



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 62 OF 2019

FATUMA ABUD FARAJ.....APPLICANT

VERSUS

BARCLAYS BANK OF KENYA LTDRESPONDENT

RULING

1. By an application dated 29.7.19, Fatuma Abud Faraj, the Applicant herein seeks a temporary injunction restraining Barclays Bank of Kenya Ltd, the Respondent, by itself, agents, servants or employees from selling, leasing, transferring, occupying taking possession or in any other manner interfering with the properties known as Apartment No. 5 on Plot No. 209/20045, Nairobi and Plot No. MN/8346 together with the developments thereon, belonging to the late Salim Juma Hakeem Kitendo (the deceased), pending the hearing and determination of a Suit filed by the Applicant.

2. The Applicant gave background information that: that the deceased took from the Respondent a business mortgage loan of Kshs. 8,400,000/= and a term loan of Kshs. 18,900,000/=; that upon his demise, the outstanding balance on the business mortgage loan was cleared in full by insurance a fact confirmed by the Respondent *vide* its letter dated 16.9.16; that by a letter dated 21.3.18, the Respondent informed the Applicant that it would exercise its power of sale to recover Kshs. 29,624,579.90 on the term loan which was in arrears; that the Applicant by her letter dated 26.3.18 informed the Respondent there was an order restraining the dealing with the estate of the deceased in High Court Succession Cause No. 200 of 2015 pending the conclusion of the matter; that by a letter dated 28.10.18, the Respondent sent another notice to the Applicant that it would sell the 2 properties in 90 days; that Faith Mawasi and the Interested Party in the Succession Cause have been receiving rent from the estate of the deceased but never applied the same to service the loan; that following a Court order, the rent is now being collected by an agent, Myspace Properties Limited; that the rental income can be applied to service the loan; that by a letter dated 26.6.19, the Respondent served the Applicant with another notice of sale of the properties to recover the outstanding loan facilities for account numbers 0770L0113287003 and 2023896047; that the latter account is different from that in the notification of sale and no explanation has been given for the same; that efforts to obtain a statement of account from the Respondent have been fruitless; that the intended sale is unlawful as there was no notice of sale for the account stated; that the Applicant will suffer irreparable loss if the properties are sold as she seeks to inherit the same; that the Respondent will suffer no prejudice if the orders sought are granted as the rental income is adequate to settle the amount due to the Respondent.

3. The Application is opposed by the Respondent *vide* its notice of preliminary objection (PO) dated 8.8.19. The objection is that the Applicant lacks *locus standi* to institute the Suit on behalf of the estate of the deceased in the absence of a grant of letters of administration. The Court lacks jurisdiction to entertain a Suit that is a nullity. Even assuming a grant was issued to the 3 widows of the deceased, the Applicant lacks *locus standi* to singularly maintain a Suit in the absence of her co-administrators. The Suit is fatally defective for violating Order 4 Rule 2 of the Civil Procedure Rules.

4. The Applicant responded to the PO by her replying affidavit sworn on 23.8.19. She avers that the PO is misadvised and self-defeating. The Respondent has been serving the Applicant with its notification for sale and correspondence and now says she is a stranger to the property. She states that her co-widows have declined to cooperate with her to file the Suit herein.

5. At the hearing of the PO, it was submitted for the Respondent that the Applicant, not being holder of a grant of representation in respect of the estate of the deceased, lacks *locus standi* to bring the present application seeking protection of the deceased's property. As such, the Suit filed herein is incompetent.

6. The second objection of failure to file a verifying affidavit was abandoned after it was confirmed that the Court record contained a verifying affidavit.

7. For the Applicant, it was submitted that she came to Court as a spouse of the deceased and beneficiary of his estate. The Respondent recognised her as such and served her with the statutory notice. If she has no *locus standi* then the Respondent's statutory notice is also

defective. The Respondent is aware that the current administrator is the public trustee who is not aware of the intended sale. AS such, the proposed sale of the property without the knowledge of the Administrator will greatly prejudice the estate of the deceased.

8. It was further submitted that a point of law must be raised on the basis that all facts pleaded are correct. The Applicant contends that the Respondent seeks to irregularly sell the properties while fully aware that the Administrator is not aware of sale. The Respondent should not hide behind the issue of locus. Citing Article 159 of the Constitution, the Applicant submitted that the Court should not look at technicalities.

9. It is common ground that the subject matter of the Suit and Application herein is the properties belonging to the estate of the deceased for which notification of sale has been issued by the Respondent. That the Applicant is not the Administrator of the estate of the deceased is not in dispute. The only issue that falls for determination therefore, is whether the Applicant has the *locus standi* to file the Suit and Application herein.

10. Under the Law Succession Act, it is only a personal representative of a deceased person who has the power to file suit on behalf the estate. Section 82(a) of provides:

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;

11. From the foregoing provision, a party who is not a holder of a grant of representation of an estate in respect of which the party seeks orders, has no *locus standi* to do so. An action filed by such a party is incompetent at inception. This was the holding in the case of Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another [1987] eKLR where the Court of Appeal observed:

But an administrator is not entitled to bring an action as an administrator before he has taken out letters of Administration. If he does, the action is incompetent at the date of its inception...

12. And in Trouistik Union International & Another v Jane Mbeyu & Another [1993] eKLR, the Court of Appeal had this to say about who may institute any action concerning the estate of a deceased person:

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”.

13. Duly guided by the cited authorities, I find that the Applicant cannot agitate by the Suit and Application herein the protection of the subject properties forming part of the estate of the deceased without a grant of representation being made to her under the Law of Succession Act.

14. The Applicant contends that the Respondent cannot serve her with a notification of sale and then when she files Suit to protect the property the subject of the sale, the Respondent says she has no *locus standi*. She further argues that if she has no grant of representation, it follows then that the Respondent’s notification of sale, having been served upon a person who has no grant of representation, is defective.

15. This Court is seized of Succession Cause No. 200 of 2015 in relation to the estate of the deceased. The Court did on 7.5.19 make a grant in respect of the estate of the deceased to the Applicant and her then co-administrator Rose Faith Mwachasi. On 27.6.19 however, the Court revoked the said grant and made a fresh grant to the Public Trustee. The Applicant stated that notification of sale was served on her on 26.6.19. A look at the notice dated 16.6.19 indicates that the same is addressed to the deceased c/o the Applicant and the said Rose Faith Mwachasi as joint administrators of the estate. At the time the notification was served, the Applicant and the said Rose Faith Mwachasi were still holders of the grant made to them. As such, the Court is satisfied that the notification of the intended sale as served upon the 2 then administrators is valid.

16. The Application herein is dated 29.7.19 and filed on even date. As indicated earlier, the grant issued to the Applicant and Rose Faith Mwachasi had been revoked on 27.6.19 and a fresh grant issued to the Public Trustee on even date. As at the date of filing the present Application, the Applicant did not hold a grant of representation in respect of the estate of the deceased. Accordingly she had no *locus standi* to file any proceedings in respect of the estate of the deceased. It is only the Public Trustee, the holder of a grant of representation of the estate of the deceased, who has the *locus standi* to file a Suit to protect the properties that the Respondent seeks to sell by public auction.

17. Article 159(2)(d) of the Constitution of Kenya, 2010 enjoins the Court, while exercising judicial authority, to administer justice without undue regard to procedural technicalities. The filing of Suit and the Application in Court without *locus standi*, renders the same incompetent. This is not a mere procedural technicality. It goes to jurisdiction and the Court has no jurisdiction to entertain an incompetent Suit. As such, Article 159(2)(d) cannot come to the aid of the Applicant.

18. In the circumstances, the Court finds that the Suit and the Application herein, having been filed by a party lacking *locus standi*, are both incompetent and the same are hereby struck out.

DATED, SIGNED and DELIVERED in MOMBASA this 24th day of January 2020

M. THANDE

JUDGE

In the presence of: -

.....for the Applicant

.....for the Respondent

.....Court Assistant