



**Thoya & 4 others v Kaingu Through agent, representatives Francis Baya  
Kaingu & 2 others (Environment and Land Miscellaneous Application  
E024 of 2024) [2024] KEELC 4960 (KLR) (25 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4960 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E024 OF 2024  
FM NJOROGE, J  
JUNE 25, 2024**

**BETWEEN**

**PASTOR BENJAMIN KAHINDI THOYA & 4 OTHERS ..... APPLICANT**

**AND**

**JAPHETH KATANA KAINGU THROUGH AGENT, REPRESENTATIVES  
FRANCIS BAYA KAINGU & 2 OTHERS ..... RESPONDENT**

**RULING**

1. By an application dated 5<sup>th</sup> June, 2024 the applicants herein sought against the respondents the following orders:
  1. .... spent
  2. That the intended personal representatives be enjoined or be substituted on behalf of the deceased respondent;
  3. .... spent;
  4. That pending the hearing of this application and intended appeal this honourable court be pleased to issue a stay of execution and judgment dated 29/5/2024 and restrain the respondent's relatives and family being Francis Baya, Reuben Chengo, And Changawa Kaingu and anybody on their behalf from interring the remains of the respondents in plot number 220;
  5. That the costs of this application be in the cause.
2. The application is opposed. The persons named as agents or representatives filed a replying affidavit sworn by Reuben Chengo Kaingu. In it, the deponent stated that Japhet Katana Kaingu is already deceased, having passed away on 25/5/2024, and is improperly named in these proceedings as a respondent; that as no grant of letters of administration has been issued to them, the agents/



representatives lack locus standi to be sued in these proceedings; that the application filed in the lower court by the applicants was dismissed for non-attendance and the grounds for the dismissal were recorded; that the dispute between the deceased and the applicants was finally settled by the court whereby the applicants were found not to own any land; that it is intended that the deceased be interred on Plot No 219 which belongs to his estate; that there is no appeal filed against the decision of the lower court; that there is no suit by way of petition, plaint, originating summons or an appeal and so the court ought not issue an injunction as it would be contrary to Order 40 of the [CPR](#).

3. The applicants thereafter filed a supplementary affidavit of Patrick Charo, one of their own, who stated as follows under oath: that the deponent of the replying affidavit is not seized of all the facts and ought not to have sworn the said affidavit; that the son of the deceased is going to be an administrator of the deceased's estate; that the disputed portion is no 220 on which a grave has been dug for interment of the deceased's remains. The rest of the contents of that affidavit are argumentative and I will not set them out in this ruling for that reason.
4. This court has considered the application and the supplementary affidavit, the replying affidavit and the submissions filed by both parties in compliance to the order of the court. The issue arising in this court is whether the orders granted can be granted by this court but before delving into a merit assessment of the application on the principles in the renowned cases of *Giella v Cassman Brown* [1973] EA 358 and *Mrao v First American Bank of Kenya* as to whether orders of injunction are merited, it is necessary to consider the principal preliminary legal objections voiced by the respondents in these proceedings. They are twofold as follows:
  - a. Whether the application is fatally defective for having joined the deceased rather than his legal representatives;
  - b. Whether the grant of an injunctive order would be in violation of order 40 of the [Civil Procedure Rules](#).
5. Regarding the first objection it is clear that proceedings may only be commenced against a living person with capacity to be sued or the estate of a deceased person represented by his legal representatives. The description given in the title to these proceedings implies that it is the deceased who is the respondent.
6. If a person dies he can not be named in a suit save through the representatives to his estate. The contrary has occurred in the present proceedings where the deceased has been named as the respondent, with a preliminary prayer being sought that the intended personal representatives be subsequently joined or substituted on his behalf, which in this court's view is plainly wrong. A suit or proceeding against a deceased person is a non-starter, null and void *ab initio*.
7. It should have been that the legal representatives ought to have been sued on behalf of the deceased's estate and not the deceased being sued with the intention of having the legal representatives substituted later.
8. Further when the so called representatives of the deceased denied being the administrators to the deceased's estate the applicants, rather than exhibit a grant of letters of administration to prove them wrong, could only state that in any event it is expected that the son of the deceased who is one of the named persons shall finally be an administrator of the deceased's estate. Quite an erroneous view in my opinion as the appointment of an administrator in subject to succession proceedings in court, and such appointment is only issued to an applicant who finds favour with the court upon convincing it of his ability to faithfully administer the estate.



9. In the case of *Japhet Nzila Muangi v Hamisi Juma Malee* [2022] eKLR the court stated as follows:

“4. The issue was comprehensively addressed by Mbogholi Msagha J (as he then was) in the case of *Viktar Maina Ngunjiri & 4 Others v Attorney General & 6 Others*, High Court at Nairobi, Civil Suit No. 21 of 2016 (2018) eKLR where he reviewed various authorities as follows :-

In the Indian case of *C. Muttu v. Bharath Match Works* AIR 1964 Kant 293 the court observed,

“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.”

In yet another Indian Case of *Pratap Chnd Mehta v Chrisna Devi Mehta* AIR 1988 Delhi 267 the court citing another decision observed as follows,

“.....if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

10. It is thus clear that proceedings commenced against a deceased person whether in the proper manner as a suit or an application does not lie.
11. The applicants clearly know who they want to injunct and against what but they have for some reason failed to join them in their application for orders. Consequently, I find that there is no application, the same having been commenced against a deceased person.
12. I will proceed to the next point in the event that this court's opinion on the first point is incorrect. The issue is whether the applicants have approached the court in the right manner so as to merit an order



of injunction in the event the ingredients of such an application are seen to have been made available to the court.

13. It is the correct position that Order 40 Rule 1 of the [Civil Procedure Rules](#) envisages injunctions in cases where there is an existing suit. the provisions of that order are as follows, verbatim:

- “ 1. Cases in which temporary injunction may be granted [Order 40, rule 1] Where in any suit it is proved by affidavit or otherwise—
- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
  - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

14. Has a suit been brought into existence in the present case? The answer lies in examining the methods prescribed by law for the institution of the suit.

15. Section 19 of the [Civil Procedure Act](#) Cap 21 states that: -

“Every suit shall be instituted in such manner as may be prescribed by Rules.” (Own emphasis)

16. Order 3 Rule (1) (ii) of the [Civil Procedure Rules](#) 2010 provides that:-

“Every suit shall be instituted by way of a Plaint or in such other manner that may be prescribed. As a general rule a suit can only be instituted by way of a Plaint, petition or an Originating summons.”

17. These methods are therefore acknowledgeable to be: by way of plaint, petition, originating summons or appeal. The proceedings herein have been commenced by way of a miscellaneous application. A Miscellaneous Application clearly does not fall into the category enumerated herein above, hence there is no suit in existence, just an application. The grant of an injunctive order against a party, even he who has locus standi in a matter on the basis of a miscellaneous application is not allowed. The application must be rooted in an existing suit.

18. In the case of [Geoffrey Ndungu Theuri v Law Society of Kenya](#) [1988] eKLR, the court observed:

“suit” means all civil proceedings commenced in any manner prescribed under the [Civil Procedure Rules](#) and an applicant is not entitled under Order 30 of the [Civil Procure Rules](#) to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused Section 3A of the [Civil Procedure Act](#) does not give the court the power to act without jurisdiction.”



19. In *Proto Energy Limited v Hasbi Energy Limited* [2019] eKLR the court stated that:
- “As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit.”
20. In *Wanja & another v Roothaert* (Miscellaneous Application E193 of 2021) [2022] KEHC 10255 (KLR) (3 June 2022) (Ruling) where the application was not rooted in a suit the application was struck out. The same result occurred in *Mwavumbo Group Ranch v Kenya Electricity Transmission Company Limited (KETRACO)* (Environment & Land Miscellaneous Case 2 of 2022) [2023] KEELC 18844 (KLR) (22 June 2023) (Ruling)
21. The question would arise as to what would be pending perchance they are confirmed as it has been proved now that there is no suit in existence. The orders granted at the initial stages this matter were meant to preserve the status quo pending hearing of the Miscellaneous Application and clearly it is a principle of the law that no person sought to be condemned unheard. However, in view of what this court has stated, those orders require to be now set aside.
22. The application before me is not a suit and is not premised on any existing suit or appeal. Even if this court proceeded to investigate the merits of the applicant’s quest for an injunction, in the end such an order would not be issued for the reasons stated in this paragraph.
23. The upshot of the foregoing is that the two objections raised by the respondents have merit and the application dated 5/6/2024 is hereby dismissed with costs to the respondents. For the avoidance of doubt the injunctive orders issued on 6/6/24 and extended variously thereafter are hereby set aside entirely. In addition, the mortuary expenses for cadaver preservation only in respect of the deceased for the period between 13/6/2024 to 25/6/2024 shall upon proof before the taxing master be added to the costs of the application for settlement by the applicants, and shall be executed in the same manner as the costs if not paid within 45 days of this order.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 25<sup>TH</sup> DAY OF JUNE 2024.**

**MWANGI NJOROGE  
JUDGE, ELC, MALINDI**

