



Nairobi City County v Mwangi; Kingori (Purchaser); Mwangi (Applicant) (Environment and Land Miscellaneous Application 70 of 2014) [2024] KEELC 615 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEELC 615 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 70 OF 2014**

**JO MBOYA, J
JANUARY 30, 2024**

**IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT, 2011:
AND
IN THE MATTER OF: THE RATING ACT CAP 267 OF THE LAWS OF KENYA**

BETWEEN

NAIROBI CITY COUNTY PLAINTIFF

AND

ESTHER NYAMBURA MWANGI DEFENDANT

AND

PHYLIS WAMBUI KINGORI PURCHASER

AND

ANNE WARINGA MWANGI APPLICANT

RULING

1. The Applicant herein has approached the Honourable court vide Notice of Motion Application dated the 14th November 2023; brought pursuant to the provisions of Sections 1, 1A, 1B, 3, 3A and 63(c) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and in respect of which same is seeking for the following reliefs;
 - i.Spent.
 - ii. The Honorable court be pleased to set aside its orders of 17th February 2020 dismissing the Misc. Application dated the 6th March 2014 for want of prosecution and an order that the said



application be reinstated for purposes of hearing of the Applicants' application dated the 14th November 2023.

- iii. The Honorable court be pleased to set aside, vacate and/or discharge the vesting orders issued on the 1st April 2014; and all other consequential orders issued thereto in respect of the property, namely L.R No. Nairobi/Block 110/155.
 - iv. The Land Registrar, Nairobi Lands registry, be and is hereby ordered to cancel and/or revoke the registration of the vesting orders issued on the 1st April 2014, the title Deed issued to Phylis Wambui Kingori and all subsequent entries made on the register of L.R No. Nairobi/Block 110/155 pursuant to this proceedings.
 - v. The Land registrar, Nairobi lands registry, be and is hereby ordered to restore the entries on the register of Title L.R No. Nairobi/Block 110/155 to reflect Esther Nyambura Mwangi as the registered proprietor.
 - vi. The Honorable court be at liberty to make any such other or further orders as it may deem just and appropriate in the circumstances.
 - vii. The costs of this Application be awarded to the Applicant.
2. The instant Application is premised and anchored on various grounds which have been enumerated at the foot of the Application. Furthermore, the Application is supported by the affidavit of Ann Waringa Mwangi sworn on even date and to which the Deponent has annexed various documents, inter-alia, a copy of the Certificate of death of the Defendant herein.
 3. Upon being served with the subject Application, the 2nd Respondent filed Grounds of opposition dated the 19th December 2023; and in respect of which the 2nd Respondent has contended, inter-alia, that the subject Application is prohibited by the Doctrine of Res-Judicata, insofar as a previous Application had been mounted and was dismissed for want of prosecution.
 4. Be that as it may, the instant matter came up for hearing on the 14th December 2023, whereupon the Advocates for the respective Parties covenanted to dispose of the Application by way of written submissions to be filed and exchanged by the Parties.
 5. First forward, the Parties thereafter proceeded to and filed their respective Written submissions, which submissions are on record.

Parties' Submissions:

A. Applicant's Submissions:

6. The Applicant herein filed written submissions dated the 6th December 2023, wherein same has adopted and reiterated the grounds contained at the foot of the Application, as well as the averments in the body of the Supporting affidavit. Furthermore, the Applicant has thereafter raised, highlighted and canvassed four [4] salient issues for consideration by the Honourable court.
7. Firstly, Learned counsel for the Applicant has submitted that even though the Application dated the 6th March 2014; was dismissed by the Honourable court on the 17th February 2020; for want of prosecution, the court herein is seized with the requisite Jurisdiction to vary and/or set aside the impugned dismissal orders and thereafter to reinstate the said Application for hearing and determination inter-partes.



8. Additionally, Learned counsel for the Applicant has submitted that the dismissal of the previous Application is amenable to the Jurisdiction of the court by dint of the provisions of Order 12 Rule 7 of the Civil Procedure Rules 2010.
9. Secondly, Learned counsel for the Applicant has submitted that by the time the instant suit/proceedings were commenced culminating into the issuance of the vesting orders, the Defendant against whom the vesting orders were issued, was long dead and hence no proceedings could be commenced and/or maintained as against the Defendant or at all. In any event, Learned counsel for the Applicant has indicated that the Defendant herein died and/or passed on the 4th April 2002.
10. Thirdly, Learned counsel for the Applicant has submitted that the Applicant has placed and/or tendered before the Honourable court sufficient and credible evidence to demonstrate that the impugned orders, namely, the vesting orders, ought not to have been issued, insofar as same touched on and/or affected the rights of the deceased person herein.
11. Premised on the fact that the instant suit/proceedings were commenced and maintained against a Dead person, Learned counsel for the Applicant has submitted that the court therefore ought to exercise her Jurisdiction and to undertake review of the impugned orders.
12. In support of the submissions that the Applicant herein has established and demonstrated suitable grounds to warrant review, Learned counsel for the Applicant has cited and relied on, inter-alia, the case of Sheikh Ali Taib vs George Eliam Wekesa (2017)eKLR.
13. Fourthly, Learned counsel for the Applicant has submitted that the instant Application is not barred and/or prohibited by the Doctrine of Res-Judicata, either as contended by the 2nd Respondent or at all. In any event, learned counsel has submitted that the previous Application, namely, the Application dated the 28th October 2022; was dismissed for want of prosecution, prior to and before same could be determined on merit.
14. Further and in addition, Learned counsel for the Applicant has contended that to the extent that the said Application was neither heard nor determined on merits, then the Doctrine of Res-Judicata does not apply.
15. Lastly, Learned counsel for the Applicant has submitted that insofar as the instant suit and proceedings were commenced and undertaken against a dead person, same were therefore a nullity ab initio and hence no legitimate orders could issue and/or ensue, whatsoever.
16. To buttress the position that a suit against a dead person is a nullity, Learned counsel for the Applicant has cited various decisions, inter-alia, the case of Samuel Ogada Yugi vs Yasaon Oyeke Ogwen & 3 Others (2013)eKLR and Pratab Chand Meta vs Chrisna Davi Meuta AIR 1988 Delhi 267, respectively.
17. Arising from the foregoing, Learned counsel for the Applicant has therefore implored the Honourable court to find and hold that the subject Application is meritorious and thus ought to be granted/allowed.

B. 2nd Respondent's Submissions:

18. The 2nd Respondent filed written submissions dated the 11th December 2023; and in respect of which same has raised, highlighted and canvassed three [3] salient issues for consideration by the court.
19. Firstly, Learned counsel for the 2nd Respondent has contended that the Applicant herein was never a Party to the instant suit and/or proceedings and hence same cannot seek to procure favorable orders, in respect of the subject matter.



20. Furthermore, Learned counsel has contended that it was incumbent upon the Applicant to seek for and obtain an order to be joined into the proceedings before same could purport to procure and/or obtain audience before the Honorable court. In this regard, Learned counsel for the 2nd Respondent has contended that the Applicant is therefore devoid of the requisite locus standi [Legal Capacity], to mount and or maintain the instant proceedings.
21. In support of the foregoing submissions, Learned counsel for the 2nd Respondent has cited and relied on, inter-alia, the case of Virginia Edith Otieno vs Joash Ochieng Ougo & Another (1987)eKLR, Morjaria vs Abdla (1984)KLR 490, Laws Society of Kenya vs The Commissioner of Lands & Others Nakuru HCC 464 of 2000 (UR), Alfred Njau & Others vs City Council of Nairobi (1982) KAR 229 and Kipng'etich Kalia Kones [Suing as the administrator of the Estate of Kipkalia Kiprono Kones, deceased,] vs Wilson Kiplang'at Kones (2021)eKLR.
22. Secondly, Learned counsel for the 2nd Respondent has submitted that the instant Application is barred and prohibited by the Doctrine of Res-Judicata and hence this court is devoid and divested of the requisite Jurisdiction to entertain and/or adjudicate upon the matter in dispute.
23. In particular, Learned counsel for the 2nd Respondent has submitted that the Applicant herein had hitherto filed an Application dated the 28th October 2022, seeking similar reliefs, but which Application was dismissed for want of Prosecution.
24. Premised on the contention that a similar Application had been dismissed for want of prosecution, learned counsel for the 2nd Respondent has therefore implored the Honourable court to find and hold that the current application is legally untenable and bad in law.
25. In support of the submissions pertaining to the relevance and applicability of the Doctrine of Res-Judicata, learned counsel has cited and relied on the case of Independent Electoral Boundaries Commission versus Maina Kiae (2017)eKLR, where the Court of Appeal enumerated various ingredients that underpins the Doctrine of Res-Judicata.
26. Thirdly, Learned counsel for the 2nd Respondent has submitted that the Application beforehand is similarly devoid of merits and thus ought not to be granted or at all.
27. Invariably, Learned counsel for the 2nd Respondent has submitted that even though the Application before the court seeks to set aside the orders made on the 17th February 2020, the Applicant has however sought to make submissions on the question/issue of review, which has neither been impleaded nor alluded to at the foot of the Application.
28. Notwithstanding the foregoing, Learned counsel for the 2nd Respondent has submitted that where an Applicant desires to procure a suitable order for review, it is incumbent upon such an Applicant to cite and implead the relevant grounds upon which the Application for review is premised.
29. Based on the contention that the requisite grounds for review have neither been espoused nor highlighted in the body of the Application, Learned counsel for the Applicant has contended that the submissions touching on the question of review are therefore misconceived and hence otherwise legally untenable.
30. In support of the submissions that no case for review has been established and/or made out, Learned counsel for the 2nd Respondent has cited and relied on, inter-alia, the case of Francis Njoroge vs Stephen Maina Kamore (2018)eKLR, Sanitam Services EA Ltd vs Rentokil (K) Ltd & Another (2019)eKLR and Republic vs Advocates Disciplinary Tribunal (Ex-parte Apollo Mboya) (2013)eKLR.



31. Finally, Learned counsel for the 2nd Responded has submitted that the current Application has been filed and mounted with unreasonable and inordinate delay, which delay has neither been explained nor accounted for by the Applicant.
32. To the extent that the subject Application has been (sic) filed with unreasonable and inordinate delay, Learned counsel for the 2nd Respondent has therefore invited the court to find and hold that the application is defeated by the doctrine of Laches and hence same ought to be dismissed.
33. In support of the submissions that the Application has been filed and/or mounted with inordinate delay, Learned counsel for the 2nd Respondent has cited and relied on, inter-alia, the case of *Ivita vs Kyumbu (1984)KLR 441* and *Mwangi S Kimenyi vs Attorney General & Another (2004)eKLR*, respectively, where the courts supplied the formula for discerning and/or ascertaining the duration that is deemed to be inordinate.
34. Furthermore, Learned counsel for the 2nd Respondent has also contended that the subject Application, which seeks to set aside, inter-alia, the vesting order hitherto issued over and in respect of the suit property, ought not to be entertained on account of the Doctrine of *Functus Officio*.
35. Simply put, it is the contention by and on behalf of Learned counsel for the 2nd Respondent that the court is *functus officio* and hence deprived of the requisite Jurisdiction to entertain and/or adjudicate upon the subject matter.
36. In support of the submission that the Application is barred by the Doctrine of *Functus Officio*, Learned counsel for the 2nd Respondent has invoked and cited the decision in the case of *Raila Odinga & Others vs Independent Electoral and Boundaries Commission & Others (2013)eKLR*.
37. Based on the foregoing submissions, Learned counsel for the 2nd Responded has invited the court to venture forward and hold that the instant Application is misconceived and thus ought to be dismissed with costs.

Issues For Determination:

38. Having reviewed the Application as well as the Response thereto; and having taken into consideration the written submissions filed by and on behalf of the respective Parties, the following issues do arise and are thus worthy of determination;
 - i. Whether this Honourable court is seized of the requisite Jurisdiction to review, vary and/or set aside the orders made on the 17th February 2020 and if so, whether sufficient basis has been established to warrant such variation.
 - ii. Whether there are any orders that were made by the court on the 1st April 2014, either as alleged or otherwise.
 - iii. Whether the instant Application is barred by the Doctrine of *Res-Judicata* and by extension Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
 - iv. Whether the instant suit and the resultant orders were taken and made when the Defendant was deceased; and if so, whether the proceedings are legally tenable in the face of the law.



Analysis And Determination:

Issue Number 1 Whether this Honourable court is seized of the requisite jurisdiction to review, vary and/or set aside the orders made on the 17th February 2020 and if so, whether sufficient basis has been established to warrant such variation.

39. It is common ground that the Applicant herein has sought for a plethora of reliefs at the foot of the instant application. Instructively, one of the reliefs that has been sought for touches on and/or concerns the setting aside and/or variation of the orders by this court (differently constituted) which were made on the 17th February 2020.
40. For coherence, it is worthy to recall and underscore that the instant suit was commenced vide Misc. Application dated the 6th March 2014 and in respect of which the Applicant/2nd Respondent sought to procure and obtain a vesting order pertaining to and concerning the suit property. Furthermore, the said Application also sought for an order to compel the Deputy Registrar to execute the requisite Transfer Instrument relating to the suit property albeit on behalf of (sic) the Defendant.
41. Subsequently, the Application dated the 6th March 2014; was heard and disposed of by Lady Justice Gacheru, Judge; vide Ruling/Order rendered on the 31st March 2014 wherein the said Application was duly granted.
42. Moreover, the 2nd Respondent purchaser subsequently filed another Application dated the 15th February 2016; which Application was similarly heard and disposed of vide Ruling rendered 3rd October 2016. For good measure, the Application under reference was dismissed by Lady Justice L Gacheru, Judge.
43. Notwithstanding the foregoing, the Deputy Registrar thereafter proceeded to and issued a Notice to Show Cause to the Parties, whose import and tenor, was to call upon the Parties to show cause why the suit ought not to be dismissed for want of prosecution.
44. Furthermore, the Notice to Show Cause under reference, came up for hearing on the 17th February 2020, when same was placed before Lady Justice K Bor, Judge. Suffice it to point out that the Learned Judge thereafter proceeded to and allowed the Notice to show cause and effectively dismissed (sic) the suit for want of prosecution.
45. For coherence, it is the orders which were made on the 17th February 2020, which the Applicant herein is now seeking to set aside and/or vary.
46. Before venturing to answer the question as to whether or not the impugned orders can be set aside or varied, it is imperative to underscore that by the time the impugned orders were being made, there was no suit that was in existence and thus capable of being dismissed for want of prosecution or at all.
47. For clarity, the Application that originated the suit, namely, the Application dated the 6th March 2014; had long been heard and concluded vide the Ruling rendered on the 31st March 2014. Notably, the named Application was granted.
48. Other than the said Application, the 2nd Respondent filed a second Application dated the 15th February 2016, which application was heard and dismissed vide Ruling rendered on the 3rd October 2016.
49. To the extent that the Honourable court had dealt with both Applications which were on record, the entire suit beforehand stood determined, prosecuted and effectively disposed of.



50. Consequently and in the premises, when the Deputy Registrar issued (sic) the Notice to show cause why the suit should not be dismissed and which culminated to the orders made on the 17th February 2020, there was [strictly speaking], no suit or at all that could be the subject of dismissal proceedings.
51. To my mind, the orders of the court [differently constituted], which were made on the 17th February 2020, were made in error and/or vacuum. In this regard, the said orders are therefore legally untenable and cannot be maintained on the face of record.
52. Premised on the foregoing analysis, my answer to issue number one [1] is therefore to the effect that the impugned orders which were made on the 17th February 2020; merits review, variation and setting aside, with a view to streamlining the Record of the Honourable Court.
53. Further and in any event, it is worth noting that by virtue of the fact that this is a court of record, it thus means that the record of the court must be consistent and where there is any [sic] inconsistency, then it behooves the court to remedy the inconsistency and/or better still, to reconcile the orders obtaining on the face of the record.
54. In a nutshell, I hold the humble albeit considered view that a proper case has been laid out and/or established to warrant the variation of the impugned orders made on the 17th February 2020.

Issue Number 2 Whether there are any orders that were made by the court on the 1st April 2014, either as alleged or otherwise.

55. Having dealt with the issue pertaining to and/or concerning the propriety of the orders made on the 17th February 2020, the next issue [question], that merits deliberation touches on and/or concerns whether there exists on record orders made on the 1st April 2014 or otherwise.
56. To start with, the Applicant herein has implored the Honourable court to venture forward and to set aside the vesting orders that were (sic) made on the 1st April 2014, pertaining to and/or concerning the suit property.
57. Nevertheless, it is important to point out that a court can only interrogate and review an existing order that was made and which is apparent on the face of the record. To the contrary, a court of law, this Court not excepted, cannot be implored to review and/or set aside a non-existent order.
58. Owing to the foregoing, it was therefore incumbent upon the Applicant herein to establish and/or demonstrate that indeed the court issued and/or made a vesting order on the 1st April 2014, before venturing forward to submit on the veracity/propriety thereof.
59. Nevertheless, I beg to point out that I have perused the entire record of the court and I have not discerned and/or come across any order of the court that was [sic] made on the 1st April 2014. For good measure, no such proceedings were ever taken and/or made by the court on even date.
60. Furthermore, it is evident from the record of the court that the Application dated the 6th March 2014, which sought for the granting of inter-alia the vesting order, was heard and allowed by the court on the 31st March 2014; and not otherwise.
61. Arising from the foregoing, the Applicant herein ought to have appraised herself of the proceedings before the court and thereafter made the requisite Application pertaining to and/or concerning a designated court order.



62. Unfortunately, learned counsel for the Applicant maintained and prosecuted the instant Application on the basis of a non-existent court order and hence the limb of the Application seeking to set aside and/or vary the orders dated the 1st April 2014, is legally untenable.

Issue Number 3 Whether the instant Application is barred by the Doctrine of Res-Judicata and by extension; Section 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya.

63. Learned counsel for the 2nd Respondent has raised the issue/question of Res-Judicata and in this regard, same has contended that the Applicant had hitherto filed an Application dated the 28th November 2022; and which Application sought similar reliefs/orders, like the one beforehand.

64. Moreover, Learned counsel for the 2nd Respondent has also contended that the said Application, namely, the Application dated the 28th November 2022; came up for hearing on the 5th December 2022, whereupon same was dismissed for want of prosecution.

65. Premised on the basis that the Application dated the 28th November 2022; was dismissed for want of prosecution, Learned counsel for the 2nd Respondent has therefore contended that the current Application is thus barred and/or prohibited by the Doctrine of Res-Judicata and hence same is legally untenable.

66. On the other hand, Learned counsel for the Applicant has submitted that the previous Application dated the 28th November 2022; was dismissed for want of prosecution and hence the merits of the said Application were never interrogated and/or dealt with at all.

67. In any event, Learned counsel for the Applicant has submitted that prior to and before invoking the Doctrine of Res-Judicata, it is important to ascertain whether the previous Application was indeed heard and determined on merits and if not, then the Doctrine of Res-Judicata becomes inapplicable.

68. Having reviewed the submissions made and/or mounted by the respective Parties and upon taking into consideration the facts obtaining on the court records, it is evident that the Applicant herein had previously filed and lodged a similar Application like the one beforehand.

69. First forward, it is also apparent that the said Application was fixed and/or scheduled for hearing on the 5th December 2022, when same was dismissed for want of prosecution.

70. Nevertheless, it is important to point out that in proceedings to and dismissing the previous Application for want of prosecution, the court did not interrogate and/or determined the merits of the said Application. For good measure, the Application was dismissed on the basis of [sic] a technicality.

71. Consequently, even though the previous Application sought for similar reliefs, it is not lost on this court that those reliefs were neither canvassed nor determined on merits. In this regard, I hold the opinion that the Doctrine of Res-Judicata can therefore not be invoked and relied upon with a view to defeating the current Application or at all.

72. For coherence, one of the salient pillars that underpin the application of the Doctrine of Res-Judicata is proof that the previous matter/suit, concerning the same Parties, was indeed heard and determined on merits and not otherwise.

73. Consequently, where a previous suit and/or matter was neither heard nor determined on merits, then the Doctrine of Res-Judicata is neither applicable nor efficacious.



74. To buttress that foregoing holding, it suffices to take cognizance of the dictum of the Supreme Court of Kenya in the case of *John Florence Maritime Services vs Cabinet Secretary Infrastructure, Transport & Public Works* (2021)eKLR, where the court held thus;
58. Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case^{3/4}to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.
59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *ET v Attorney-General & another*, (2012) eKLR, thus: The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others*, (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted *Kuloba J*, in the case of *Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991* (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’
59. For res judicata to be invoked in a civil matter the following elements must be demonstrated: a) There is a former Judgment or order which was final; b) The Judgment or order was on merit; c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and d) There must be between the first and the second action identical parties, subject matter and cause of action. (See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011* (2013) eKLR)
75. From the erudite exposition obtaining in the decision [supra], it is evident and/or apparent that where a suit/matter is dismissed on the basis of a technicality or where a dismissal did not entail merit analysis, then the Doctrine of Res-Judicata cannot be invoked and/or relied upon.
76. Arising from the foregoing, my answer to issue number three [3], is thus to the effect that the current Application is neither barred nor prohibited by the Doctrine of Res-Judicata, either in the manner adverted to by the 2nd Respondent or at all.

Issue Number 4 Whether the instant suit and the resultant orders were taken and made when the Defendant was deceased; and if so, whether the proceedings are legally tenable in the face of the law.

77. The Applicant herein has contended that the suit property was registered in the name of the Defendant, now deceased, who died on the 4th April 2002. In any event, the Applicant has tendered



and produced before the court a copy of the Certificate of Death which confirms that the Defendant indeed died on the 4th April 2002.

78. Nevertheless, it is imperative to recall that the proceedings that were undertaken by and on behalf of the City Council of Nairobi, [now defunct] culminating into the sale and disposal of the suit property were commenced on the 20th February 2013.
79. Furthermore, it is also not lost on this court that arising from the proceedings before the City Court, the suit property was thereafter sold to and in favor of the 2nd Respondent and who upon (sic) the purchase of the suit property filed and/or lodged the instant proceedings vide Application dated the 6th March 2014.
80. Instructively, upon the filing of the instant Application, same was placed before the Honourable Court on various dates, resting with the 31st March 2014; when the Application was granted, culminating into the issuance of a vesting order.
81. Subsequently, the 2nd Respondent herein prepared the requisite Transfer instrument which were thereafter executed by the Deputy Registrar of the court culminating into the issuance of Certificate of title to and in respect of the suit property.
82. Be that as it may, the pertinent issue that merits mention and due analysis relates to whether or not any legal proceedings could be commenced and/or maintained against a Dead person.
83. Secondly, there is the ancillary issue as to the legal import and tenor of proceedings that are commenced against a Dead person.
84. To start with, it is common knowledge that legal proceedings can only be commenced and maintained against existing Legal entities, whether natural human persons; or Juristic entities, including companies and such other Incorporated bodies.
85. On the other hand, there is no gainsaying that where a person is dead prior to and before the filing of a legal suit, then the intended proceedings can only be mounted and sustained against the Legal Administrator or Administratrix of the Estate of the deceased and not otherwise. [See Section 82 of the *Law of Succession Act*, Chapter 160 Laws of Kenya.]
86. However, in respect of the instant matter, it appears that the proceedings were mounted, prosecuted and determined as against the Defendant herein who had long died on the 4th April 2002. Consequently, several questions do arise, inter-alia, how the 2nd Respondent was able to serve the court process on a Dead person.
87. However and of greatest concern is the legal import of a suit that is commenced against a Dead person. In my humble view, the death of a person terminates the Legal Capacity inherent in such a person and henceforth no legal suit can be commenced against a dead person and where proceedings are so commenced, the entire proceedings are a nullity ab initio and thus invalid.
88. Without belaboring the point, it suffices to cite, adopt and reiterate the holding of the Court in the case of *Geeta Bharat Shah & 4 Others Versus Omar Said Mwatayari & Another* [2009] eKLR, where the court held thus;

“We have anxiously considered the appeal. This is a first appeal. We have no doubt whatsoever that the learned Judge, in refusing to allow the application as in favour of the deceased against whom a suit was filed after his demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased’s estate to urge the court to do so for



once the respondent also admitted that he sued a dead person, the court was duty bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed. In any event, because the person cited in the plaint as the first defendant was already dead by the time the suit was filed meant that the plaintiff (now first respondent) did not tell the truth when he said in his verifying affidavit that he had read the plaint and verified the facts therein for how could he say that against undisputed fact later discovered that by the time he was saying so, the first defendant was long dead whereas paragraph 2 of the plaint he allegedly verified stated:-

“The first Defendant is an adult (sic) of sound mind residing and working for gain at Nairobi. Service of summons in this suit shall be effected through the plaintiff’s advocates office.”

89. Similarly, the legal import and implication of a suit filed against a Dead person were also highlighted and amplified by the Court in the case of Viktar Maina Ngunjiri & 4 others versus Attorney General & 6 others [2018] eKLR, where the Court held as hereunder;

“It is common ground that the 7th defendant was not alive when the suit was filed against him. It is also inconceivable how a party who is deceased can instruct counsel and that counsel takes over instructions from a non-existent person. It follows therefore any action including the filing of the plaint, the extraction of the summons; the entering of appearance and filing of the defence were a nullity. The cases cited by counsel for the plaintiff’s include, Benjamin Leonard Mc foy vs. United Africa Company Limited [1961] All ER 1169. In that case the court stated as follows,

“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.”

This is exactly what the instructing party to the counsel now on record for the deceased person and or his estate is attempting to do. In the words of the cited case above this is an attempt to place something on nothing and expect it to retain ground. This cannot happen.

90. Additionally, it is also instructive to take cognizance of the holding in the case of Samuel Ogada Yugi v Yason Oyieke Ogwenyo & 3 others [2013] eKLR, where the court stated thus;

“I am in agreement with the submission by the 2nd interested party that if this suit was filed against the 1st defendant when he was already dead then in law no suit existed against him. If no suit existed against the 1st defendant then there is no suit which the 1st interested party can seek to be joined in as the legal representative of the estate of the 1st defendant. A suit against a deceased person is a nullity and amounts to nothing. There is nothing therefore to join. In the case of Macfoy-vs-United Africa Co. Ltd.(1961) 3 All E.R 1169, Lord Denning stated as follows concerning an act which is a nullity at page 1172;

“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 much ado, though it is sometimes convenient to have the Court to 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”.



It is clear from the foregoing that you cannot put something on nothing. It will surely come to nothing. The 1st interested party cannot seek to join a suit that never was. I am further in agreement with the submission by the 2nd interested party that Order 24 rule 4 of the Civil Procedure Rules is not applicable to the circumstances of this case. At this point, I would wish to pose a question that has also disturbed my mind as I pondered over these novel arguments by counsel namely, what is the remedy available to the 1st interested party in the circumstances? Is he supposed just to sit back and see the title of the suit property which belongs to the deceased being cancelled through a decree which has been irregularly obtained as he claims? In my view, in the circumstances of this case, the 1st interested party does not need to be joined in this suit so as to protect the interest of the 1st defendant. The 1st interested party can simply apply to this court in his capacity as the legal representative of the estate of the 1st defendant for the setting aside of the judgment and decree issued herein on the ground that the suit herein was lodged after the death of the 1st defendant and as such the judgment and decree issued herein against the 1st defendant are null and void as against the 1st defendant. It is not necessary in the circumstances of this case for the 1st interested party to join this suit before seeking such relief.

91. Arising from the foregoing, what is crystal clear and indeed the golden thread, that runs across the cited decisions, is to the effect that a suit filed against a Dead person is a nullity ab initio and thus incapable of redemption.
92. Having found and held that the instant suit/proceedings were commenced against a person who was long dead and thus incapable of defending herself, the question that remains outstanding and thus worthy of interrogation, is whether the entire proceedings and consequential orders that were made herein are lawful and legitimate or otherwise.
93. On the other hand, if the said proceedings and consequential orders are not lawful, then the incidental question should be whether a court of law and/or Equity, [exercising good Judgment and clear conscience], should sanction and countenance such an illegality or otherwise.
94. To my mind, this court by virtue of being a court of law and of Equity is vested with the requisite mandate, authority and inherent Jurisdiction to enable the court to ensure that the ends of justice are achieved and where appropriate to avert injustice. In any event, the extent and scope of the courts inherent jurisdiction is wide and infinite.
95. As concerns the extent and scope of the courts inherent Jurisdiction, it is imperative to cite and adopt the holding of the Supreme Court of Kenya in the case of Narok County Government versus Livingstone Kunini Ntutu & 2 others [2018] eKLR, where the court held thus;
 - (97) We furthermore note that Jerold Taitz succinctly describes the inherent jurisdiction of the Supreme Court as follows in his book, 'The Inherent Jurisdiction of the Supreme Court' (1985) pp 8-9: ". . . This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the Court would be unable to act in accordance with justice and good reason. The inherent powers of the Court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court."
 - (98) Back home, the Court of Appeal in addressing the point at hand in Kenya Power & Lighting Company v Njumbi Residents Association & another [2015] eKLR cited Ouko J (as he then



was) In the matter of the Estate of George M'Mboroki, Meru HCSC No. 357 of 2004 and aptly put it that;

“ ... the Court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular, to ensure the observance of the due process of the law, to prevent abuse of process to do justice between the parties”.

96. Furthermore, the court ventured forward and stated thus;

[100] The conclusion drawn from the above citations is that this Court, indeed any other appellate Court, even where there are no specific provisions to do an act, has inherent and/or residual powers to act in a fair or equitable manner in the interest of justice and/or to ensure the observance of the due process of the law. Therein also lies the power for the Court to act to prevent abuse of Court process by one party so that fairness is maintained between all parties.

97. In my humble view, the inherent/intrinsic Jurisdiction of the court is such that the court is clothed the residual powers to ensure that injustice does not arise and/or accrue. In any event, where an injustice has arisen, then the court can draw from the fountain of inherent Jurisdiction to remedy the injustice.

98. Without belaboring the point, where a suit was filed and commenced against a Dead person such a suit was/is a nullity and hence incapable of anchoring any legitimate and/or lawful orders or at all.

99. Perhaps and at this juncture, it is instructive to adopt and reiterate the dictum in the case of MACFOY VS UNITED AFRICA CO LTD (1961) 3 All ER, 1169, where the court held thus;

“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...But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it.”

100. In a nutshell, my answer to issue number four [4] is therefore threefold. Firstly, no legal proceedings could commenced nor maintained against a deceased person or at all.

101. Secondly, any proceedings that are commenced and sustained against a Dead person are void and thus invalid ab initio. Consequently and in this regard, no legal rights and/or interests can ensue therefrom.

102. Thirdly, any orders and/or benefits, which are procured and obtained out of such a suit, are themselves null and void and thus amounts to nothing. Indeed, the Doctrine of Ex-Nihilo-Nihil-Fit [out of nothing comes nothing] suffices.

Final Disposition:

103. Having considered the various issues [perspectives], that were highlighted in the body of the Ruling herein, it must have became evident that certain injustices arose and/or were meted against the Estate of the Defendant, now deceased.



104. Furthermore, even though the Applicant herein was neither a Party in the instant proceedings, same however is at liberty to ventilate and/or bring to the attention of the court the illegalities that were inflicted against the Estate of the deceased.
105. Consequently and in view of the foregoing, the court finds that the Application dated the 14th November 2023; is meritorious and same is therefore allowed on the following terms;
- i. The orders of the court made on the 17th February 2020; and in respect of which the suit herein was dismissed for want of prosecution be and are hereby rescinded, vacated and/or set aside.
 - ii. The vesting orders which were issued and granted by the court on the 31st March 2014 [and not 1st April 2014] and all the consequential orders pertaining to and concerning L.R No. Nairobi/Block 110/155, be and are hereby vacated and/or set aside.
 - iii. The Chief Land Registrar be and is hereby ordered and directed to cancel and/or revoke the vesting order issued on the 31st March 2014 [and not on the 1st April 2014] together with the Certificate of title issued to and in favor of Phyllis Wambui King'ori as concerns L.R No. Nairobi/Block 110/155.
 - iv. The Chief Land Registrar be and is hereby ordered to rectify the Register in respect to L.R No. Nairobi/Block 110/155; and inter-alia restore the name of Esther Nyambura Mwangi, now deceased as the proprietor thereof.
 - v. Each Party shall bear own costs of the Application

106. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY 2024.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Benson - Court Assistant.

Mr. Omwega h/b for S.N Otinga for the Applicant.

Ms. Kimulu h/b for Mr. Njugi B .G for the 2nd Respondent.

