



**Obore v Sherman; Shaban & another (Interested Parties) (Environmental and Land Originating Summons E001 of 2023) [2024] KEELC 4852 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4852 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2023**

**LL NAIKUNI, J**

**JUNE 11, 2024**

**BETWEEN**

**RAPHAEL OJIAMBO OBORE ..... PLAINTIFF**

**AND**

**SWALEH SAID SHERMAN ..... DEFENDANT**

**AND**

**YAKUN SHABAN ..... INTERESTED PARTY**

**AWADH SALEH SAID SHERMAN ..... INTERESTED PARTY**

**RULING**

**I. Introduction**

1. This Honorable Court is tasked on making a determination onto two (2) applications being the Notice of Motion application dated 12<sup>th</sup> September, 2023 by Awadh Saleh Said Sherman, the 2<sup>nd</sup> Intended Interested Party/Applicant herein. It was brought under the provision of Order 1 Rule 10 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3A of the *Civil Procedure Act*, 2010. Further, the other application is the Notice of Motion application dated 17<sup>th</sup> August, 2023 by Yakub Shaban, the 1<sup>st</sup> Intended Interested Party herein under the dint of the provision of Order 1 Rule 10 of the *Civil Procedure Act*, Cap 21.
2. Despite of the service of the application to the Plaintiff/ Respondent, he never responded to the said twin applications. Nonetheless, the Honourable Court decided to make a Ruling on its own merit.

**II. The 2nd Intended Interested Party/ Applicant's case**

3. The Applicant sought for the following orders:-
  - a. That the Applicant Awadh Saleh Said Sherman be enjoined as an interested Party to this suit.



- b. That this Honourable Court upon grant of Order 1 above be pleased to declare this suit as null and void for having been filed against a dead person and issue an Order the same be struck out.
  - c. That the costs of this application be provided for.
4. The application herein was premised on the grounds, testimonial facts and averments made out under the 10<sup>th</sup> Paragraphed Supporting Affidavit of –Awadh Saleh Said Sherman, the Applicant herein sworn and dated 12<sup>th</sup> September, 2023 with two (2) annextures marked as “ASSS - 1 and 2” annexed thereto). The Applicant averred that:-
- a. The Applicant prayed to be enjoined in this suit as an interested party. This was because he was a duly appointed Legal Administrator of Estate of the late Saleh Said Sherman, his grandfather, against whom the suit herein has been instituted. He was issued with letters of administration of the Estate of Saleh Said Sherman vide High Court Mombasa Succession Cause No. 375 of 2009. (Annexed in the affidavit was a copy Grant of Letters of Administration Intestate marked as “ASSS – 1”).
  - b. The suit herein had been instituted against the Defendant, who was deceased, having passed away on 1<sup>st</sup> April, 1972 (Annexed in the affidavit was a copy Certificate of Death of the late Swaleh Said Sherman marked as “ASSS – 2”).
  - c. The suit was filed on 7<sup>th</sup> July, 2023, hence the Defendant was already dead when the suit was filed.
  - d. The suit was improper before the court for having been filed against a dead person.
  - e. The suit herein, the orders and the subsequent proceedings was a nullity ab-nitio and the same cannot be salvaged in law by allowing an amendment of the Plaint to allow the administrators to his to take over the matter as it was filed after the Defendant was already dead.
  - f. There would be no inconvenience or prejudice caused to the Plaintiff if the application was allowed. It was in the interest of justice that this application be heard and allowed.
  - g. This Honourable Court has unfettered duty to the Court’s overriding objective herein to avoid miscarriage of justice and prejudice that may be caused by the Orders/or Judgment issued against a dead person.

### **III. The 1st Intended Interested Party’s case**

5. The Applicant sought for the the following orders:-
- a. Spent.
  - b. The Applicant Yakub Shaban be enjoined as an Interested Party to the suit.
  - c. Costs of this application be provided for.
6. The application herein was premised on the grounds, testimonial facts and averments made out under the 14<sup>th</sup> Paragraphed Supporting Affidavit of –YAKUB SHABAN, the Applicant herein sworn and dated 17<sup>th</sup> August, 2023 with six (6) annextures marked as “YS - 1 to 6” annexed hereto. The Applicant averred that:
- a. The Applicant was a duly appointed Legal Administrator of the Estate of the late Shaban Kassim Ribiero who was his father. He applied to be the Administrator of his estate on 4<sup>th</sup> November, 2014 and on 9<sup>th</sup> September, 2014 the grant was confirmed in High Court Mombasa Succession Cause No.



- 221 of 2013. In the grant lot No. II/MN/77 situated in Junda Mombasa was part of the Estate of the late Shaban Kassim Ribiero. (Annexed in the affidavit were copies of the Grant and Certificate of Confirmation of Grant marked as “YS - 1a and YS - 1b” respectively).
- b. The late Shaban Kassim Ribiero was the actual and beneficial owner of Plot no. 77/II/MN the late owned the property jointly with Ramadhan Kassim Ribiero and Peter Tom, having purchased the property from Swaleh Said Sherman on 12<sup>th</sup> June, 1970. (Annexed in the affidavit was a copy of sale agreement marked as “YS – 2”).
  - c. The Applicant’s wife was granted permission by his late father in the late 1980s as a licensee to build a one room on a portion of the property the one room was to be utilized as a nursery school.
  - d. The Applicant (Raphael Ojiambo Obore) went contrary to the licensee agreement and persisted to constructed and went ahead and constructed and encroached onto his late father’s property. He reported the matter to the police on the issue of encroachment and further wrote a letter to the administrative authority and County Government of Mombasa to intervene. (Annexed in the affidavit was a copy of the letter dated 4<sup>th</sup> February, 2014 marked as “YS – 3”).
  - e. The Applicant filed a case in the capacity of the school St. John Mshomoroni Academy against him in Mombasa Chief Magistrate Court Civil Suit No. 473 of 2018 seeking a permanent injunction on a claim of trespass into the school situated on Plot No. L.R. No. 77/II/MN. Judgment was delivered on 14<sup>th</sup> May, 2020 and the Court dismissed the Applicant’s suit and entered judgment in his favour and granted vacant possession of the suit property the costs were also awarded to him. (Annexed in the affidavit were copies of the Judgment delivered on 14<sup>th</sup> May, 2020 and decree issued on 13<sup>th</sup> January, 2021 marked as “YS - 4a and 4b” respectively).
  - f. The Applicant filed an appeal against the above mentioned judgment in Civil Appeal No. 83 of 2020 before Mombasa High Court and the High Court on 8<sup>th</sup> June 2021 delivered its judgment and upheld the lower Court’s judgment and dismissed the Applicant’s appeal. (Annexed in the affidavit was a copy of the Judgment delivered by Justice D.O. Chepkwony on 8<sup>th</sup> June, 2021 marked as “YS – 5”).
  - g. He had filed an application in Civil Suit No. 473 of 2018 before the Chief Magistrate Court against the Applicant’s school for the Applicant to give vacant possession since the Applicant had refused to vacate the suit premises even after the lower Court in Civil Suit No. 473 of 2018 had entered judgment in his favour and ordered the Applicant to vacate. (Annexed in the affidavit and marked as “YS – 6” was the copy of the affidavit.
  - h. It was in the interest of justice that he needed to be enjoined in this suit for the reasons stated above and for reason that the suit property belonged to the estate of his late father.
  - i. If this Honourable Court did not grant the orders sought a great injustice would occur in his part.

#### **IV. Submissions**

- 7. On 7<sup>th</sup> February, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 12<sup>th</sup> September, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that the parties obliged and on 13<sup>th</sup> March, 2024 a ruling date was reserved on 27<sup>th</sup> May, 2024 by Court accordingly. But due to unavoidable circumstance it was eventually delivered on 11<sup>th</sup> June, 2024.

A. The Written Submissions by the 2<sup>nd</sup> Intended Interested Party/ Applicant



8. The Applicant through the Law firm of Messrs. M.K. Oyaró & Company Advocates for the Plaintiffs filed their written submissions dated 5<sup>th</sup> February, 2024. M/s. Kemunto Advocate commenced the submissions by stating that by Originating Summons dated 6<sup>th</sup> July, 2023 the Plaintiff herein instituted this suit against the Defendant- Saleh Said Sherman, and asked this Honourable Court to determine questions which inter alia include:-
- a. Whether the Defendant's title ownership/interests in LAND PARCEL PLOT NO.777 (ORIG.NO. 207/2) measuring 8.3 acres has been extinguished by lapse time.
  - b. Whether the Plaintiff have obtained title and ownership by virtue of doctrine of adverse possession
9. According to the Learned Counsel, the application dated 6<sup>th</sup> September, 2023 (court notes an error as the said application is dated 12<sup>th</sup> September, 2023 instead) was filed by Awadh Saleh Said Sherman, who was an administrator of the estate of the Defendant in this suit. The Applicant sought orders that he be joined to this suit as an interested party, and consequent thereto, had this suit struck out, principally on the basis that when the suit was filed, the Defendant/Respondent named herein had long passed away. The application was based on the grounds inter alia that the Defendant herein died on 1<sup>st</sup> April, 1972 while this suit was filed on 7<sup>th</sup> July, 2023. The supporting affidavit was sworn by Awadh Saleh Said Sherman, who had annexed a copy of the Certificate of Death of the Defendant. The Plaintiff did not respond to the said application.
10. The Learned Counsel relied on the following issues for determination:-
- a. Whether the suit herein having filed been filed against a dead person is valid?
  - b. What the fate of the suit ought to be in the instance the same is held to lack validity?
  - c. Who bears the costs of this Application
11. The Learned Counsel indicated that she would handle the afore - stated crafted issues herein jointly taking that they were somehow co - related. From the material placed before the court it was self-evident that Saleh Said Sherman named as the Defendant/Respondent in the Originating Summons passed away some Fifty-One (51) years before this suit would be filed on 7<sup>th</sup> July, 2023. It has how well – settled that there a suit was filed against a dead person, that suit was bad in law because it was filed against nobody and there was simply no valid suit. To buttress on this point, the applicant placed reliance in the civil case of” - “ELC NO.71 OF 2016 (OS), Japhet Nzila Muangi v Hamisi Juma Malee [2022]eKLR”, Munyao Sila. J. while addressing the issue of a suit filed against a dead person stated;
- “ .....the question is actually whether the Defendant had died at the time that this suit was filed and if I find for a fact that he was deceased at the time, then I will have no choice but to strike out this suit as null and void for one cannot sue a dead man and claim that the suit is properly before court.”
12. In arguing on the nullity of the Plaintiffs suit, the Learned Counsel relied and was guided by J.O. Olola. J in the case of:- “ELC Case NO. 88 OF 2013(OS), Mbigo Kadzo Tembo & another v Vincent



Sabastian D’costa [2020]eKLR”, placed reliance in Lord Denning statement in the famous case of “Mac Foy v United Africa Co. Limited [1961] All ER 1169”,

“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.”

13. Accordingly, the Learned Counsel further submitted that, the Originating Summons herein was filed against the Defendant, a person who had been dead for fifty-one years and was therefore for all intents and purposes, nullity ab initio. Hence, they prayed that the application herein be allowed and the suit be struck out.
14. In conclusion the Learned Counsel acquiesced that since the suit collapsed, they prayed that the costs be in the cause and be awarded to the Applicant.

### **B. The Written Submissions of the 1st Intended Interested Party.**

15. The 1<sup>st</sup> Intended Interested Party through the Law firm of Messrs. Katib & Company Advocates filed his written submissions dated 2<sup>nd</sup> February, 2024. M/s. Mohammed Advocate averred that the submissions were on behalf of the 1<sup>st</sup> Interested Party in respect of the Application dated 17<sup>th</sup> August 2023 and the Application dated 12<sup>th</sup> September 2023.
16. On the application dated 17<sup>th</sup> August, 2023, the Learned counsel submitted that this was the 1<sup>st</sup> Intended Interested Party’s Application seeking to be enjoined into these proceedings as an Interested Party. The Application was premised on grounds that, the 1<sup>st</sup> Interested party was an Administrator of the Estate Shaban Kassim Ribeiro and the suit property herein being Plot No.MN/II/777 forms part of the deceased Estate. Despite service and directions on filing response, the Plaintiff filed no Response to the Application.
17. On whether the 1<sup>st</sup> Intended Interested Party had proved his case for the grant of the orders sought. The Learned Counsel relied on the provision of Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 which provided that:-

“the Court may at any stage of the proceedings either upon or without the Application of a party and on such terms as the Court may deem fit, order the name of any party improperly joined whether as defendant or plaintiff be struck out and that the name of any person who ought to be joined, whether as defendant or plaintiff whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon or settle the matter be added to the suit.”
18. The Learned Counsel relied on the case of “Permet Ole Kiseet – Versus – Sylvia Moi & 3 Others eKLR” the Court held as follows:-

“an Interested Party means a person who has an identifiable stake or legal interest or duty in the proceedings before Court but is not a party to the proceedings or may not be directly involved in litigation.”
19. As far as the Learned Counsel was concerned, from the instant suit, the subject matter is suit No. MN/11/777, which is being claimed by the Plaintiff. At paragraph 4 of the supporting affidavit, the 1<sup>st</sup>



Intended Interested Party deponed that he was the duly appointed Legal Administrator of the estate of the late Shaban Kassim Ribeiro pursuant to letters of Administration issued in Succession Case No. 221 of 2013 and annexed the Grant as “YS – 1”. He added that the suit property was part of the Estate of deceased which he jointly owned with Ramadhan Kassim Ribeiro and Peter Tom having purchased the property from Swaleh Said Sherman on 12<sup>th</sup> June, 1970 and attached copy of sale agreement as “YS – 2” in the supporting affidavit.

20. At the contents made out under Paragraph 10 of the supporting affidavit the Applicant deponed that he had since filed an Application in Civil Suit No. 473 of 2018 in the Chief Magistrate's Court. It was against the Plaintiff's school on the suit premises for vacant possession. It was still pending before Court and attached copy of the Application as “YS – 6”.
21. In conclusion, the Learned Counsel submitted that the 1<sup>st</sup> Interested Party herein had proved a stake in these proceedings. Therefore, he was a necessary party to be enjoined herein for this Court to be able to effectively determine the issues at hand. The Learned Counsel submitted that the 1<sup>st</sup> Interested Party had proved a case for grant of the orders sought.

#### **V. Analysis & Determination.**

22. I have carefully read and considered the pleadings herein by the Applicants from the twin applications herein, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
23. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has four (4) framed issues for its determination. These are:-

- a. Whether the Defendant had died at the time that this suit was filed?  
IF YES, for a fact that he was deceased at the time, then what are remedies available by Court?
- b. Whether the Intended Interested Parties can be joined in this suit as per the Notices of Motion application dated 17<sup>th</sup> August, 2023 and 12<sup>th</sup> September, 2023?
- c. Who will bear the Costs of Notices of Motion applications dated 17<sup>th</sup> August, 2023 and 12<sup>th</sup> September, 2023.

ISSUE No. a). Whether the defendant had died at the time that this suit was filed.

24. Under this sub title, the Honourable Court is tasked with the examination of the prayer 2 in the application which is based on a dead person. Critically speaking, death in law carefully connotes a totally different dimension in any proceedings. It is my own assessment that dead persons are strongly and well protected almost more than the living. There is no air space to escape on matters regarding protecting of the assets and benefits of the dead persons. The Applicant sought for:-

“b) THAT this Honourable Court upon grant of Order 1 above be pleased to declare this suit as null and void for having been filed against a dead person and issue an Order the same be struck out.”



25. 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 Chand Mehta v Chrisna Devi Meuta 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.”

Having reviewed the above authorities, he found that the suit as against the 7<sup>th</sup> Defendant, who was dead when the case was filed, was null and void ab initio.

26. The Court of Appeal has also had occasion to address the issue of a suit filed against a dead person in the case of “Geeta Bharat Shah & 4 Others v [\*Omar Said Mwatayari & Another, Court of Appeal at Mombasa, Civil Appeal No. 46 of 2008\*](#), [2009] eKLR”. In that case, a suit was filed against two persons one of whom was already dead when the case was filed. Judgment was entered against the deceased. An application to set aside the Judgment was disallowed and the applicants appealed to the Court of Appeal. The Court of Appeal held that the Judgment could not be sustained as it was entered against a person who was already dead. The court stated as follows :-

“In the result, as Bharatkumar Nathalal Shah was already dead by the time the suit was filed, we hold the view that the suit was a nullity and Mr. Oddiaga, is with respect right in conceding the appeal in respect of him on that score. We see no merit in directing that he be allowed to file defence as he is not there to do so and the administrators to his estate cannot in law take over the matter as it was filed after he was already dead.”

27. It is not contended that the Defendant died over 50 years before the institution of the suit. The Honourable court is bound by the above decision of the Court of Appeal, be that as it may, in the application before it dated 12<sup>th</sup> September, 2023. The answer to the issue at is that the Plaintiff filed a suit against someone who had passed away some Fifty-One (51) years before this suit would be filed on 7<sup>th</sup> July, 2023 as proved by Annexure “ASSS – 1”.



**IssueNo. b). Whether if the Court find for a fact that he was deceased at the time then what are the legal remedies available to Court.**

28. Under sub – heading, under no circumstances should Court be helpless. For instance, in the event the Court is able to establish that a party is dead through empirical documentary documents, what ere the legal remedies available. The provision Order 24 Rule 4 (4) of the Civil Procedure Rules, 2010 provides as follows:-

“ 4.

(1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant 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 Defendant to be made a party and shall proceed with the suit.

(2) .....

SUBPARA (3)

Where within one year no application is made under subrule (1), the suit shall abate as against the deceased Defendant. (emphasis is mine).”

29. The law is clear on what happens when one of the Defendants dies and the cause of action survives or continues. Upon an application made, the Court shall cause the legal representative of the deceased to be made a party or to be substituted in place of the deceased party to proceed with the case. The provision Section 2 of the Civil Procedure Act, Cap. 21 defines legal representative as follows:-

“ means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.

30. The question this Honourable Court is left to ask itself is whether substitution applies in this case. The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. It is however important to note that even if the intended interested parties wanted to take over the suit against the defendant, the same does not exist. The action of bringing a suit against a dead person was a nullity from the start of the process of initiating the action.

31. On this point, I rely on 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.”

32. Additionally, in yet another Indian Case of “Pratap Chand Mehta v Chrisna Devi Meuta 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.”

33. Therefore the Honourable Court is of the opinion that the only cure to this irregularity by the Plaintiff is that the suit as filed was non – suited ab initio, for one cannot sue a dead person, The only legal remedy is to have the suit or any legal proceedings struck out.

**IssueNo. c). Whether the Intended Interested Parties can be joined in this suit as per the Notices of Motion application dated 17<sup>th</sup> August, 2023 and 12<sup>th</sup> September, 2023**

34. Before I proceed to determine the issues above, I wish to point out an issue of concern. From the filed application before me the applicants in prayer 1 are seeking for orders to enjoin the 2<sup>nd</sup> Intended Interested party in the suit by virtue of him being legal representatives to the estate of the deceased. On quick reading of the application what the parties are essentially seeking is for the Intended Interested party to be part of the suit in place of the Defendant, which is for them to join the suit. I find this rather strange in the given circumstances of a dead party. This order is never available in law.

35. Additionally, I wish to point out that there is a difference between join and enjoin. In the case of: “Re Estate of Barasa Kananje Manya in Kakamega Succession Cause No. 263 of 2002”, the court which had been moved on an application that sought to enjoin the parties to the suit distinguished the two terms and stated as follows

“To “join” a party to a suit means to add that person to the suit. To “enjoin,” in law, means to injunct, or to bar a party from doing something. “Enjoinder” means a prohibition ordered by injunction”.

36. Despite the difference in meaning of the two words the court allowed the application and in so doing, justified the exercise of its discretion by stating as follows

“I am inclined to stretch the application of Article 159 of *the Constitution* and Rule 73 of the Probate and Administration Rules, to presume that the applicants intended to apply for “joinder” as opposed to “enjoinder,” and to proceed to determine the application on its merits based on that presumption”.

37. This Honourable Court dares to say if a suit is a nullity then it cannot joined any legal representative; the Court cannot even join any other party because, it was 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.



38. I reiterate that the Law is very clear that if a case was filed or has been instituted against a dead person and that person happened to be the only person who had been sued in the suit then the proceedings are a nullity. Having said so, the Application for joining the 2<sup>nd</sup> intended interested party and the striking out the suit as filed has been allowed only in respect to prayer 2. The prayer on joining the applicant fails. The Application dated 17<sup>th</sup> August, 2023 cannot be determine by virtue of the fact that there was no suit that existed in the first place.

**IssueNo. d). Who will bear the Costs of Notices of Motion applications dated 17<sup>th</sup> August, 2023 and 12<sup>th</sup> September, 2023**

39. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh v Tarchalan Singh[2014] eKLR” and Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited, [2014] eKLR”.

40. In the case of “Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

41. With regard to the instant case, I find this to be an appropriate case where to award the Applicants the costs of the applications, the provision of section 27 of the *Civil Procedure Act* chapter 21 of the Laws of Kenya notwithstanding.

**VI. Conclusion & Disposition**

42. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the two applications, this court arrives at the following decision. Specifically, these are the orders:-

- a. That the Notice of Motion application dated 12th September, 2023 be and is hereby partially found to have merit thus allowed in respect to prayer 2 of the application.
- b. That the Notice of Motion application dated 17th August, 2023 be and is hereby struck out on account that being that the suit was instituted against a dead person thus clearly there was no suit to begin with.
- c. That this Honourable Court be and hereby issues an order striking out the suit filed via Originating Summons dated 7th July, 2023 against Saleh Saidi Sherman who has been deceased for the past 51 years.
- d. That the costs of the Notices of Motion applications dated 17th August, 2023 and 12th September, 2023 awarded to the Applicants.

It is so Ordered Accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 11TH DAY OFJUN 2024.**

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**HON. MR. JUSTICE LL. NAIKUNI,**



**ENVIRONMENT AND LAND COURT AT  
MOMBASA.**

**Ruling delivered in the presence of:**

- a. M/s. Firdaus Mbula, the Court Assistant.**
- b. No appearance for the Plaintiff/Respondent.**
- c. No appearance for the Defendant/Respondent.**
- d. No appearance for the 1<sup>st</sup> Intended Interested Party/ Applicant.**
- e. M/s. Kemunto Advocate for the 2<sup>nd</sup> Intended Interested Party/Applicant.**

