



Gicimu (Suing as Personal Representative of the Estate of the late Uwe Kerschek) v Ouya & 2 others; Ogada & another (Applicant) (Environment & Land Case 133 of 2014) [2024] KEELC 1745 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1745 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 133 OF 2014**

**SM KIBUNJA, J
APRIL 11, 2024**

BETWEEN

ESTHER GATHONI GICIMU (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE UWE KERSCHKEK) PLAINTIFF

AND

**FAITH JUDITH OUYA 1ST DEFENDANT
PURITY WANGUI KURIAH 2ND DEFENDANT
REGISTRAR OF TITLES 3RD DEFENDANT**

AND

**COLLINS OTIENO OGADA APPLICANT
DICKENS ODHIAMBO OUYA APPLICANT**

RULING

Notices of Motion Dated The 25th November 2015 & 18th September 2018]

1. In the first notice of motion dated the 25th November 2015, the Applicants seeks for among others to be substituted in the suit, in place of Faith Judith Ouya, the 1st defendant, who had passed on the 14th July 2015. The application is premised on the five (5) grounds on its face and supported by the joint affidavit of the applicants sworn on the 25th November 2015 to which they annexed a copy of Limited Grant Ad Litem issued in Mombasa HC P& A Cause No. 263 of 2015 on the 18th November 2015 in respect of the estate of Faith Judith Ouya, who reportedly died on the 14th July 2015.
2. The court has perused the record and there is no reply filed in opposition to the above application.



3. In the second notice of motion dated the 18th September 2018, the Applicants seeks for inter alia to be substituted for the 1st defendant; orders of 18th September 2017 to be stayed and further entries on LR No. MN/1/5246, suit property, to be stopped; orders of 18th September 2017 to be interpreted in light of those made by the Deputy Registrar on 15th September 2017 and be set aside, varied, reviewed and or vacated. The application is based on the eight (8) grounds on its face and supported by the affidavit of Dickens Odhiambo Ouya, sworn on the 18th September 2018.
4. The application dated the 18th September 2018, is opposed by Esther Gathoni Gicimu, the plaintiff, through her replying affidavit sworn on the 8th March 2019, inter alia deposing that the applicants, as legal representatives of the 1st defendant, had indicated they had no objection to the transfer of the suit property by Purity Wangui Kuria, 2nd defendant, to Muhiddin Abubakar Al Amin or his nominee.
5. The Applicants filed Mombasa CACA No. 64 of 2019 against the court orders of 11th March 2019 that had inter alia declared the suit as abated. The Court of Appeal rendered its judgement among others setting aside the orders of 11th March 2019 and ordered the applications dated the 25th November 2015 and 18th September 2018 to be heard by another judge of this court, other than Omollo J.
6. This court issued directions on the 20th November 2023 on filing and exchanging submissions on the two applications. Only the learned counsel for the Applicants has filed submissions dated the 9th December 2023, which the court has considered.
7. The following are the issues for the determinations by the court:
 - a. Whether the applicants application for substituting the 1st defendant was made within one year of the 1st defendant's death.
 - b. Whether the suit survived the 1st defendant's death and if so, whether the applicants have made a reasonable case to be substituted thereof.
 - c. Whether the applicants have made a reasonable case for the reviewing and setting aside of the orders of 18th September 2018 as far as it affects the 1st defendant.
 - d. Whether the applicants have made a prima facie case for stoppage of further entries in respect of the suit property's title.
 - e. Who pays the costs in each of the two applications?
8. The court has carefully considered the grounds on the two applications, affidavit evidence, submissions by the learned counsel, the record and come to the following determinations:
 - a. That though no reply to the notice of motion dated the 25th November 2015 was seen on the record, the learned counsel for the applicants has in their submissions made reference to grounds of opposition filed by the plaintiff in answer thereof, raising one ground that the applicants have no locus as the suit against the 1st defendant abated on the 13th July 2016, a year after her death and without substitution being done. The Court of Appeal at paragraph 6 of its judgement in Civil Appeal No. 64 of 2019 referred to the plaintiff's grounds of opposition raising the ground that the application was incompetent, frivolous and bad in law; that the applicants had not annexed the authority appointing them as legal representatives of the deceased; that the suit has been withdrawn as against the 2nd and 3rd defendants and the consent of the applicants was not required; that the deceased had no claim in the suit and that the suit as against the deceased abated. The court has considered the said grounds as set out above.



- b. From the depositions by the applicants, the 1st defendant died on the 14th July 2015. The applicants filed Mombasa HC P&A No. 263 of 2015 and obtained a Special Limited Grant of Letters of Administration on the 18th November 2015, that is annexed to their supporting affidavit. That grant clothed the applicants with capacity to apply to this court to be substituted for the 1st defendant, contrary to the plaintiff's claim. They then filed the notice of motion dated the 25th November 2015 for substitution that is still pending. From the date of death of the 1st defendant, that is 14th July 2015, one year was to end on or about 13th July 2016. It follows therefore that the application dated the 25th November 2015 for the substitution of the 1st defendant by the applicants was filed before the one year lapsed from the date of the said death. It would therefore be erroneous to claim that the applicants had not filed an application to substitute the 1st defendant before the expiry of one year from the date of her death.
- c. The Court of Appeal in Civil Appeal No. 64 of 2019, at paragraphs 24 and 25, rendered itself as follows:

“ 24. ... It is not disputed that the appellants filed the application dated 25th November 2015 for the substitution of the deceased defendant. That application was made timeously, before the expiry of one year. That means that by the time the learned ELC judge made the order of 18th September 2018, the appeal [sic] had not abated. The effect of that is that the existence of the application dated 25th November 2015 is that it vitiates the order abating the suit.

25. Our finding that the existence of the application dated 25th November 2015 on the record, filed before the abatement of the suit vitiated the order declaring the suit abated answers the third issue for determination. The suit against the deceased defendant had not abated.”

The above rendition by the Court of Appeal, whose decisions are binding to this court, leaves no doubt of its decision that by the time the application for substitution dated 25th November 2015 was filed, the suit against the 1st defendant was still alive, and contrary to the plaintiff's claim, had not abated.

- d. The filing by the applicants of the notice of motion dated 18th September 2018, in which they at prayer 2 sought to substitute the 1st defendant, does not affect or negate the application dated the 25th November 2015 that was still pending as stated at ground (a) thereof. It was for the court to determine which of the prayers to grant upon the parties being heard.
- e. That the orders by the Deputy Registrar of 15th September 2017 did not mention about the suit against the 1st defendant being withdrawn. That in view of the above Court of Appeal decision that the suit against the 1st defendant had not abated by the time the application for substitution dated 25th November 2015 was filed, and as this court's order of 11th March 2019 has been successfully appealed against and set aside, there is no doubt the suit against the 1st defendant is still subsisting.
- f. That it is only fair and just that the Applicants be allowed to substitute the 1st defendant in this suit on behalf of the deceased's estate.



- g. That though under section 27 of Civil Procedure Rules the costs follow the events unless otherwise directed by the court, in this matter, the justice of the case demands that the costs in the application to abide the outcome of the suit.
9. In view of the foregoing determinations, the court finds and orders as follows:
- a. That the Applicants notice of motion dated the 25th November 2015 has merit and the applicants are hereby allowed to substitute the 1st defendant, deceased.
- b. The application dated the 18th September 2018 marked spent and overtaken by events.
- c. The costs in the applications to abide the outcome of the suit.
- Orders accordingly.

DATED AND VIRTUALLY DELIVERED ON THIS 11TH DAY OF APRIL 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : No Appearance.

Defendants : Mr. Abidha For 1st Defendant.

Applicants: Mr Abidha.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

