



**Obiero v Piotto (Enviromental and Land Originating Summons
314 of 2016) [2024] KEELC 13623 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13623 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 314 OF 2016
LN MBUGUA, J
DECEMBER 5, 2024**

BETWEEN

PIUS OYUYO OBIERO PLAINTIFF

AND

LYDUSHKA HORNIK PIOTTO DEFENDANT

RULING

1. Before me is a Notice of Motion Application dated 6.11.2023 filed by one Dianella Moretti Proske, who is not a party in this suit. The Respondent in the main suit is one Lydushka Hornik Piotto. For purposes of harmony of the record, the court will identify the current applicant simply as Daniella, the applicant in the main suit Pius Oyuyo Obiero as Pius, while the respondent there of shall be Lydushka.
2. Dianiella is seeking orders that the suit be struck out as the same was filed against a deceased person, the respondent, Lydushka having died on 5.8.2006. It is argued that Pius was all along aware of the death of Lydushka. The application is supported by the affidavits of Dianella who identifies herself as a co-administrator of the estate of Lyduska Hornik Piotto, who is the registered owner of the suit property L.R. No. 10107. She avers that Pius was employed by the deceased and was even present when she died.
3. In support of her case, Dianella has availed the Grant of letters of administration issued to her on 26.7.2010 in succession cause No. 2039 of 2008 Nairobi indicating that Lydushka died on 5.8.2006. A copy of the death certificate of the said Lyduska has also been availed.
4. In her further affidavit dated 3.5.2024, Dianella contends that the Grant of letters of administration was formally registered against the title on 28.9.2010, thus by the time the suit was filed, the correct parties who ought to have been sued were the administrators of the estate of the deceased. To this end, she has availed a copy of title for parcel L.R.10107 whose entry no. 6 is a transfer of the suit property to Lydushka Hornik Piotto on 22.11.1972, while entry no. 7 is the registration of the Grant of letters



of administration with will of the estate of Lydushka on 28.9.2010 in favour of Dianella and Roperto Sainoqh.

5. Dianella further avers that she is aware of the grants issued to Romeo Pierino Rocco and Benita Sigei Hornik, but contends that the same are fraudulent and there are pending applications for their revocation.
6. In her submissions dated 7.5.2024, Dianella reiterates that this suit is a nullity ab initio as the same was filed against a deceased person. Reference was made to several cases including *Saju v Baker & 2 Others* (Environment and Land Court case Civil Suit E008 of 2023 (2023) KEELC 21837 (KLR) (23 November 2023) (Ruling) (Oguttu Mboya J)). Dianella submits that being a Co administrator of the estate of the deceased, she has the right and the capacity to file the application.
7. In opposition thereof, Pius filed a Replying Affidavit dated 19.4.2024 indicating that Dianella is a stranger to the instant proceedings and has no capacity to participate in the same. He contends that he was never made aware of the demise of Lydushka, adding that his suit is against the registered owner of the suit property who is Lydushka.
8. He further avers that he has stumbled upon a certificate of confirmation of the Grant issued to one Romeo Pierino Rocco dated 23.7.2018 issued in HCCC Succession case no. 271 of 2018, and another Grant issued to Benita Sigei Hornik issued on 30.3.2022. He therefore contends that the issue pertaining to the capacity to represent the estate of Lydushka is uncertain and is shrouded in mystery, and it cannot be ascertained as to who the legal representative of the deceased is.
9. He however does admit to having been employed by the deceased but denies that he was present during her cremation.
10. In his submissions dated 21.6.2024, Pius reiterated that Dianella has no capacity to act as an administrator of the estate of the deceased, adding that the Grant of letters of administration issued to Romeo and Benita in respect of the estate of Lydushka have since been confirmed by the court.
11. Citing the cases of *The Co - Operative Merchant Bank Ltd v George Fredrick Wekesa*, Civil Appeal No. 54 of 1999 amongst other cases, Pius avers that striking the suit is a draconian act which may only be resorted to in plain cases.
12. I have considered all the arguments raised herein including the rival submissions. The question falling for determination is whether this suit is valid on account of the death of the respondent, Lydushka. The records indicate that this suit was filed by Pius on 1.4.2016 against Lydushka claiming entitlement to the suit property by way of adverse possession and the claimant subsequently effected service of the pleadings by way of substituted service.
13. On 10.7.2023 when the court was dealing with applications to have the suit reinstated, the same having been dismissed for want of prosecution, Mr. Kahura advocate appeared and addressed the court stating that he was representing a co administrator of Lydushka's estate. He contended that Lydushka died way back in the year 2006. In a ruling delivered on 21.9.2023, the court did reinstate the suit. However, at paragraph 18 of the said ruling, the court had this to say on the averments made by Mr. Kahura regarding the death of Lydushka.

“Death is a serious issue and the court must be given further and better particulars to determine whether this suit is a nullity. In the circumstances I direct that such particulars of the death of the respondent. i.e a death certificate be availed to this court to enable the court give further directions.”



14. The applicant, Dianella has now filed the current application availing a death certificate of the respondent indicating that Lydushka died on 5.8.2006. Nowhere in his rather wordy Replying affidavit dated 19.4.2024 has Pius rebutted the fact of death of Lydushka as per the death certificate. What he contends is that he was never made aware of the death. To this end, Pius states as follows at paragraph 5 (i) of his Replying affidavit;

“Since the last time I saw the respondent to the point where the instant application was filed, I had no knowledge nor was I informed of any alleged demise of the respondent.”

15. I pose the question; “when was that last time that Pius saw Lydushka before the application was filed?”. It is clear beyond peradventure that Pius was economical with the truth on when he last saw the deceased and he has not taken the issue of death seriously, yet as noted by the court, death is an extremely grave matter. At paragraph 7 of his replying affidavit, Pius alludes to having been employed by Lydushka. Thus all the more reason as to why he ought to have given cogent evidence on the issue of the death of Lydushka.

16. Pius contends that Dianella has no capacity to bring forth the current application as she is not a party to this suit and that there are other grants issued in respect of the estate of the deceased to Romeo and Benita. However, the fundamental question before this court is not about capacity of the applicant. The crux of the matter is whether Lydushka was alive as at the time this suit was filed. And there is firm and consistent evidence availed by Dianella to indicate that Lydushka died way back on 5.8.2006. Thus from whichever angle one looks at the matter, this suit was dead on arrival and cannot be redeemed in whichever manner as no suit can be commenced against a deceased person.

17. To this end, I make reference to the case of Japhet Nzila Muangi v Hamisi Juma Malee [2022] eKLR where the court cited the Indian case of C. Muttu v. Bharath Match Works AIR 1964 Kant 293 where 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.” Emphasize added

18. Further, it is noted that even with all the information that Pius has gathered relating to the death of Lydushka, there is no evidence to demonstrate that he has made any efforts to bring on board any administrators of the estate of the deceased in this suit, including the alleged Romeo and Benita. Thus again, there would be no reason to sustain this suit.

19. It is worthy to note that Dianella has availed a copy of title to the suit property indicating that the Grant issued to her and her co administrator was registered on the said title on 28.9.2010 as reflected in entry number 7. This entry is peculiarly missing in the title availed by Pius, yet he obtained a search long after the date of 28.9.2010!

20. In the end, I find that this suit is a nullity ab initio, thus the application filed by Dianella is found to be merited. This suit is hereby struck out with costs to the applicant, Dianella.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5th DAY OF DECEMBER 2024 THROUGH MICROSOFT TEAMS.



LUCY N. MBUGUA

JUDGE

In the presence of:

Ann Makori for Plaintiff

Kahura for Applicant in the pending Application

Court Assistant: Vena

