



**Muthoki v Munyao & 11 others (Environment & Land Case
E021 of 2022) [2023] KEELC 17821 (KLR) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E021 OF 2022**

**TW MURIGI, J
MAY 17, 2023**

BETWEEN

REGINA MUTHOKI PLAINTIFF

AND

BENJAMIN NZIOKA MUNYAO & 11 OTHERS DEFENDANT

RULING

1. By a Plaint dated 6th July, 2022, the Plaintiff prays for judgment against the Defendant for:-
 1. An order declaring the late Timothy Munyao Kingóku is the lawful and bona fide owner of land parcels numbers Makueni/Unoa/2871 and Makueni/Unoa/1443.
 2. An order declaring all subdivisions and their registration in respect to land parcels numbers Makueni/Unoa/2871 and Makueni/Unoa/1443 null and void ab initio.
 3. An order directing the 12th Defendant to rectify and register land parcels numbers Makueni/Unoa/2871 and Makueni/Unoa/1443 in the name of the late Timothy Munyao Kingóku.
 4. Costs of this suit plus interest thereon.
 5. Any other or further relief as this Honourable Court may deem fit and just to grant.
2. The 1st- 4th, 7th- 9th and 11th Defendants filed a Memorandum of Appearance dated 17th August, 2022 through the firm of B M Mung'ata & Co Advocates and thereafter, a Statement of Defence dated 25th August, 2022 was filed on their behalf.
3. The 10th Defendant filed a Memorandum of Appearance dated 22nd August, 2022 through the firm of B M Mung'ata & Co. Advocates while the 5th and 6th Defendants filed a Memorandum of Appearance dated 31st August, 2022 through the firm of Judah Kioko & Co Advocates.



4. The 1st-4th, 7th-9th, 10th and 11th Defendants through the firm of B M Mungáta & Co Advocates filed a Notice of Preliminary objection dated 22nd August, 2022 on the grounds that:-
 1. The Plaintiff lacks capacity to institute the suit and the same should be struck out.
 2. The suit is time barred under Section 26 of the *Limitation of Actions Act* Cap 22.
 3. The Court lacks jurisdiction to hear and determine a time barred suit.
5. The parties were directed to canvass the Preliminary Objection by way of written submissions.

The 1st- 4th, 7th- 9th, 10th and 11th Defendants Submissions

6. The 1st-4th, 7-8, and 9th-11th Defendants submissions were filed on 18th January, 2023.
7. Learned Counsel identified the following issues for the Court's determination:-
 - i. Whether the Plaintiff has the capacity to institute the present suit.
 - ii. Whether the suit is time barred under Section 26 of the *Limitation of Actions Act* Cap 22.
 - iii. Whether the Court has jurisdiction to determine a time barred suit.
8. While relying on the case of Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd. (1969) EA 696, Counsel submitted that a preliminary objection can only be raised on a pure point of law.
9. On the issue of whether the Plaintiff has the requisite capacity to institute the present suit, Counsel submitted that the Plaintiff has no locus standi to institute the suit herein as she has not obtained a grant of letters of administration for the Estate of Timothy Munyao Kingóku the registered owner of the suit properties. Counsel urged the Court to strike out the suit with costs to the Defendants.
10. On the issue of whether the suit is time barred, Counsel submitted that the suit herein was filed 3 years after the alleged fraud was discovered. Counsel went on to submit that according to the green card for land parcel No. Makueni/Unoa/212, the portion was closed for subdivisions on 05/09/2002 to give rise to land parcel No. Makueni/Unoa/1442 and Makueni/Unoa/1443.
11. That subsequent to the subdivision of land parcel No. Makueni/Unoa/1443, title deeds were issued in the year 2016. Counsel further submitted that according to the Plaintiff, the subdivisions were made during the lifetime of Timothy Munyao Kingóku deceased. To support this argument, Counsel relied on the provisions of Section 26 of the *Limitation of Actions Act*.
12. Finally, Counsel submitted that the Court has no jurisdiction to hear and determine the suit herein as the Plaintiff's claim is time barred.

The 5th and 6th Defendants Submissions

13. The 5th and 6th Defendants submissions were filed on 13th February, 2023.
14. Counsel outlined the following issues for the Court's determination:-
 - i. Whether the Plaintiff has locus standi to institute this suit?
 - ii. Whether this suit is time barred under Section 26 of the *Limitation of Actions Act*.
 - iii. Whether the Court has jurisdiction to hear and determine this suit?



15. On the issue of whether the Plaintiff has locus standi to file the suit herein, Counsel submitted that the Plaintiff instituted the instant suit in her capacity as the legitimate beneficiary and heiress of the suit properties which are registered in the name of her deceased father.
16. While citing the provisions of Section 82 of the *Law of Succession Act*, Counsel submitted that it was imperative for the Plaintiff to obtain a grant of letters of administration ad litem or be appointed as the administrator of the estate of her deceased father before she could institute the present suit. Counsel urged the Court to strike out the Plaintiff's suit for the reason that the Plaintiff has no locus to institute the same.
17. On the issue of whether this suit is time barred, Counsel submitted that the provisions of Section 26 of the *Limitation of Actions Act* stipulates that time begins to run from the date when the fraud is discovered. Counsel contended that the suit herein is not time barred and requires a trial to ascertain when the Plaintiff discovered the fraud.

The Plaintiff's Submissions

18. The Plaintiff's submissions were filed on 25th January, 2023.
19. Counsel for the Plaintiff identified the following issues for the Court's determination:-
 - i. Whether the Plaintiff has locus standi to institute this suit?
 - ii. Whether this suit is time barred under Section 26 of the Law of *Limitation of Actions Act*.
 - iii. Whether this Court has jurisdiction to hear and determine this suit.
20. On the issue of whether the Plaintiff has locus standi to institute the suit herein, Counsel submitted that the Plaintiff instituted this suit against the Defendants in her individual capacity as the legitimate beneficiary and heiress of land parcels No. 221 and 212 which are registered in the name of her deceased father.
21. It was submitted that failure to take out a grant of letters of administration was not fatal to the case as the Plaintiff instituted the present suit in her individual capacity to pursue her rightful interest in her late father's properties and not as a personal representative of his estate.
22. Counsel argued that it is trite law that the Plaintiff who has presented the suit herein in her individual capacity as the heiress of her deceased father's properties does need to take out letters of administration so as to claim her rightful share of the suit properties.
23. Counsel submitted that it is in the interest of justice that the Plaintiff is heard as the Defendants have inter meddled with the estate of her deceased father and disinherited her.
24. Finally, Counsel submitted that the suit herein is not time barred as the Plaintiff discovered the fraud in the year 2022 and therefore, the Court has jurisdiction to hear and determine the suit. Counsel urged the Court to dismiss the preliminary objection with costs to the Plaintiff.

Analysis and Determination

25. The law on Preliminary Objection is well settled. A Preliminary Objection must be on a pure point of law. The principles as to what constitutes a Preliminary Objection were laid down by the Court



of Appeal in the case of Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696, where Law JA stated as follows:-

“So far as I’m aware, a preliminary objection consists of point of law which have been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

26. Further on Sir Charles Newbold JA stated:-

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

27. In *Oraro Vs Mbaja* [2005] eKLR Ojwang J (as he then was) described it as follows:-

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

28. Having considered the pleadings, the Preliminary Objection and the rival submissions, the following issues arise for determination:-

- i. Whether the Plaintiff has locus to institute the suit herein.
- ii. Whether the suit is time barred on account of Section 26 of the *Limitation of Actions Act*.
- iii. Whether the Court has jurisdiction to hear and determine this suit.

29. The Defendants Preliminary Objection is based on the grounds that the Plaintiff has no locus standi to institute the present suit and that the court has no jurisdiction to hear and determine the same as it is time barred. The issue of locus standi, jurisdiction and whether the suit is time barred is a pure point of law which can determine the matter without having to consider the merits of the case.

30. This was the holding in the case of *Bosire Ongero Vs Royal Media Services* [2015] eKLR. The Preliminary Objection is on a point of law and the Court is satisfied that it has been properly and validly taken.

31. The question whether or not the Plaintiff has capacity to institute this suit and whether the same is time barred on account of limitation goes to the jurisdiction to entertain this suit.

32. This Court is called upon to determine the issue of whether the Plaintiff has locus standi to institute this suit.



33. Locus standi is defined in Black's law dictionary 9th Edition as "the right to bring an action or to be heard in a given forum."
34. In the case of Alfred Njau and Others Vs City Council of Nairobi (1982) KAR 229, the Court defined the word Locus Standi as follows;-
- " the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings."
35. Further in the case of Law Society of Kenya Vs Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000, the Court held that ;
- "Locus Standi signifies a right to be heard, A person must have sufficiency."
36. The Defendants contended that the Plaintiff has no locus standi to institute the suit herein as she has not obtained a grant of letters of administration for the estate of her late father to permit her to institute the same. The Plaintiff on the other hand argued that she instituted the suit in her individual capacity as the heiress of the estate of her deceased father and therefore it was not necessary to take out the grant of letters of administration.
37. Section 82(a) of the Succession Act confers power on personal representatives to institute a suit in regard to the estate of the deceased and provides as follows:-
- "Personal representatives shall subject only to any limitation imposed by their grant have the following powers:-
- a) to enforce, by suit or otherwise all causes of action which by virtue of any law survive the deceased or arising out of his death for his personal representative."
38. From the reading of the above provision, it is clear that the personal representative of the deceased shall subject to any limitation imposed by the grant, enforce by suit or otherwise all causes of action which by virtue of any law survive the deceased or arise out of his death.
39. Section 3 of the Act defines a personal representative to include the executor or administrator, as the case may be, of a deceased person.
40. Among the prayers sought by the Plaintiff was a prayer seeking for a declaration that the late Timothy Munyao Kingóku is the lawful and bona fide owner of land parcels numbers Makueni/Unoa/2871 and Makueni/Unoa/1443.
41. In the case of Rajesh Pranjivan Chudasama Vs Sailesh Pranjivan Chudasama [2014] eKLR the Court of Appeal held that;
- "a litigant is clothed with locus standi upon obtaining a limited or full letters of administration in cases of intestate succession....."
42. From the pleadings it is clear that no letters of administration have been taken out in respect of the Estate of Timothy Munyao Kingóku. The Plaintiff has not demonstrated that she is the Administrator of the deceased's estate.



43. The Plaintiff had the option to apply for an ad litem grant of letters of administration to enable her to institute the present suit but failed to do so. This Court finds and holds that the Plaintiff has no locus standi to file the present suit.
44. Having found that the Plaintiff has no locus standi to institute the suit herein, I will not delve into the other issues raised in the application.
45. Consequently, the Plaintiff's suit is struck out with costs to the Defendants. The Plaintiff is at liberty to file a fresh suit after obtaining a limited grant for that purpose.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 17TH DAY OF MAY, 2023.

IN THE PRESENCE OF:-

Court assistant - Mr. Kwemboi

Kioko for the 5th and 6th Respondent.

