 2nd Defendants made an oral application in court seeking substitution of the 1st Defendant. No formal motion, affidavit evidence of death, nor any document identifying a proposed personal representative or showing authority to act for the estate was placed before the court at the time of the oral application. The Interested Party expressly objected to the oral application and asserted a right to be served and to respond. The court also notes the 1st Defendant had earlier filed a Counter - Claim which, on the present material, has not been revived by any representative. The court has

before it a copy of the originating process in a related file which confirms the procedural posture of the suit.

16. On whether an oral application suffices; applying the authorities and the policy considerations set out above, an oral application in open court is not a proper substitute for a formal substitution application where:

- a. the death occurred some time ago;**
- b. no person is identified on the record as the proposed substitute; and**
- c. interested parties have not been given notice and an opportunity to respond.**

17. In such circumstances the court cannot properly exercise its discretion to substitute because there is no evidential foundation and no record of authority or notice. The court therefore finds that substitution cannot be allowed on the basis of the oral application made in this matter.

18. The court recognises limited exceptions where an oral application may be entertained — for example, where the death is recent and incontrovertible, where all parties consent in open court and the proposed substitute is present and able to demonstrate authority, or where the court is satisfied on the record (by contemporaneous

affidavit or other admissible material) that no prejudice will result. Those are exceptional circumstances and must be shown on the material before the court. Absent such circumstances, the formal route is required.

19. Under this sub - title it is the Court's finding that the oral application by the Defendants is procedurally defective and time-barred. Substitution requires a formal application, and the lapse of three years without substitution means the claim against the deceased Defendant has abated unless revival is formally sought and granted.

ISSUE No. b). Whether the Counter - Claim filed by the 1st Defendant (Now deceased) has abated.

20. Under this Sub-heading, the Honourable Court will decipher on the substratum of the matter is whether the Counter - Claim filed by the deceased 1st Defendant has abated by operation of law, or whether it survives and can be revived or prosecuted by a legal representative or other person entitled to apply for substitution.

21. The governing law is the provision of Order 24 Rule 3(2) of the Civil Procedure Rules, 2010 which provides that the death of a Plaintiff or Defendant does not automatically

cause a suit to abate if the cause of action survives; where substitution is required the court, on application, shall cause the legal representative of the deceased to be made a party, and where no application is made within the prescribed period the suit (or that part of it) may abate. The principle applies equally to Counter - Claims which are pleaded pursuant to the provision of Order 7 Rule 3 of the Civil procedure Rules, 2010, since they are pleadings filed by a party in their personal capacity.

22. The jurisprudence is settled that abatement is automatic upon expiry of the statutory period. In the case of:- ***“Mungai & 3 others - Versus - Mbugua & another(supra)”***, the Court of Appeal held that abatement does not require a formal court order; it occurs by operation of law once the statutory period lapses without substitution. Similarly, in the case of:- ***“Republic - Versus - Land Registrar, Kisumu & another Ex - Parte Onyango (Supra)”***, the High Court emphasized that revival of an abated suit or Counter - Claim can only be sought through a formal application under the provision Order 24 Rule 7 (2), supported by sufficient cause.

23. The death of the Counter - Claimant (the 1st Defendant) does not, by itself, extinguish a cause of action that

survives to the estate; rather, the Counter - Claim is in abeyance pending substitution by a legal representative or other person entitled to act for the estate. The court's power is discretionary and is exercised on application supported by evidence of death and proof of authority to act.

24. If no application for substitution or revival is brought within the period prescribed by the rules (or within such time as the court may extend for good reason), the Counter - Claim will be treated as having abated and may be struck out on application for want of prosecution.
25. The Honourable Court further notes that the Counter - Claim is a distinct pleading, but it is inseparable from the party who filed it. Upon the demise of the 1st Defendant, and in the absence of substitution within the statutory one - year period, the Counter - Claim abated. This position was reinforced in the case:- ***"Karanja & another - Versus - Gichini & another (Supra)"***, where the court held that a Counter - Claim abates alongside the main suit unless revived.
26. Consequently, on the material presently before the Court, the Counter - Claim filed by the deceased 1st Defendant has

29. The law is clear that advocates must avoid situations where their representation creates a real or perceived conflict of interest. The Advocates Act, Cap. 16, Laws of Kenya), read together with the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct (2016), prohibits an advocate from acting for two parties in the same transaction where their interests are adverse, or where confidential information obtained from one client may be used to the detriment of another.

30. It must be stated at this juncture that an order in the nature of recusal and or barring of counsel from representation of a party or participating in proceedings on behalf of a party, as sought by the Applicant, rests on whether a state of affairs by way of conflict of interest that may portend real prejudice and mischief exists. With the above in reserve, **Black's Law Dictionary Tenth Edition** defines conflict of interest as:-

“ 1. A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.

2. A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent”

31. And as regards what constitutes conflict of interest and client confidentiality **Halsbury Laws of England 4th Edition at Para. 527, Pg. 353** states:-

“A practicing barrister must not accept any instruction if there is or appears to be a conflict or risk of conflict either between the interests of the barrister and some other person or between the interests of any one or more clients, unless all relevant persons consent to the barrister accepting the instructions.

A barrister must also not accept instructions if there is a risk that information confidential to another client or former client might be communicated to or used for the benefit of anyone other than that client or former client without their consent.”

32. Further, within our jurisdiction, **The Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, 2016** defines conflict of interest in **Rule 6 Paragraph 96** as follows: -

“A conflicting interest is an interest which gives rise to substantial risk that the Advocate’s representation of the client will be materially and adversely affected by the Advocate’s own interests or by the Advocate’s duties to another current client, former client or a third person.”

33. In the case of:- ***“Larsen - Versus - Mbugua (Civil Case 282 of 2018) [2025] KEHC 8327 (KLR) (Civ) (12 June 2025) (Ruling)”***, the High Court held that where an advocate has previously acted for both parties in a transaction forming the subject

matter of litigation, the risk of conflict is real and disqualification may be warranted to preserve the integrity of proceedings.

34. In the case of ***“King Woolen Mills Limited [formerly known as Manchester Outfitters Suiting Division Limited - Versus - Kaplan and Stratton Advocates [1993] e KLR (per Muli JA)”*** it was held of an advocate who had acted for common clients and who were parties in the subsequent main litigation before the court, that arising from the contractual fiduciary relationship between him and his common clients: -

“[T]he information imparted to (him) by the individual clients was confidential. [He] owed a duty to his individual clients not to disclose or divulge any confidential or secret information imparted to him in confidence to anyone else including the clients in the (common) transaction without the consent of the client imparting the confidential information... nor do I think for a moment that it can be argued that the duty and obligations imposed on him as a common advocate ceased after the conclusion of the transaction for which returns were made.”

35. Similarly, in the case of:- ***“Uhuru Highway Development Limited - Versus - Central Bank of Kenya [2002] 2 EA 654”***, the Court of Appeal emphasized that justice must not only be done but must be seen to be done, and that

representation tainted by conflict undermines public confidence in the judicial process.

36. In a later decision, the Court of Appeal in the case of:-
“Delphis Bank Limited - Versus - Channan Singh Chatthe & 6 Others [2005] eKLR” while considering the objection against the participation of an advocate in representing a party in the matter where erstwhile counsel had prepared disputed instruments and was likely to be summoned as a witness. The Court while addressing itself to various scenarios in which conflict may arise equally stated that:-

“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however, particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/client fiduciary relationships or where the advocate would double up as a witness. There is otherwise no general rule that an advocate cannot act for one party in a matter and then act for the opposite party in subsequent litigation. The test which has been laid down in authorities applied by this Court is whether real mischief or real prejudice will in all human probability result.”

37. In conclusion, the said Court emphasized, while considering the nature of the application as is the one presently for determination:-

“.....each case must turn on its own facts to establish whether real mischief and real prejudice will result. In this case, we hardly have any facts to consider in arriving at such a conclusion.”

38. The court asks whether a reasonable, informed person would have a real apprehension that the advocate’s duty to a former or concurrent client will materially and adversely affect the fair conduct of the proceedings.

39. The party alleging conflict must plead and prove facts showing

- a. the existence of a retainer or retainer-like relationship between the advocate and the complaining party;**
- b. that the prior or concurrent retainer was in a matter substantially related to the present dispute; and**
- c. that the advocate thereby obtained confidential information or a position that could be used to the prejudice of the complaining party. Mere suspicion, innuendo, or the fact of involvement in the same broad transaction is insufficient.**

40. The Interested Party has orally alleged that Mr. Oddiaga “seemingly acted” for both the Plaintiff and the Interested

Party in the conveyance/transaction concerning the suit property. No affidavit from the Interested Party setting out particulars of the alleged retainer, dates, documents, or confidential information was placed before the court at the hearing of the oral application. No affidavit from Mr. Oddiaga denying or explaining the allegation was filed.

41. Allegations of conflict should be pursued by a formal notice of motion supported by affidavit evidence particularizing the retainer, dates, documents, and the confidential information said to have been obtained. The advocate should be given an opportunity to respond by affidavit. Absent cogent evidence, the court will not lightly displace a party's choice of counsel.
42. Applying these principles, the Honourable Court notes that Mr. Stephen Oddiaga previously acted for both the Plaintiff and the Interested Party in the transaction involving the suit property. This creates a reasonable apprehension of conflict, as the advocate may be privy to confidential information from the Interested Party that could be deployed to the Plaintiff's advantage. The court must

safeguard fairness and impartiality by ensuring that representation is free from such risks.

43. On the present material the court cannot find the existence of a prior retainer in a matter substantially related to the present dispute, nor can it find that confidential information was obtained and is likely to be misused.

44. It is therefore the finding of this Honourable Court that the objection to Mr. Oddiaga's representation on the transaction to be incomplete without any tangible evidence and a chance for the said advocate to respond hence the allegation is therefore unparticularised and speculative.

III. Conclusion and Disposition.

45. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus legal issues raised through an oral application, the Honourable Court arrives at the following decision and makes the below orders:-

(a) THAT the oral application by the 1st and 2nd Defendants for substitution of the deceased 1st Defendant made in open court on the mention date be and is hereby refused without prejudice to a properly constituted formal application.

(b) THAT the Counter - Claim filed by the deceased 1st Defendant be and is hereby held in abeyance and

has not automatically abated; it may be revived only by a formal substitution or revival application by a person with locus to act for the estate.

(c) THAT on the material presently before the Court Mr. Stephen Oddiaga is not disqualified from representing the Plaintiff; the Interested Party is granted leave to bring a formal, evidence-based application to disqualify within the time directed below.

(d) THAT the following directions shall apply:-

- i. The 1st and 2nd Defendants shall, WITHIN 7 DAYS of this ruling, file and serve a notice of motion for substitution supported by affidavit(s) annexing proof of death, identifying the proposed substitute and proving authority to act (letters of administration, grant of probate, or an explanation and supporting evidence where a limited grant is sought).**
- ii. The substitution application shall be served on the Plaintiff and the Interested Party who shall have 7 days from service to file any response.**
- iii. The substitution application shall be served on the Plaintiff and the Interested Party who shall have 14 days leave from service to file any response.**
- iv. The Interested Party, if it elects to pursue disqualification of counsel, shall file a Notice of Motion application supported by affidavit(s)**

particularising the alleged retainer, dates, documents and confidential information relied upon within 14 days; Mr. Oddiaga shall have 14 days leave to file a responding affidavit

(e) **THAT** in view of the fore - going, the scheduled hearing date of 24th March, 2026 becomes pre - mature and hence will have to be automatically vacated awaiting the full compliance of the above stated out processes. For expediency sake, there shall be a Pre - Trial Conference on 4th May, 2026 and a hearing date on 17th July, 2026 preferably through Physical means.

(f) **THAT** the costs of the oral applications and objections heard today shall be borne each party to bear its own costs; costs of any future formal applications (substitution, revival, or disqualification) are reserved and will be dealt with by the Court in the light of the outcome of those applications.

IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS..... 3RDDAY OFMARCH.....2026.

.....
**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT
KWALE**

Ruling delivered in the presence of:

- (a) Mr. Daniel Disii, the Court Assistant.
- (b) Mr. Odiagga Advocate for the Plaintiff; and
- (c) Mr. Sanjiv Khagram Advocate for 1st and 2nd Defendants.
- (d) Mr. Ngaine Advocate for the 1st Interested Party.
- (e) Mr. Olendo Advocate for the 2nd Interested Party.