



REPUBLIC OF KENYA



Amala (Suing As Personal Representative of Joseph Amala Okuthe - Deceased) v Ochar & 4 others (Civil Suit 32 of 2021) [2023] KEELC 21809 (KLR) (29 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21809 (KLR)

MIGORI ELC CIVIL SUIT NO. 95 OF 2017

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

CIVIL SUIT 32 OF 2021

GMA ONGONDO, J

NOVEMBER 29, 2023

BETWEEN

ONYANGO MICHAEL AMALA (SUING AS PERSONAL REPRESENTATIVE OF JOSEPH AMALA OKUTHE - DECEASED) PLAINTIFF

AND

PETER OCHAR 1ST DEFENDANT

SEBASTIAN NGONGA 2ND DEFENDANT

LAND SURVEYOR, HOMA BAY COUNTY 3RD DEFENDANT

LAND REGISTRAR, HOMA BAY COUNTY 4TH DEFENDANT

THE HON. ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. This ruling is in respect of the 1st and 2nd defendants' Notice of Preliminary Objection dated 30th May 2023 (The Preliminary Objection herein) and filed through Veronica Migai and Company Advocates.
2. The gist of the preliminary objection is that the plaintiff lacks locus standi to prosecute the instant suit. That the plaintiff's father who first instituted this matter died and the plaintiff has not taken out letters of administration in respect of the estate of the deceased herein, Joseph Amala Okuthe.
3. By grounds of opposition dated 7th August 2023 and filed herein on 8th August 2023, the plaintiff, acting in person, opposed the preliminary objection and urged the court to dismiss the same. He stated, inter alia, that it is the deceased who instituted the instant suit thus, any irregularity on the part of the plaintiff ought not cause the same to abate. That the suit land, Kabuoch/K/K/Karita/548, is family land hence, the cause of action survives the deceased. That further, the plaintiff has since obtained a



grant of letters of administration to the estate of the deceased dated 1st August 2023 and as such has capacity to prosecute the instant suit.

4. On 25th July 2023, this court ordered and directed that the Preliminary Objection be heard by way of written submissions in the spirit of Article 159 (2)(b) of the Constitution of Kenya, 2010.
5. Accordingly, the 1st and 2nd defendants' counsel filed submissions dated 1st September 2023 and identified twin issues for determination thus: whether the plaintiff lacks requisite locus to file this suit in view of the fact that he did not first obtain a limited grant ad litem before filing the case in court and whether the honourable court can admit limited grant ad litem obtained by the plaintiff after filing the case. Learned counsel submitted that the present suit is a nullity since the plaintiff filed the same when he lacked the legal capacity to do so. That further, this court should not admit the limited grant ad litem obtained by the plaintiff on 1st August 2023, since the same was only obtained after the instant preliminary objection was filed. Thus, counsel urged the court to strike out the instant suit with costs to the 1st and 2nd defendants. To fortify the submissions, counsel relied on the case of Hawo Shako v Mohamed Uta Shanko (2018) eKLR, among other authoritative pronouncements.
6. The plaintiff filed submissions dated 7th August 2023 on 8th August 2023 and identified 5 issues for determination to wit: whether the plaintiff lacks locus standi, whether the mistake of counsel should be visited on a litigant, whether the plaintiff should suffer on account of procedural technicalities, whether the suit should abate and whether the preliminary objection is merited. He also filed supplementary written submissions dated 10th November 2023.
7. He submitted that he has since been issued with a limited grant of letters of administration ad litem in regard to the estate of the deceased hence, has locus standi. That his previous counsel amended the pleadings but failed to apply for a grant of letters of administration ad litem to the estate of the deceased. That the mistake of counsel should not be visited upon the plaintiff. He urged the court to allow him to amend the pleadings and properly come on record, stating that the matter has not yet proceeded. Reliance was placed on Article 159 (2)(d) of the Constitution of Kenya, 2010 and the case of Rajesh Rughani v Fifty Investments Limited & Anor. (2016) eKLR, among others, to buttress the submissions.
8. It is noteworthy that by way of a plaint filed on 8th January 2013, the deceased instituted suit against the 1st and 2nd defendants and the District Land Surveyor- Homa Bay and sought the orders infra:
 - a. A permanent injunction restraining the defendants themselves, their agents and/or their servants from entering onto and/or in any manner interfering with the quiet and peaceful possession of the suit land by trying to construct a road through it without permission and or consent of the plaintiff.
 - b. Costs of the suit be borne by the defendants.
 - c. And any other further orders this court may deem fit and expedient.
9. The plaint was initially amended on 1st January 2021 and Onyango Michael Amala substituted Joseph Amala Okuthe as the plaintiff, the latter having died on 20th March 2018. The plaint was further amended on 15th February 2022 and the 4th and 5th defendants added to the suit. Further, the plaintiff amended the orders initially sought as infra:
 - a. A declaration that the said public road of access as is opened does not fall under the definition of Public Roads Access Act CAP 399, Section 2 hence not a public road.



- b. A declaration that if indeed the portion of the plaintiff's land parcel he used for his subsistence is a road reserve, it is therefore a public land which falls within the constitutional definition of public land hence, the plaintiff ought to be protected against arbitrary destruction of property without following due process of law.
 - c. That the destruction of crops and trees without following the due process of the law is illegal, unprocedural, unlawful hence, violated the plaintiff's fundamental rights and freedom under the various articles of the Constitution of Kenya, 2010.
 - d. An order that the incorrect and misleading statements by the defendants to court be expunged from court records.
 - e. An order to compensation for the arbitral destruction of property of the plaintiff without a court order.
 - f. An order that the administrative action by the defendant is in disregard to the laid down procedures, rule of law and the Constitution of Kenya 2010 be declared null and void and if the process if found necessary, be ordered to start afresh.
 - g. Costs of the suit be borne by the defendants.
 - h. And any other further orders this court may deem fit and expedient.
10. Notably, both amended plaints were filed by the plaintiff's then counsel, S. M. Sagwe & Company Advocates.
 11. The 1st and 2nd defendants filed an amended statement of defence dated 23rd May 2022 on 30th May 2022, denying the plaintiff's claim.
 12. Originally, the suit was filed at the Kisii High Court. The same was transferred to Migori Environment and Land court and subsequently to this court for hearing and determination.
 13. I have duly considered the Preliminary Objection. So, is the same sustainable?
 14. It must be noted that the Preliminary Objection is on a point of law and may dispose of the suit; see Mukisa Biscuits case (infra).
 15. The Preliminary Objection is grounded on the fifth schedule of the Law of Succession Act, Chapter 160 Laws of Kenya.
 16. In the locus classicus case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696, the Court of Appeal pronounced itself on what constitutes a preliminary objection as follows:

“...a preliminary objection consists of a point of law which has 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 a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration...” (Emphasis added).
 17. I have considered the preliminary objection. The main issue that arises therein is: whether the plaintiff had locus standi to prosecute the suit without first obtaining a grant of letters of administration to the estate of the deceased.



18. In the case of *Alfred Njau v City Council of Nairobi* [1983] KLR 625, the Court of Appeal held inter alia that
- “...Locus standi” literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”
19. It is trite law that a litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in case of intestate succession; see *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* (2014) eKLR.
20. Section 80(2) of the *Law of Succession Act*, Chapter 160 Laws of Kenya stipulates as follows:
- (2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant. (Emphasis added)
21. Further, Section 82(a) of the *Law of Succession Act* (*supra*) provides that:
- 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;
22. This court subscribes to the Court of Appeal decision in *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR, where the Court stated in part thus:
- “...the general rule in relation to administration is that a party entitled to administration can do nothing as administrator before letters of administration are granted. Section 80(2) of the *Law of Succession Act* provides that a grant of letters of administration, with or without the will annexed, shall only take effect as from the date of the grant...
- ... but an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does, the action is incompetent at the date of its inception. The doctrine of the relation back of an administrator’s title, on obtaining a grant of letters of administration, to the date of the intestate’s death, cannot be invoked so as to render the action competent...” (Emphasis added)
23. Similarly, in *Troustik Union International & another v Jane Mbeyu & another* (1993) eKLR, the court held that no person can file a suit on behalf of an estate or participate in proceedings to enforce the rights of a deceased unless he/she holds a grant of representation issued by a court of law; see also Chudasama case (*supra*).
24. In the foregone, it is clear that the grant of letters of administration ad litem issued to the plaintiff on 1st August 2023 cannot validate the plaintiff’s amended plaint dated 15th February 2022. The doctrine of relation back does not apply to intestacy. Therefore, the suit is incompetent. Besides, it is noted that the said grant was obtained more than five years after the death of the deceased and only after the instant notice of preliminary objection was filed.
25. The plaintiff submitted that his previous counsel amended the pleadings but failed to apply for a grant of letters of administration ad litem to the estate of the deceased. That the mistake of counsel should not be visited upon him.



26. In *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR, which decision I cite with approval, Odunga J. (now, JA) stated that:

“ 33. In this case the applicant has not expounded on the nature and quality of the inadvertence alluded to. This seems to be a case of mere inaction and as was held in *Berber Alibhai Mawji vs. Sultan Hasham Lalji & 2 Others* [1990-1994] EA 337, inaction on the part of an advocate as opposed to error of judgement or a slip is not excusable. Therefore, pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client.” (Emphasis added)

27. Therefore, it is my considered view that the defect herein is a substantive one. The same is not curable by dint of Article 159 (2) (d) of *the Constitution* (*supra*).

28. The upshot is that the 1st and 2nd defendants’ Preliminary Objection dated 30th May 2023 is merited. As a consequence, thereof, the plaintiff’s suit instituted by way of an amended plaint dated 15th February 2022 is hereby struck out with costs to the 1st and 2nd defendants. All the consequential orders attendant to are hereby vacated.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 29TH DAY OF NOVEMBER 2023.

G.M.A ONG’ONDO

JUDGE

Present

Plaintiff, present in person

1st and 2nd defendants, present

Mr. Oriche holding brief for Ms. Veronica Migai, learned counsel for the 1st and 2nd defendants

