



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

ENVIRONMENT & LAND COURT

ELC APPEAL NO. 1 OF 2020

ABDI WOCHE IMALA.....APPELLANT/APPLICANT

VERSUS

ADAN CHULA SODE.....RESPONDENT

RULING

1. The appellant herein filed notice of motion dated 8th April 2021 under **Section 1A, 1B, 3A & 63 of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules 2010 and Article 40 of the Constitution of Kenya 2010** seeking the following Orders;

A. Spent.

B. Spent.

C. THAT an Order do issue restraining the Respondent, his servant's agents, representatives, assigns, relatives or associates together with any Other unknown trespassers their agents, servants, representatives and assigns from in any way occupying, entering and/or erecting structures on the unregistered farm no. 341 of 1973 at Gulbatuca (Harbore) pending the hearing and determination of this Appeal.

D. That the Respondent, his relatives along with any other trespassers, their agents, servants, representatives and assigns be evicted from the property farm No. 341 in Gualabatica, Harbore with the assistance of the Officer in Charge of Moyale Police station.

E. That costs be provided for.

2. The application was supported by grounds apparent on the face of the application and the sworn affidavit of **Abdi Woche Imala** who averred that he is the owner of the Property known as Farm No. 341 which is unregistered property. That his ownership is affirmed by a letter dated 19th September 2007 from the District Agriculture Officer in Moyale under the Ministry of Agriculture which states that "Mr Woche Imala is the owner of farm no. 341 located at Gubatica, Harbore in Moyale. He annexed the letter as annexure **WI-1**."

3. That the Respondents herein through their agents and/or representatives and other unknown trespassers have invaded the said property claiming ownership to the property. That the property is the subject of this appeal and the continued trespass would render the appeal nugatory.

4. The Respondent opposed the application through a Notice of Preliminary Objection and Replying Affidavit both dated 4th July 2021. The Respondent raised the following grounds in the Preliminary Objection;

a. That the Appellant lacks the *locus standi* to institute this appeal as he has not caused himself to be the Administrator of the estate of the deceased WOCHE IMALA in accordance with Section 82 (a) of the Law of Succession Act Cap 160 Laws of Kenya.

b. That the Appeal is res judicata as the High Court in Civil Appeal No. 125 of 2009 at Milimani had dealt with a similar appeal from the same court touching on the same suit property, arising from the same judgement in Senior Principal Magistrate Court in Moyale Civil Case No. 2 of 2008.

5. In the Replying affidavit sworn by **Adan Chula Sode**, the respondent deponed that the dispute in the suit property commenced before the Senior Principal Magistrate Court in Moyale being Civil Case No. 2 of 2008 and subsequently concluded through judgement of the court

delivered on 30th April 2008. He annexed a copy of the judgement as annexure **ADS1**.

6. That two months after the judgment they divided the property amongst family members and filed the share document in court. He annexed agreement dated 12th June 2008 filed on 12th June 2017 as annexure **ADS 2**.

7. That subsequently the defendant in Moyale Civil Case No. 2 of 2008, who is the father of the Applicant herein approached the High Court in Milimani through notice of Motion dated 27th August 2008 in Miscellaneous Civil Application No. 512 of 2008 seeking leave to appeal out of time. That through a Ruling delivered by Lady Justice H.M. Okwengu on 16th December, 2008 the late WOCHE IMALA father to the applicant herein was allowed to file his appeal within 90 days from the aforementioned date of the Ruling. He attached a copy of the Ruling as annexure **ADS 3**.

8. That the late Woche Imala proceeded to file the Appeal in Civil Appeal No. 125 of 2009 and the same was dismissed for want of prosecution by an Order issued by the Court on 30th May 2017. He annexed a copy of the Order as annexure **ADS4**.

9. The Respondent lastly averred that the application as brought is an effort to mislead the court. That he and his family have been in occupation of the suit premises even prior to filing of Civil Case No. 2 of 2008 and that some of the relatives have already sold their respective portions hence it will amount to a fundamental contravention to ownership and possessory rights if the Honourable Court issues the Orders sought.

10. On 29th July 2021 the Court issued the following directions;

- a. That the notice of Motion dated 8/4/2021 be canvassed alongside the P.O. raised by the Respondent by way of written submissions.
- b. The applicant to file and serve their submissions within 21 days from the date thereof together with a Supplementary affidavit.
- c. The Respondent to file and serve their submissions within 21 days from the date of Service thereof.

11. At the time of writing this Ruling both parties had filed their respective submissions.

12. The appellant on his part submitted that this is not a fresh suit but a continuation of the suit in Civil Appeal No. 125 of 2009 which was reinstated by Hon.C.W.Githua vide Ruling dated 29th April 2019 and transferred to this Honourable Court. That the appeal herein is therefore not Res Judicata. In that regard, he cited the case of **Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others (2017) eKLR**

13. On whether injunctive Orders should issue the applicant submitted that being the owner of the property he has an indefeasible interest in the suit property hence raising a prima facie case. That by the Respondent admitting they have sold part of the suit premises they are in contravention of this Honourable Court's Order and thereby occasioning irreparable harm to the Respondent. That he raises an arguable appeal and further disposal and waste of the suit property will render the appeal nugatory. In support of this part of the submissions he cited the following authorities i.e **Patricia Njeri & 3 Others vs National Museum of Kenya [2004] eKLR, Giella versus Cassman brown (1973) EA 358, Nguruman Limited vs Jan Blonde Nielsen & 2 Others CA No. 77 of 2012 (2014) eKLR, Mrao Ltd vs First American of Kenya and 2 others, (2003) Eklr 125, Moses C, Muhia & 2 Others vs Jane.W.Lesaloi and 5 Others, 2014 Eklr, Pius Kipchirchir Kogo vs. Frank Kimeli Tenai (2017) Eklr, Nelson Andai Havi vs Law Society of Kenya & 3 Others [2018] Eklr, Stanley Kangethe vs Tony Keter & 5 Others (2013) eKLR.**

14. The Respondent submitted that the applicant has no *locus standi* in the appeal as he has not obtained letters of administration for the estate of the deceased WOCHE IMALA in accordance with Section 82 (a) of the Law of Succession Act Cap 160 laws of Kenya. He cited the case of **Beatrice wambui Kiarie v Tabitha Wanjiku Nganga & 9 Others [2018] eklr, Hawo Shanko v Mohammed Uta Shanko [2018] eKLR,**

15. On the injunctive relief sought, it was the Respondents submission that the applicant is undeserving of the orders sought. That at the time the Respondents family members sold the premises, there were no Orders to forestall the same. That the Respondent and other parties will therefore suffer great prejudice if the Orders sought are granted. He cited the following authorities i.e. **Giella versus Cassman brown (1973) EA 358, Nguruman Limited vs Jan Blonde Nielsen & 2 Others CA No. 77 of 2012 (2014) eKLR, Mrao Ltd vs First American of Kenya and 2 others, (2003) Eklr 125, Pius Kipchirchir Kogo vs. Frank Kimeli Tenai (2017) Eklr.**

Analysis and Determination

16. I have looked at the application, the preliminary Objection and the rival submissions of both parties. I discern that the issues for determination are as follows;

- a. Whether the appellant has locus standi?
- b. Whether the appeal herein is Res judicata?
- c. Whether the appellant is deserving of the Orders Sought?

a. Whether the Appellant has Locus Standi?

17. **locus standi** is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore, if a party is found to have no **locus standi**, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no **locus standi**, then the Applicant cannot be heard and that point alone may dispose of the suit. See **Daykio Plantations Limited v National Bank of Kenya Limited & 2 others [2019] eKLR**.

18. In this case the main issue is whether the Appellant filed letters of administration in respect of the estate of the deceased Woche Imala in accordance with Section 82 (a) of the Law of Succession Act Cap 160 Laws of Kenya to enable him have the **locus standi** to institute this appeal

19. Order 42 of the Civil Procedure Rules provides for the Appeals and the procedure in Appeals. Order 42 Rule 5 specifically provides;

[Order 42, rule 5.] One of several plaintiffs or defendants may obtain reversal of whole decree where of it proceeds on ground common to all.

5. Where there is more than one plaintiffs or defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the High Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

20. Order 4 Rule 4 of the Civil Procedure Rules provides that: -

“Where the Plaintiff sues in a representative capacity, the Plaintiff shall state the capacity in which he sues and where the Defendant is sued in a representative capacity, the plaintiff shall state the capacity in which he is sued, and in both cases it shall be stated how the capacity arises.”

21. Section 82 (a) of the Law of Succession Act provides that personal representatives shall, subject only to any limitation imposed by their grant, have the powers 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.

22. Rule 14 of the 5th Schedule to the Law of Succession Act provides for a grant for purposes of filing suit as follows:

“14. Administration limited to suit

When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administer is unable or unlikely to act, letters of administration may be granted to the nominee of a party to the suit, limited for the purpose of representing the deceased herein or in any other cause or suit which may be commenced in the same, or in any other court between the parties or any other parties touching the matters at issue in the cause or suit and until a final decree shall be made therein and carried into complete execution”

23. Another clear provision of the law on the capacity of a party seeking to institute a suit and appeal is cited in **Rule 76 of the Court of Appeal Rules**, which provides as follows;

Death of party to intended appeal

(1) An appeal shall not be instituted in the name of a person who is dead but may be instituted in the name of his legal representative.

(2) An appeal shall not be incompetent by reason only that the respondent was dead at the time when it was instituted but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased.

24. The Court of Appeal has authoritatively delivered itself on the issue of locus standi in the case of **Trouistik Union International & Another v Jane Mbeyu & Another (2008) IKLR (G&F) 730** where it was held that’;

“To determine who may agitate by suit any cause of action vested in the deceased 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”

25. In this case the appellant has not denied that he is a son to WOCHE IMALA, who is now deceased. He has not taken out letters of Administration or a grant for purposes of filing suit. From the authorities cited above he clearly lacks capacity to institute/proceed with the appeal herein.

b. Whether the appeal herein is Res judicata

26. At this stage I ought to down my tools as the Preliminary Objection succeeds in the first Question being answered in the affirmative. However, I do note that the clear position of Whether this appeal is a fresh appeal or whether this file had been transferred from Nairobi has

been raised by the Appellant in opposition to the preliminary objection. The answer will ostensibly resolve the issue whether the appeal herein is Res Judicata.

27. From the ruling by Justice C.W. Githua dated 29/4/19, the appeal was transferred from Nairobi in **Civil Appeal No. 125 of 2009 Woche Imala versus Adan Chula Sode**. The matter had initially been dismissed on 18th July 2015 for want of prosecution but the same was reinstated by Lady Justice C.W. Githua in her ruling referred herein above. The matter is therefore not Res Judicata.

28. For all the reasons given hereinabove, the finding of this court are as follows;

(i) The preliminary Objection dated 4th June 2021 succeeds on the first ground. The appellant lacks locus standi to proceed with this appeal as he has not filed succession proceedings as the administrator of the estate of the deceased, Woche Imala in accordance with section 82 (a) of the Law of Succession Act, Cap 160, Laws of Kenya.

(ii) The application dated 8th April 2021 lacks merit and the same is hereby dismissed with costs to the Respondent.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 29TH DAY OCTOBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. M/s Mugure holding brief Muriithi for the Appellant/Applicant
2. Mr. Bahailu for the Respondent.
3. Fardowsa; Court Assistant