

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**  
**ELC CASE NO. E084 OF 2023**

**ROSELYN DOLA OUKO.....1<sup>ST</sup>**

**PLAINTIFF**

**AARON TAFARI OUKO.....2<sup>ND</sup>**

**PLAINTIFF**

**VERSUS**

**PATRICK MBUGUA.....**

**.....DEFENDANT**

**RULING**

1. The learned counsel for the defendant filed the notice of preliminary objection dated 21<sup>st</sup> January ,2026 seeking that the plaint dated 25<sup>th</sup> January, 2023 be struck out on the following grounds:-

- a. The instant suit is void and therefore a nullity in law as the defendant is non-suited having died on 1<sup>st</sup> May, 1989 a fact now admitted by the plaintiffs.***
- b. By virtue of the determination in Benjamin Leonard Mcfoy v United Africa Company Limited (1961) All ER 1169 that, "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”***

***c. By virtue of the determination in the Indian case of C. Muttu v Bharath Match Works AIR 1964 Kant 293 that, “If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”***

2. The notice of preliminary objection was canvassed through written submissions. The learned counsel for the defendant filed written submissions dated 4<sup>th</sup> February, 2026 in support of their preliminary objection and highlighted that it is an undeniable fact more so accepted by the plaintiffs’ advocates that the defendant was long dead by the time of filing suit. Further, that on 13<sup>th</sup> November, 2025 the plaintiffs sought sixty (60) days to put their house in order by substituting the administrators of the estate of the defendant. Subsequently on 22<sup>nd</sup> January, 2026 the plaintiffs’

counsel sought to invoke the provisions of **Article 159 (2)(d)** of the **Constitution** preferring to view the anomaly as a mere technicality, which prompted them to file this preliminary objection.

3. The learned counsel relied on the authority of **Benjamin Leonard Mc Foy vs United Africa Co. Ltd(1961) ALL ER 1169** that if an act is void, then it is in law a nullity, and is incurably bad and thus cannot be cured by **Order 1 Rule 10**, and **Order 24** of the **Civil Procedure Rules** and **Article 159 (2) (d)** of the **Constitution**. Further reliance was placed in the cases of **Seeta Bharati Shah & 4 others vs Omar Said Mwateyari & Another (2009) eKLR** and **Viktar Maina Ngunjiri & 4 others vs A.G & 6 Others (2018) eKLR**. The learned counsel urged the court to strike out the instant suit with costs for being a nullity.
4. The plaintiffs filed their written submissions dated 6<sup>th</sup> February, 2026 in opposition to the preliminary objection and relied on the authorities of **Mukisa Biscuit Manufacturing Co. Ltd -versus- West End Distributors Ltd [1969] EA** and **Attorney General & another -versus- Githinji & another [2016] eKLR** on what constitutes a preliminary objection. They submitted that to

investigate whether the defendant is indeed deceased, proving the same would fall outside the scope of the preliminary objection, as it is a fact requiring evidentiary proof.

5. The plaintiffs further submitted that the notice of preliminary objection is merely a move to escape liability by the defendant, which action will violate their right to a fair hearing and the overriding objectives contained in the **Civil Procedure Act**. They further contended that the death of a party does not alter the nature of the claim under **Order 24** of the **Civil Procedure Rules**, the death of a defendant does not cause the suit to abate where the cause of action survives, and that the correct procedure would entail substitution of the deceased by a legal representative. Thus, they concluded that the court retains jurisdiction and the proceedings should continue following successful substitution.
6. I have considered the notice of preliminary objection and the written submissions filed by both parties. The issue for determination is *whether the preliminary objection has merit*.
7. The defendant's counsel filed the notice of preliminary objection seeking to strike this suit out for being a nullity because the

defendant was already deceased at the time of filing this suit.

8. According to the Black Law Dictionary a preliminary objection is defined as being:-

***“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary...”***

9. The above legal preposition has been cemented in the now famous case of **Mukisa Biscuit Manufacturing Co. Ltd -VS- West End Distributors Ltd. [1969] E.A. 696**, where the court held that:-

***“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer as it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop”***

10. The plaintiffs also relied on the authority in **Oraro v Mbaja [2005] eKLR** where the court stated that:-

*“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are diverse weighty authorities carrying the message”*

11. The issue of the defendant’s capacity to be sued relates to his *locus standi* in the suit. The court in **Alfred Njau and Others vs City Council of Nairobi (1982) KAR 229**, held that:-

*“The term Locus Standi means a right to appear in court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”*

12. The Court of Appeal in the case of **Trouistik Union International & another v Jane Mbeyu & another [1993] eKLR** held as follows:-

*“To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the Law of Succession Act. That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all-inclusive answer. It says “personal representative means executor or administrator of a deceased person”. It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative, is the administrator of the estate of the deceased.”*

13. Regarding the plaintiffs’ contention that the issue of the defendant’s death does not meet the threshold of a preliminary objection, in the case of **Kipngetich Kalya Kones (Suing as the Administrator of the estate of Kipkalya Kiprono Kones (deceased) v Wilson Kiplangat Kones [2021] eKLR** the court held that:-

*“The issue on locus standi is a primary point of law*

*almost similar to that of jurisdiction and since the plaintiff/respondent was not an administrator to the deceased's estate herein, he lacked the capacity to sue on behalf of the deceased's estate which renders the suit incompetent. Indeed, the Court of Appeal authoritatively delivered itself on the issue of locus standi in Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1 KAR, Morjaria v Abdalla [1984] KLR 490 and in Trouistik Union International (supra) to the effect that locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.*"

14. Thus, the preliminary objection is indeed a pure point of law as locus standi is a pure point of law. From the court proceedings, it is evident that the plaintiffs were fully aware that the defendant herein is deceased, yet they proceeded to institute a suit against him in his own name instead of that of his legal representative as required in law. The defendant being deceased is an uncontested fact emanating from the proceedings and therefore the preliminary objection falls within the realm of a pure point of law.
15. In the case of **Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others [2018] eKLR** relied on by the learned

counsel for the defendant, the court found that a suit filed against a deceased person is a nullity in law. The court relied on the Indian case of **C. Muttu vs. Bharath Match Works AIR 1964 Kant 293** in which the court observed that:-

*“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”*

16. Similarly, in the case of **Naikuni v Naikuni & 7 others; Manyuele (Applicant) (Environment & Land Case 9 of 2023) [2025] KEELC 3064 (KLR)** the court observed as follows:-

*“It is trite that a dead person cannot be sued, and technically, a suit filed against a deceased person is invalid and a nullity from inception. This court was referred to the case of Manyange (Deceased) v TG (Minor suing through her mother and next friend*

**WMG) (Civil Appeal E005 of 2022) [2024] KEHC 1083 (KLR) (7 February 2024) (Ruling), which quoted with approval the Indian case of *C. Muttu v. Bharath Match Works AIR 1964 Kant 293*, where the court observed as follows; “If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”**

17. The upshot of the foregoing is that the plaint dated 25<sup>th</sup> January, 2023 is a nullity, and it is hereby struck out. I make no orders as to costs since the deceased defendant has no locus in this suit.

It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY  
THIS 12<sup>TH</sup> DAY OF MARCH, 2026.**

**HON. MBOGO C.G.  
JUDGE  
12/03/2026.**

**In the presence of:**

*Ms. Benson Agunga - Court assistant*

*Ms. Sheila Sakwa holding brief for Mr. Charles Njagi for the  
Defendant/Applicant*

*Ms. Wanjiru holding brief for Mr. Oduk for the Plaintiff/Respondent*

ORIGINAL