



Oport & another v Oyola (Sued as the Legal Admin of the Estate of Arthur Oyola Ajumbo alias Timothy Oyola - Dcd) (Environment & Land Case E015 of 2022) [2023] KEELC 19089 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19089 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E015 OF 2022**

**E ASATI, J
JULY 27, 2023**

BETWEEN

TOBIAS NYAURE OPORT 1ST APPLICANT

FRANK OPORT 2ND APPLICANT

AND

SUSAN ANYANGO OYOLA (SUED AS THE LEGAL ADMIN OF THE ESTATE OF ARTHUR OYOLA AJUMBO ALIAS TIMOTHY OYOLA - DCD) RESPONDENT

RULING

1. This ruling is in respect of the Preliminary Objection raised by the Respondent vide the Notice of Preliminary Objection dated 6th March 2023 filed by the firm of ROW Advocates LLP on behalf of the Respondent. The Respondent contends through the preliminary objection that she has no locus standi in law to be sued on behalf of the estate of her late husband one Arthur Oyola Ajumba alia Timothy Oyola because as at the date of filing the Originating Summons to date she was not the legal representative of the estate of the deceased as envisaged by section 2 of the *Civil Procedure Act* and sections 3 and 82 (a) of the *Law of Succession Act*. That therefore the suit is incompetent and should be struck out with costs.
2. There was no response or submissions filed by the applicant in reply to the Preliminary Objection. The applicant was represented in the proceedings. It was submitted on behalf of the Respondent vide the written submissions dated 14th April 2023 that the Respondent was sued as the “legal Admin” of the estate of her late husband. That section 2 of the *Civil Procedure Act* defines a legal representative as a person who in law represents the estate of a deceased person. Relying on s. 3, 80(2) and 82(a) of the *Law of Succession Act* and the case of *Sebastian Njage Maria vs Nau Mungania Munyinyi & another* [2019] eKLR Counsel submitted that the legal representative must be appointed through the procedure set



out in the Law of succession Act. That the Respondent demonstrated through her Replying Affidavit that although she had initiated the succession process through Succession Cause No. 56 of 2020 at Maseno Law Courts, an objection filed by the 1st Applicant in the succession Cause had stalled the process and hence she has not been appointed as a personal representative. That lack of appointment as a legal representative was not just a procedural technicality for which one can find refuge in article 159 (2) (d) of the Constitution.

3. I have considered the pleadings filed. The heading of the Originating Summons and indeed the first paragraph thereof indicate that the Respondent was sued in her capacity as “legal admin” of the estate of Arthur Oyola Ajumba alias Timothy Oyola deceased. In paragraphs 8, 10 and 11 of her replying affidavit sworn on 6th March 2023, the Respondent states that an objection was lodged by the 1st applicant in the Succession Cause and the same is yet to be heard and finalized. That as at the time of filing the suit she had not obtained Grant of Letters of Administration to the estate. These facts were not controverted.
4. I have also considered the submissions and particularly the law and decided cases relied upon. I am in agreement with Counsel for the Respondent that the matters raised in the Preliminary Objection are points of law related to the question of capacity of a party to be sued and which question emanates from the pleadings filed. In the case of *Mukisa Biscuits Manufacturing Ltd v Westend Distributors* [1969] EA 696 relied on herein, it was held that:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.”

The court further stated that;

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.”

5. Section 2 (1) of the Law of Succession Act provides that

Except where it is otherwise expressly provided in this Act or any other written law, the provision of the Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estate of the deceased person dying after the commencement of this Act and to the Administration of Estates of those persons.”

The meaning of this provision of the law is that an estate of a deceased person in Kenya can only be managed in accordance with the provisions of the Law of Succession Act (the Act). On filing of suits in respect of such estate, the Act, in section 82, vests the power to file such suit (or for such suits to be filed against) in the personal representative of the deceased duly appointed through the process of succession as provided for in the Act. There is no evidence placed before the court that the Respondent has been duly appointed as personal representatives of the deceased through the process provided for in the Act.

6. I am satisfied that the Preliminary objection has merit. I uphold the preliminary objection and find that the suit against the Respondent is incompetent for lack of capacity to be sued on the part of the Respondent. The suit is therefore hereby struck out. Costs to the Respondent.
7. Orders accordingly.



RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 27TH DAY OF JULY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen- Court Assistant.

Otieno for the Applicants.

Okello for the Respondent.

