



Shah & Shah (Suing as the personal representative of the Estate of the Late Amritben Lakhmshi Shah) & another v Shambo & another (Land Case E351 of 2024) [2025] KEELC 5406 (KLR) (21 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5406 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E351 OF 2024
CG MBOGO, J
JULY 21, 2025**

BETWEEN

SANJAY SHAH & PUNIT LAKHAMSHI SHAH (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE AMRITBEN LAKHAMSHI SHAH) 1ST PLAINTIFF

SUHASINI GUDKA NIMISH MAHENDRAKUMAR SHAH REENA MAHENDRAKUMAR SHAH (SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE MAHENDRAKUMAR LAKHAMSHI SHAH) 2ND PLAINTIFF

AND

ROBA SHAMBO 1ST DEFENDANT

ABDULLAHI HUSSEIN 2ND DEFENDANT

RULING

1. Before me is the notice of motion dated 20th February 2025, filed by the 2nd defendant/applicant herein, and it is expressed to be brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 and Order 2 Rule 15 (1)(a) of the Civil Procedure Rules seeking the following orders:-
 1. That the honourable court be pleased to strike out the suit herein as well as the application dated 26th August, 2024 for being incompetent null and void ab initio as against the 1st defendant.
 2. That the honourable court be pleased to strike out the suit herein for not disclosing any reasonable cause of action against the 2nd defendant.



3. That the costs of this application be awarded to the applicants.
2. The application is premised on the grounds inter alia, that the plaint dated 26th August, 2024 was filed against the deceased 1st defendant who died on 29th December, 2020 and that the same is not curable by any manner of amendment.
3. The application was supported by the affidavit of the 2nd defendant/applicant sworn on even date. The 2nd defendant/applicant deposed that on 2nd September, 2024 he was served with copies of pleadings in this suit yet he did not know the plaintiffs/respondents, and that neither did he have an interest in the suit property. That even though the suit is at an advanced stage, he is a complete stranger to the plaintiffs' case in the plaint. The 2nd defendant/applicant deposed that the plaint does not disclose any reasonable cause of action against him as no right to relief in the suit property is alleged to exist between him and the plaintiffs/respondents. The 2nd defendant/applicant further deposed that an order of permanent injunction against him would be an order issued in vain whereas he has no interest in the same.
4. The application was further supported by the affidavit of Hassan Alio Rioba, the son of the deceased 1st defendant. He deposed that he came to learn of the existence of this suit in January 2025 after the advertisement was brought to his attention. He deposed that the suit having been filed long after the demise of the 1st defendant, it is a nullity from inception as the person alleged to have fraudulently acquired the suit property is deceased. He deposed that the suit ought to be struck out as it is fatally defective.
5. The application was opposed by the replying affidavit of the 1st plaintiff/respondent sworn on 19th March, 2025. The 1st plaintiff/respondent deposed that at the time of filing the suit, the name of the deceased 1st defendant appeared on the search records, and that the name of the 2nd defendant was given out by the goons hired as the alleged owner of the land and the one who had sent them to forcefully take over possession unlawfully. The 1st plaintiff/respondent deposed that there was no way the plaintiffs/respondents would know about the demise of the 1st defendant and in any event, a suit cannot be defeated by the misjoinder or non-joinder of parties.
6. The 1st plaintiff/respondent deposed that the logical thing to do is to amend the plaint to include Hassan Alio Roba as a personal representative to the estate of the deceased 1st defendant. Further, that the suit discloses a cause of action against the 2nd defendant as either an agent to the plaintiff, or an alleged owner who sent goons to illegally take possession. Further, that it is curious that the 2nd defendant/applicant alleges not to know the 1st defendant yet they are represented by the same advocate and have filed a joint application.
7. The application was canvassed by way of written submissions. The defendants/applicants filed their written submissions dated 25th March, 2025 where they raised two issues for determination as follows:-
 - i. Whether the suit as against the deceased 1st defendant can be cured by substituting the deceased with his personal representative, Hassan Alio Roba.
 - ii. Whether the suit discloses any reasonable cause of action against the 2nd defendant.
8. On the first issue, the defendants/applicants submitted that Order 1 Rules 9 and 10 of the Civil Procedure Rules are only applicable where a party being substituted was alive at the time of being sued. They submitted that a suit filed against a deceased person is a nullity and incapable of being brought



into existence even by substituting the deceased party with their legal representatives. The defendants/applicants relied on the cases of Geeta Bharat Shah & 4 Others v Omar Said Mwatayari & Another [2009] eKLR, Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others [2018] eKLR, and Manyange (deceased) v TG (Minor suing through her mother and next friend WMG) [2024] eKLR.

9. On the second issue, the defendants/applicants submitted that the power to strike out a suit is a discretionary matter. While relying on the cases of Crescent Construction Co. Ltd v Delphis Bank Ltd [2007] eKLR, and Susan Rokih v Joyce Kandie & 6 others [2018] eKLR, the defendants/applicants submitted that in the instant case, the court is required to protect the person against whom the suit is brought when it appears in itself that the case is a non-starter. Further reliance was placed in the case of Samwel Ndura Kanyara v Mary Njambi Kariuki & another [2013] eKLR.
10. I have carefully analysed and considered the application, the reply thereof and the written submissions filed by the parties herein. I am of the view that the issue for determination is whether the suit as against the 1st defendant is a nullity and whether no reasonable cause of action has been disclosed as against the 2nd defendant/applicant.
11. With respect to the first issue, the defendants/applicants argued that the plaint was filed long after the demise of the 1st defendant, and in that case, the suit as against him is a nullity. The defendant/applicants relied on a number of authorities in support of their submissions to the effect that a suit against a deceased is a nullity and cannot survive. However, the defendant/applicants have not shown that the knowledge of the demise of the 1st defendant was known to the plaintiffs/respondents prior to the filing of the suit. In fact, a perusal of the file indicates that an application for substituted service dated 16th September, 2024 was premised on the grounds that the whereabouts of the 1st defendant was unknown despite all reasonable diligent efforts. In my view, it would be unreasonable to assume that the suit would be defeated strictly on the ground that the 1st defendant is deceased, yet his death was unknown to the plaintiffs. In any case, Hassan Alio Roba has indicated to this court that he is the personal representative of the deceased 1st defendant, thus, he is in a position to defend the estate of his late father.
12. On the second issue, the Court of Appeal in D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] KECA 3 (KLR) observed as follows:-

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.



No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

13. The defendants/applicants contended that there is no reasonable cause of action disclosed against the 2nd defendant, and neither is there any nexus between the 2nd defendant/applicant and the plaintiffs/respondents. While I place reliance on the above cited authority, the defendants/applicants are urging this court to find that no case exists, and has been shown to survive against the 2nd defendant. A plain reading of the plaint dated 26th August, 2024 contains statements levelled against the defendants in paragraphs 14 and 18. While the plaint does not pinpoint an individual’s allegation, the same is worded to include both defendants. For the court to establish these facts, it would be necessary that the parties are subjected to trial in a bid to ensure that justice is meted to all the parties involved.
14. In my view, the notice of motion dated 20th February, 2025 lacks merit, and it is hereby dismissed with costs to the plaintiffs/respondents.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 21ST DAY OF JULY, 2025.

HON. MBOGO C.G.

JUDGE

21/07/2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Wasieba holding brief for Mr. Simiyu for the Plaintiff/Respondent

Ms. Mwangi holding brief for Mr. Barke for the Defendants/Applicants

