



**Wakhome & another v Alunga & 4 others; Kisiangani (Third party) (Environment & Land Case 7 of 2020) [2025] KEELC 3109 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 3109 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 7 OF 2020**

**EC CHERONO, J  
MARCH 27, 2025**

**BETWEEN**

**SALOME WAKHOME ..... 1<sup>ST</sup> PLAINTIFF**

**JULIANA WAKHOME ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**TAFROZA MUHONJA ALUNGA ..... 1<sup>ST</sup> DEFENDANT**

**WAMALWA WANYAMA CHIMBAGA ..... 2<sup>ND</sup> DEFENDANT**

**PAUL MWELEZA ..... 3<sup>RD</sup> DEFENDANT**

**ERASTUS BARASA ..... 4<sup>TH</sup> DEFENDANT**

**MOSES ASICHELE ..... 5<sup>TH</sup> DEFENDANT**

**AND**

**GILBERT KISIANGANI ..... THIRD PARTY**

**RULING**

1. The Plaintiffs/Applicants through a Notice of Motion dated 28/11/ 2024, seek the following orders:  
Spent
  - a. That the suit against the 3<sup>rd</sup> defendant, Paul Mweleza (deceased) be withdrawn.
  - b. That this honourable court be pleased to issue consequential orders amending the pleadings to reflect the withdrawal of the suit against the 3<sup>rd</sup> defendant(deceased).
  - c. That this honourable court be pleased to direct that this suit be set down for hearing on a priority basis.



- d. That the costs of this application be provided.
2. The application is based on grounds set out on face of the said application supported by the Affidavit sworn by the Juliana Wakhome, the 2<sup>nd</sup> Plaintiff/Applicant herein who deposed that with her co-plaintiff, they have brought this suit as administrators of the estate of Joseph Wakhome Nabiswa (dcd) against the Respondents who were objectors in Kitale High Court Succession Cause No. 13 of 2014. That they were not aware that at the time of filing this suit, the 3<sup>rd</sup> Defendant/Respondent was deceased and his inclusion in the suit was an honest mistake. That it is in the interest of justice that the matter which has delayed due to various applications by the Respondents be expedited.
  3. In opposition thereto, the 1<sup>st</sup> plaintiff filed a replying affidavit sworn on 13/01/2025 where she stated that a certificate of death is a prima facie proof of death and not a letter from the chief as presented by the Applicant. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent on their part filed a replying affidavit sworn on 16/01/2025 where they averred that the Applicant has not sufficiently proved that the 3<sup>rd</sup> Respondent is deceased.
  4. When the application came up for directions, the parties agreed to have it canvassed by way of submissions. The Applicant filed submissions dated 27/01/2025 where he cited the provisions of Order 25 Rule 1 Civil Procedure Rules, 2010 which permits a plaintiff to withdraw or discontinue a case against any defendant at any stage of the proceedings. He also relied on the provisions of Order 1 Rule 9, Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 which provides that a suit cannot be defeated on grounds of misjoinder and that a court may order for the name of a party who is improperly joined to be struck out. She further cited the case of Viktar Maina Ngunguri & 4Others vs. Attorney General & 6 Others (2018) eKLR, The Co-operative Merchant Bank Ltd vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999 in support of her case.
  5. The third party filed submissions dated 31/01/2023 which on perusal do not relate to the current application but the claim against them as presented by the Respondents.
  6. The 1<sup>st</sup> plaintiff filed submissions dated 07/02/2025 where she reiterated the averments in her replying affidavit.
  7. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents filed submissions dated 17/02/2025 and argued that there is no case to withdraw against the 3<sup>rd</sup> Respondent since a suit against a deceased person is a nullity. They referred to the case of ELC no. 120 Limuru Hills Ltd vs. Mwaritha Wangu Muriithi. It was further submitted that the Applicant had not attached a copy of the proposed amended plaint. Lastly, it was submitted that the Applicant had not submitted evidence of the 3<sup>rd</sup> Respondent's alleged death.
  8. The primary issue for determination by this court is whether it should grant the Applicant leave to amend Plaint. Before addressing the merits of the application, I recall in my previous ruling that plaintiffs acting as co-administrators do not have the authority to act separately and independently. Their power to initiate legal proceedings on behalf of the estate comes solely from the estate itself. Thus, it remains perplexing that the plaintiffs in this case continue to perform their administrative duties in a discordant manner at the risk of having the letters of administration issued to them being challenged for revocation.
  9. Having said that, I proceed to determination the merits or otherwise of the application. The general power to amend pleadings is provided for under Section 100 of the *Civil Procedure Act* which states as follows:

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall



be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

10. Order 8 of the Civil Procedure Rules expounds on the process and requirements for amendment of pleadings. Under Order 8 Rule 1, a party may amend his pleadings without leave of the court at any time before the pleadings are closed. However, even after the close of pleadings, a party may still amend his pleading with the leave of the court. This is prescribed under Order 8 Rule 3 of the Civil Procedure Act.

11. The general power to amend is also provided for under Order 8 Rule 5 which provides as follows:

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just.”

12. Amendment of pleadings is to enable parties to alter their pleadings to reflect the true state of affairs which they intend to rely on. This was the position taken in the case of Institute For Social Accountability & Another vs Parliament of Kenya & 3 Others [2014] eKLR, where the court held as follows:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”

13. The proposed amendments in the present application is said to be occasioned by the notice of withdrawal of suit against the 3<sup>rd</sup> respondent, PAUL MWELEZA sought by the 2<sup>nd</sup> plaintiff/Applicant. The Respondents have argued that the Applicant has not sufficiently proved that the said 3<sup>rd</sup> Respondent is indeed deceased. The Applicant has attached a letter from the Chief, Ndalulungu Location, one Peter W. Simiyu dated 27/11/2024 where he stated that the 3<sup>rd</sup> Respondent died sometime in October 2017. To this end, I agree with the Respondents that a letter from a chief is not sufficient proof of the death of a person. I concur with the findings of Justice Njagi in the case of Adan Chuda Sode v Madina Oshe Jira & another [2021] eKLR where he stated that;

“It is then clear that the death of a person can be proved by production of a certificate of death, an order of presumption of death or some other written evidence of the death as may be available. In my view, the phrase “such other written evidence of death as may be available” would include such documents as a doctor’s certificate of death, post-mortem report, burial permit and such other documents. The qualification to be attached to such other documents is that they must be credible. The question then is whether a chief’s letter passes the test of a document that can be used to prove the death of a deceased person. I do not think so. It is a well-known fact that at most times chiefs write such letters based on



information given to them by other people. A question as to the death of a person is such a grave matter that it cannot be left to speculation or conjecture.”

14. However, my finding on the issue is not fatal to the application. Order 1 Rule 10 (2) and 10(4) of the Civil Procedure Rules 2010 as to substitution and addition of parties, read as follows; -
  - (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or defendant,(emphasis mine) be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
15. Further, Justice Sila Munyao’s views in the case of Marigat Group Ranch & 3 Others Vs. Wesley Chepkoiment & 19 Others (2014) eKLR declined to allow joinder of a party as defendant on the basis that where the Plaintiff has chosen to assert his rights against certain defendants and not others, the court should be slow in imposing other defendants upon him.
16. It is clear from the record that since the inception of this case, the 3rd Respondent has never been served with summons, a failure attributed to the claim that he is deceased. This has significantly hindered the progress of the case, which, despite being filed in 2020, is far from being heard. Such delay is a clear violation of Article 159 of the Constitution, 2010, and the overriding objective of the Civil Procedure Act.
17. In my considered view, the Respondents’ objection to strike out the name of the 3rd Respondent is made in bad faith, is purely malicious, and appear to be a calculated attempt to delay these proceedings without any valid basis. If the Applicant chooses not to pursue claims against the 3rd Respondent, neither the court nor the other Respondents should compel him to do so. In the exercise of its discretion and inherent powers, this court finds no justification for further delay in this matter.
18. In the interest of justice, this application should be allowed. The suit against the 3<sup>rd</sup> respondent is hereby marked as withdrawn. Since the proposed amendments merely reflect this withdrawal, I see no need to file a fresh amended plaint. Additionally, having reviewed the proceedings and records, I note that the parties have complied with the necessary requirements. To that end, I direct that this matter be set down for hearing forthwith. There shall be no orders as to costs
18. It is so ordered.

**DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 27<sup>TH</sup> DAY OF MARCH, 2025.**

.....  
**HON.E.C CHERONO**  
**ELC JUDGE**

In the presence of;

1. Mr. Samba for 2<sup>nd</sup> plaintiff/Applicant
2. Mr. Angima H/B for Mr. Onyando for the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> Defendants.
3. Bett C/A

