



REPUBLIC OF KENYA



KENYA LAW
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**Maturi & another v Nyaboke Fam Limited & 3 others (Civil Case
E009 of 2021) [2022] KEHC 14987 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14987 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL CASE E009 OF 2021
REA OUGO, J
OCTOBER 31, 2022**

BETWEEN

CLIVE MATURI 1ST PLAINTIFF

GEORGE MATURI 2ND PLAINTIFF

AND

NYABOKE FAM LIMITED 1ST DEFENDANT

HENRY NYABUTO MATURI 2ND DEFENDANT

ZIPPORAH KINANGA MOGAKA 3RD DEFENDANT

GRACE ONGUTI 4TH DEFENDANT

RULING

1. The plaintiffs filed an originating summons before this court on September 27, 2021 seeking orders that this court finds the 2nd to 4th defendants (who are directors in the 1st defendant) trustees of the estate of Pastor Stephenson Maturi (deceased) and that the 1st defendant holds the titles LR Bassi/Masige/4727 and Central Kitutu/Daraja Mbilia/2960 in trust for the deceased's beneficiaries. The plaintiffs sought to have the trust created determined and the matter be remitted to the probate and administration court.
2. The factual background to the suit was that the deceased was the registered owner of LR Bassi/Masige/4727 and Central Kitutu/Daraja Mbilia/2960 until 2010 and 2015 respectively, when the 2 parcels were transferred to the 1st defendant. The plaintiffs contend that they live in the United States of America and were not aware of the transfer of the suit properties and subsequent registration in favour of the 1st defendant. The 1st plaintiff in his affidavit in support of the suit contends that he built his house on the suit property in 1995 and later built a second house. The 1st plaintiff averred that in 2021 when he came back to the country he was surprised to find tenants in his house and experienced



hostility from the 3rd defendant who was managing the house. The 1st plaintiff could not access his house and avers that the deceased only intended that the 1st defendant holds the house in trust for his beneficiaries.

3. The 1st and 3rd defendants entered appearance and filed a replying affidavit dated October 29, 2021. They also filed a preliminary objection on the following grounds:

1. That the suit as filed can only be a suit by the 1st plaintiff since no written authority by the 2nd plaintiff has been filed as mandatorily required by order 1 rule 13 of the [Civil Procedure Rules 2010](#).
2. That the honourable court lacks jurisdiction to entertain any of the questions and/or orders sought in the originating summons as all those questions are by didn't of the [Constitution](#) of Kenya 2010 and the relevant statutes reserved for the Environment and Land Court.
3. That the plaintiff's lack locus standi to institute and prosecute this suit to the extent that this suit seeks to be agitating rights and/or interests of Pastor Stephenson Maturi (deceased) since neither of the plaintiffs is an administrator of the said Pastor Stephenson Maturi (deceased).
4. That it consequently follows from this that the issue raised in the plaintiffs' originating summons do not disclose any cause of action against any of the defendants except the 1st defendant, thereby, making the suit against the 2nd – 4th defendants a clear abuse of the process of the court.

4. The respondents in their submissions on the preliminary objection advanced that this court has no jurisdiction to entertain the suit. They argue that the prayers sought in the originating summons relates to the title, ownership, use and/or occupation of LR Bassi/Masige/4727 and Central Kitutu/Daraja Mbilia/2960 both of which are admittedly registered in the name of the 1st defendant. The question before the court would therefore be, who is the owner of the suit property? They called into aid the Court of Appeal decision in the [Administrator of the Estate of Joseph Kipkering – Deceased v Selina Jerotich \(sued as an administrator of the Estate of Mary Jepkosgei Kiswai – Deceased\)](#):

“The appellant’s contention was that the ELC had no jurisdiction to entertain the dispute since it related to ownership of assets of a deceased person and administration of his Estate. It is quite clear to us from the pleadings that though the appellant filed the suit as an administrator of his late father’s estate, he sought the determination of the ownership of the suit land and not administration of the deceased’s estate, which was already a concluded issue. The question of who between the parties was entitled to the suit property, without a doubt, fell within the mandate of the ELC. See article 162(2)(b) of the [Constitution](#) and section 13 of the ELC Act.”

5. It was also submitted that the plaintiffs herein have no locus standi as they are not administrators of the deceased. In [Trouistik Union International & Another v Jane Mbeyu & Another \[1993\] eKLR](#) the Court of Appeal stated:

“The Act came into force on the July 1, 1981. The person whose death and succession gave rise to this suit, namely, John Katembe, died on the April 10, 1984. To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the [Law of Succession Act](#). That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the act, section 3, the interpretative section, provides an



all inclusive answer. It says “personal representative means executor or administrator of a deceased person”. It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative, is the administrator of the estate of the deceased. The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? section 3 says “administrator means a person to whom a grant of letters of administration has been made under this act”.”

6. The respondents also argued that the suit by the 2nd plaintiff ought to be struck out for being filed without a written authority authorizing the 1st plaintiff to plead on behalf of his co-plaintiff as mandatorily required by order 1 rule 13 of the [Civil Procedure Rules 2010](#).
7. The plaintiffs failed to file submissions on the preliminary objection.

Analysis and Determination

8. The preliminary objection challenges the jurisdiction of this court. At the heart of every case in the justice system is the question of jurisdiction. It confers to courts the ability, legality, and power to hear a case before it. In [Owners of the Motor Vessel “Lillian S’ v Caltex Oil \(Kenya\) Ltd \[1989\] KLR 1 Nyarangi, JA](#) held as follows:

“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

9. Consequently, a court of law can only exercise jurisdiction that has been conferred by the [Constitution](#) or other written law. A court’s jurisdiction derives from either legislation or the [Constitution](#), or both. (See [Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & others \(2012\) eKLR](#)).
10. Article 162(2) (b) of the [Constitution](#) of Kenya provides that the Environment and Land Court shall hear and determine disputes relating to the environment, the use and occupation of land and title to land. Section 13(2) of the [Environment and Land Court Act](#) gives power to ELC to hear and determine disputes relating to inter alia, environment, land use planning, title, boundary disputes, land administration and management, choses in action or other instruments granting enforceable interests in land among other related issues.
11. The plaintiff’s main contention raised in the suit relates to the ownership and occupation of LR Bassi/Masige/4727 and LR Central Kitutu/Daraja Mbilia/2960. This is an issue reserved for the environment and land court by virtue of article 162(2) (b) of the [Constitution](#) of Kenya and section 13(2) of the [Environment and Land Court Act](#). The plaintiffs concerns revolve around ownership of the suit properties and the appropriate forum for resolution of the issues raised will be the environment and land court. I am therefore constrained to agree with the argument of the defendants that indeed this court lacks jurisdiction to entertain the suit.
12. In any event, even if the issues raised in the suit were rightfully before the court, the two plaintiffs are strangers as they are not the administrators of the deceased’s estate. In [Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva \(Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased\) \[2016\] eKLR](#) the court observed as follows:

“Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to



institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

13. It is not in dispute that the plaintiffs have not obtained grant of letters of administration and therefore lack the legal right to sue on behalf of the deceased’s estate. Since the plaintiffs did not obtain grant of letters of administration or a grant limited to the filing of the suit, I do find that the suit herein cannot be sustained.

14. I also note that the originating summons was supported by an affidavit in support of the summons where the 1st plaintiff averred that he had the authority of the 2nd plaintiff to swear the affidavit. Order 1 rule 13 of the Civil Procedure Rules provides that:

- “ 13. Where there are more plaintiffs than one, any one or more of them may be
- (1) authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
 - (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

15. Although the 1st plaintiff deposed that he had the authority of the 2nd plaintiff to make and swear the affidavit, he failed to annex the written and signed authority in his affidavit. The effect of a party’s failure to comply with order 1 rule 13 of the Civil Procedure Rules was discussed in *Savala & another v Ndanyi* (Environment and Land Case Civil Suit 248 of 2021) [2022] KEELC 2536 (KLR) (5 July 2022) (Ruling) where the court stated:

“....a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he is so authorized to do so in writing and the authority is filed in such a proceeding....lack of such an authority does not necessarily void the proceedings.....The case by his co-parties remain unprosecuted.”

1. In view of the foregoing, I do agree with the preliminary objection and uphold the same. This suit is hereby struck out. Considering that the issue revolve around the estate of the deceased and the plaintiffs and the 2nd -4th respondents are siblings, I make no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT BUNGOMA THIS 31ST DAY OF OCTOBER, 2022

R E OUGO

JUDGE

In the presence of:

Mr Ayuka for the plaintiffs

Mr Malanga for the 1st & 3rd defendant



2nd defendant - Absent

4th defendant - Absent

Aphline - C/A

