



**Commission for Human Rights and Justice & another v Ibrahim Mwanje
Zia t/a Ibado Enterprises & 11 others (Environment & Land Petition
E016 of 2021) [2025] KEELC 453 (KLR) (12 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 453 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E016 OF 2021
SM KIBUNJA, J
FEBRUARY 12, 2025**

BETWEEN

COMMISSION FOR HUMAN RIGHTS AND JUSTICE 1ST PETITIONER

COAST LEGAL AND RESOURCE FOUNDATION 2ND PETITIONER

AND

IBRAHIM MWANJE ZIA T/A IBADO ENTERPRISES 1ST RESPONDENT

JOEL JOHN RIA 2ND RESPONDENT

DISCOUNT GROUP OF COMPANIES 3RD RESPONDENT

**SHAMUSDEEN KASHMIRI ZAUDDIN IBRAHIM, SHAHED
SHAMSU DEEN KASHMIRI, SAJJA KASHMIRI T/A KASHMIR
INVESTMENTS 4TH RESPONDENT**

SHIMAKA NECHEZA LEONARD 5TH RESPONDENT

JOHN GICHUKI WANJOHI 6TH RESPONDENT

MARY KAI 7TH RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA 8TH RESPONDENT

**COUNTY LAND MANAGEMENT COORDINATION MOMBASA 9TH
RESPONDENT**

**THE CHIEF LAND MANAGEMENT COORDINATION MOMBASA 10TH
RESPONDENT**

NATIONAL LAND COMMISSION 11TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 12TH RESPONDENT



RULING

1. The application dated 24th September 2024, is brought under Order 1 Rule 10 (2) and Order 2 Rule 15 (1) of the Civil Procedure Rules, Sections 1A, 1B, & 3A of Civil Procedure Act and Article 159 (2) of the Constitution of Kenya. It was filed through “Ernest Mogaka & Associates Advocates for the 5th respondents/applicants”, and seeks the following orders:
 - a. “Spent.
 - b. Spent.
 - c. That this court be pleased to unconditionally set aside and or discharge the ex-parte proceedings against the 5th Respondent, all the consequent orders and directions issued and the 5th Respondent be granted unconditional leave to defend this petition and the Draft Answer — Response to the petition annexed be deemed as duly filed after payment of the requisite filing fees.
 - d. That consequent to grant of prayer 3 above, this court be pleased to declare the Petition as filed against Shamusdeen Kashmiri as null and void for having been filed against a deceased person.
 - e. That the costs of this application be borne by the Petitioners herein.”

The application is premised on the eleven (11) grounds on its face marked (i) to (xi) and supported by the affidavit of Shahed Shamsu Deen Kashmiri, sworn on the 24th September 2024, deposing inter alia that this petition was filed against the deponent, his late father Shamusdeen Kashmiri, who died on 21st November 2020, which was before the filing of the petition, and his brother, Sajjid Kashmiri, under their business name, Kashmir Investments; That They Sajjid Kashmiri and himself have never been served with the petition despite being among the registered owners of Land Parcel No. Mombasa/Mwembelegeza/1473; that the entire proceedings herein are irregular and should be set aside, and they be allowed to file their reply which raises triable issues.

2. The application is opposed by the petitioners through the replying affidavit Julius Ogot And Joseph Juma Mukewa, the petitioners' Executive Directors, sworn on 14th October 2024, inter alia deposing that the application was a delaying tactic employed by the 5th respondent, Shimaka Necheza Leonard, represented by Marende Necheza & Company Advocates, to ensure the matter is not heard and determined; that the 5th defendant has been aware of the existence of this matter, and had even filed a Notice of Preliminary Objection that was heard and determined by the court; that the party named as the applicant is not the 5th respondent, but the 4th respondent, which consists of a registered business name and Shamusdeen Kashmiri, Shahed Shamsu, Sajjad Kashmiri named as its joint proprietors; that even if Shamusdeen Kashmiri had died before the commencement of the petition, the business was never wound up, and still purports to own the public property; which was fraudulently acquired; that as the applicants have not demonstrated that they are the administrators of the estate of their deceased father, they have no locus to represent his estate, and should stop hiding behind his death; that even if the application was properly filed by the 4th respondent, he had opted not participate in the proceeding; that the application contravenes Order 9 Rule 6 of Civil Procedure Rules as the 5th respondent had not served them with notice of change of advocate; that the application was lacking in merit, and is an abuse of the court process and should be dismissed with costs to the petitioners.



3. The learned counsel for the petitioners' filed their submissions dated the 5th November 2024 which the court has considered.
4. The following are the issues for determination by the court:
 - a. Whether the application contravenes Order 9 Rule 6 of Civil Procedure Rules.
 - b. Whether the applicant has met the threshold for the proceedings to be set aside, and they be allowed to file their reply and participate in the fresh hearing.
 - c. Whether the application is an abuse of court process.
 - d. Whether the petition against Shamusdeen Kashmiri, is null, and void.
 - e. Who pays the costs?
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, submissions by the learned counsel, superior courts decisions cited, the record, and come to the following determinations:
 - a. The record confirms that this petition was filed on 12th February 2021. Its heading clearly names Shamusdeen Kashmiri ZAuddin, Shahed Shamsu Deen Kashmiri And Sajjad Kashmiri, T/a As Kashmir Investments, as the 4th respondent, while Shimaka Necheza Leonard, is named as the 5th respondent. The 6th respondent is indicated as John Gichuki Wanjohi. Paragraph 6 of the petition described the 4th respondent to be "individual trading and carrying business in Mombasa and they are purported person who are currently registered as the proprietors through an alleged sale and disposition made in their favour the same being orchestrated by the 5th respondent and the 6th respondent in a bid to cover their track and to defeat any claim over the subject parcel of land." At paragraph 7 of the petition, the 5th respondent is described as "a male of sound mind residing and working for gain in Mombasa as an advocate of the high court of Kenya has masterminded all the machinations to have the subject land be alienate (grabbed) and all through he has been acting in all transaction relating to sale, transfers and any other disposition made in respect to a subject parcel of land. Through his advice, the subject parcel of land was caused to be subdivided and has been changing hands under his watch and representation. This has been in connivance with the 6th respondent." The 6th respondent is described at paragraph 8 of the petition as "a male adult of sound mind who has at the material times herein being residing and working for gain in Mombasa employee in the Civil Service as Land Registrar in charge of Mombasa Land Registry and it is through his assistance, advice and participation has enable the 1st, 2nd, 3rd, 4th, and 5th respondents alienated the subject parcel of land." It is apparent therefore that though the application is indicated to be by the 5th respondents/applicants, it is indeed made by the 4th respondent, being the three named persons trading as Kashmir Investments. The court will in the interest of justice consider the application as being made by the 4th respondent.
 - b. The 4th respondent claims that they were never served with any pleadings and as such the proceedings herein ought to be found as irregular and set aside for want of service. A quick look at the proceedings before this court on 20th September 2022, show Ms. Meme holding brief for Mr. Masake for the petitioners was present in court and had no appearance from any of the respondents. She informed the court that the petitioners were unable to serve the 1st to 7th respondent and sought substituted service. The court directed the petitioner to apply for substituted service. However, the said application was never made before the



court. On 17th October 2022, Ms Meme informed the court that they had effected service on all the respondents and have filed an affidavit of service. I have perused the affidavit of service filed on 14th October 2022 by Kevin Ngoli Shisanya on behalf of the petitioners. He claimed to have served the 2nd, 3rd, 4th, 5th and 6th respondents through their WhatsApp numbers. In the said affidavit of service, I do see screenshots of WhatsApp messages sent to ‘discount group’, ‘shimaka’, ‘wanjohi’. The court would presume that discount group is the 3rd respondent, shimaka the 5th respondent and wanjohi the 6th respondent. The proof of service unfortunately did not demonstrate that the petitioners’ process server sent the pleadings to the WhatsApp numbers of Shamusdeen Kashmiri Zauddin, Shahed Shamsu Deen Kashmiri And Sajja Kashmiri, The Proprietors Of Kashmir Investments, the 4th respondent. There were no receipts for delivery via WhatsApp to the 4th respondent and this court is inclined to find that the 4th respondent was not properly served by the petitioners. The court in the case of Commission for Human Rights and Justice versus Jacob Kimutai Torutt & 5 others [2021] eKLR held that;

“Needless to say, the Civil Procedure (Amendment) Rules, 2020 now embrace the Electronic Mail Service and service via Mobile Enabled Messaging applications. The Rules further provide that the person effecting service shall attach the Electronic Mail Service delivery receipt upon confirming service, and in case of service via Mobile Enable Messaging application also attach delivery receipts confirming service (See Order 5 rules 22B and rule 22 respectively). In the instant Petition, the Process Server annexed a receipt of delivery for Electronic Mail Service but did not annex receipts for delivery of service via Whatsapp. I have further scrutinized the receipts of delivery attached and they show that service was effected on a different email from the one provided under paragraph 3 and 10 of the Affidavit of Service. To be specific, whereas the Process Server deponed that he served the 1st Respondent via email tortut166@yahoo.com which is a different email address. As such, this court is not satisfied that service was properly effected upon the 1st Respondent and it is therefore right that the Petitioner properly serves 1st Respondent before the pending application dated 1st May, 2021 is heard.”

- c. Shamusdeen Kashmir, Shahed Kashmir And Sajjid Kashmiri Are Undoubtedly, The Proprietors Of Kashmir Investments, as seen from the Certificate of Registration No. 513625 dated 5th June 2008. The copy of the title deed attached to the replying affidavit show that Shamusdeen Kashmiri Zauddin, Shahed Shamsu Deen Kashmiri And Sajjid Kashmiri, t/a Kashmir Investments, were registered as the proprietors of Mombasa/Mwembelegeza/1691, the suit property, on 6th November 2020. It appears from the copy of death certificate dated 11th December 2020, attached to the supporting affidavit, that Shamusdeen Kashmiri Zauddin, one of the proprietors of the Kashmir Investments, died on the 21st November 2020. This petition was filed on 12th February 2021, which was roughly three months after the death of Shamusdeen Kashmiri Zauddin. That as the Shamusdeen Kashmiri Zauddin, was not alive when the petition, was filed against him, he could not instruct counsel to enter appearance or defend him by the time the petition was filed. The petition against him was therefore a nullity in law and incurable, and even incapable of being taken over by a subsequently appointed personal representation, as there is nothing to take over from a nullity.
- d. However, where like in this petition a deceased person was sued alongside others who are still alive, the suit against those who are alive does not abate. In the case of Manyange (Deceased)



versus TG (*Minor suing through her mother and next friend WMG*) (*Civil Appeal E005 of 2022*) [2024] KEHC 1083 (KLR) (7 February 2024) (Ruling) where the court held:

“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.”

It is therefore in order for the court to find the petition against Shamusdeen Kashmiri Zauddin, as a nullity ab initio, and order that his name be struck out. However, the petition against Shahed Shamsu Deen Kashmiri and Sajjad Kashmiri, t/a as Kashmir Investments with their deceased father, and who are registered as owners of the suit property, is properly before the court and should be allowed to continue to its logical conclusion.

- e. On the issue of whether the application has contravened Order 9 Rule 6 of the Civil Procedure Rules, I have perused the court record and noted the 4th respondent had not entered appearance or in any other way participated in this petition. I have also confirmed that Ms. Ernest Mogaka & Associates Advocates, through whom the instant application was filed were not on record for any other party. Though the petitioners claim that the application was by the 5th respondent hiding under the 4th respondent, no specific evidence was tendered by the petitioners in support thereof. I therefore find no fault in the said firm representing the 4th respondent in filing and prosecuting the application.
6. Subsequently, and in view of the conclusions set out above, the court finds the application dated 24th September 2024 has merit and is allowed in the following terms:
- a. The as Shamusdeen Kashmiri Shauddin had died before the commencement of the petition, the claim against him is hereby declared null and void, and his name be struck out from the petition.
 - b. The petitioners are granted leave to file and serve an amended petition to reflect Order (a) above in fourteen (14) days from today.
 - c. The proceedings against the 4th respondent, including that of 29th July 2024 culminating in fixing the judgement for 6th November 2024, is hereby set aside.
 - d. The 4th respondent granted leave to file and serve a response to the petition, whether amended or not, within thirty (30) days from the date of this ruling.
 - e. The petitioners granted corresponding leave to file and serve their response to any new issues of facts in the 4th respondent’s reply within 14 days from the date of service.
 - f. The costs of this application be in the cause.

Orders accordingly.



DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 12TH DAY OF FEBRUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Petitioners : M/mugure .

Respondents : Mrs. Chengo for Kenga for 1st and 2nd Respondents,

Mr. Mokaya for 4th Respondent.

M/s Tikuba for Kyalo for 6th Respondent and Mr. Kiprono for Penda for A/G

Shitemi - Court Assistant.

