



**Ombese v Kumemda (Environment & Land Case 34 of 2019)
[2024] KEELC 3369 (KLR) (23 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3369 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 34 OF 2019**

M SILA, J

APRIL 23, 2024

BETWEEN

JOHN OSORO OMBESE PLAINTIFF

AND

JOHN KUMEMDA DEFENDANT

RULING

(Application for substitution of the deceased plaintiff; application allowed)

1. The application before me is that dated 25 January 2024 filed by Kennedy Osoro Nyoka and Tom Nyaundi Osoro who wish to substitute the plaintiff who is said to be deceased. The supporting affidavit is sworn by Kennedy Osoro Nyoka. He avers that he and his co-applicant are the administrators of the estate of the deceased plaintiff. He has annexed a grant of letters of administration ad litem dated 23 October 2023 issued in Kisii CMCC Miscellaneous Succession Cause No. E134 of 2023. He avers that the cause of action survives the deceased and they intend to continue with the case.
2. The application is not opposed by the defendant and I have given it due consideration.
3. I observe that the deceased plaintiff commenced this suit through a plaint filed on 30 October 2019. In that plaint, he pleaded that he filed the suit as legal representative of the estate of Agnes Nyanganyi Osoro (deceased) through curiously he also pleaded that he is the registered proprietor of the land parcel Kisii Municipality Block 1/350 which he obtained after confirmation of grant of letters of administration in respect of the estate of Agnes Nyanganyi Osoro (deceased). He averred that on 15 October 2019 the defendant wrongfully entered the said land and fenced it round with iron sheets and started to dig a foundation. In the suit he asked for a declaration that the defendant is not entitled to enter the suit land and a permanent injunction to restrain him from the land.



4. The defendant filed defence and counterclaim. He denied encroaching into the suit land and pleaded that he has confined his activities on the land parcel Central Kitutu/Daraja Mbili/789 which he owns.
5. This being an application for substitution of a sole deceased plaintiff, Order 24 Rule 3 of the *Civil Procedure Rules* applies. It states as follows :

Procedure in case of death of one of several plaintiffs or of sole plaintiff
[Order 24, rule 3]

- (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
- (2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

6. It will be observed from the above that an application for substitution is to be made within one year of death. I have not seen the Certificate of Death of the plaintiff, for it is not attached to the application, but from the grant ad litem it would appear that the plaintiff died on 23 April 2023. This application was filed within one year of his death. I am also of the opinion that the cause of action survives the death of the plaintiff and can be continued by his legal representative/s. I have no reason to doubt that the applicants are the legal representatives of the deceased plaintiff and can substitute him. They can however only substitute the plaintiff in his personal capacity and not in his capacity as legal representative of the estate of Agnes Nyanganyi Osoro (deceased) for they are not legal representatives of the late Agnes Nyanganyi Osoro.
7. The application for substitution is therefore allowed to the above extent. The plaint may be amended to reflect the substitution within the next 14 days.
8. There will be no orders as to costs.
9. Orders accordingly.

DATED AND DELIVERED THIS 23 DAY OF APRIL 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

