



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**ELC NO. 285 OF 2017**

**THOMAS KIBICHII**

**(Suing on behalf of MALAKWAN SITIENEI)..... PLAINTIFF**

**VERSUS**

**GREENVILLE PLANTATIONS LIMITED..... DEFENDANT**

**JUDGMENT**

By a plaint dated 11<sup>th</sup> August 2017 and amended on 18<sup>th</sup> March 2019 the Plaintiff herein sued the Defendant seeking for the following orders:

- a) An order that the defendant gives 5 acres to the 1<sup>st</sup> Plaintiff pursuant to paragraph 23 above.***
- b) A declaration pursuant to paragraph 25 A above.***
- c) Costs of the suit.***
- d) Any other relief this court may deem fit to grant.***

The Plaintiff Malakwen Sitienei was subsequently substituted by Thomas Kibichii the current Plaintiff upon an application for substitution which was granted by the court.

**PLAINTIFF'S CASE**

PW1 Malakwen Sitienei gave evidence that he is a resident of Growel Farm, Uasin Gishu L.R. No. 23201/46 situate North West of Eldoret Municipality, measuring approximately 129.2 hectares where he lived as a squatter and worker from 1962. He stated that the suit land was later sold to one Nirmal Singh, David Cullen, J.G Hunter and Raghbir Singh who recognized the PW1 as a squatter amongst others. It was PW1's testimony that the squatters were to be given 5 acres each from the suit land.

PW1 stated that sometime in 1995, the Defendant, having bought the suit land sued one Esther Birgen, Michael Chumba, Peter Keter, Raymond Simatwa Kiptoo and Josephat Tanui Maina for trespass in ***Criminal Case No. 1732 of 1995*** but they were acquitted and ordered that they are allowed to cultivate the suit land until they are given their promised 5 acres.

It was PW1's further evidence that later in 2001, the Defendant filed another suit against the Esther Birgen, Harry Thuku Laurien Kokwa and Some Menjo vide ***Eldoret HCCC No. 152 of 2001*** seeking for an order of injunction against them and that in both suits PW1 was omitted as one of the squatters.

PW1 stated that together with one Joseph Kipkemei Mengich, they filed an application through the firm of Kitiwa & Company Advocates to be joined as interested parties in the civil suit.

PW1 also stated that the Defendants in ***HCCC 152/2001*** with the other intended Interested Party had their names included in a consent dated 12<sup>th</sup> June 2003 which was filed on 13<sup>th</sup> June 2003 only signed by Laurien, Ewei, Some and Esther Tele Kariuki. On the same date, the consent was adopted by the Deputy Registrar High Court and marked that civil suit as settled. It was PW1's case that he was not informed of the consent or the outcome of ***HCCC 152/2001***, until when his grandchildren did a follow up on the suit.

PW1 was stood down at this juncture to be referred to Moi Teaching and Referral Hospital for psychiatric assessment for purposes of substitution.

PW1 Thomas Kibichii who is a grandson of Malakwen Sitienei substituted him and adopted his statement filed on 27<sup>th</sup> October 2020. He testified that his grandfather lived and worked on the suit land but he did not know why he was excluded in the settlement in the civil suit.

On cross examination, PW1 confirmed that he brought the case on behalf of the deceased Plaintiff however he did not have any grant to do so. He also stated that he lived with the Plaintiff on the suit land and was certain that the previous owners of the suit land had promised to give the Plaintiff 5 acres therefrom.

PW2 Joseph Kipkemei Mengich adopted his statement dated 14<sup>th</sup> July 2017 and stated that the previous owner of the suit land had allocated 60 acres to be given to their 12 workers. It was his evidence that the Plaintiff was not given his 5 acres because the defendant stated that the Plaintiff was deceased. He told the court upon cross examination that he did not sign the consent which determined HCCC 152 of 2001.

### **DEFENCE CASE**

DW1 Sammy Chesinya, a Manager at the Defendant Company adopted his statement dated 3<sup>rd</sup> January 2018 and testified that when the Defendant bought the suit land from the previous owner, Mr. Sidhu, there were 12 employees and squatters but the Plaintiff was not one of them. He stated that Mr. Sidhu agreed to settle the employees on a 60-acre land at Timboroa, where each of the employees was to get 5 acres. He exhibited as DEX 1 the minutes to that effect.

DW1 testified that only 7 employees moved to the Timboroa farm and 5 remained on the suit land. It is these 5 that they chose to file charges against and that the Plaintiff was not amongst them.

On the application by the Plaintiff and PW2 to be joined as Interested Parties in the 2001 suit, DW1 told this court that the application was withdrawn by PW2 and subsequently a consent was recorded between the Defendant, the 5 Defendants therein and PW2 to issue 5 acres each. DW1 stated that in exchange the Defendant was to take their portions in Timboroa.

On cross-examination, he told the court that he did not know all the squatters and could not know whether the Plaintiff was one of the squatters.

### **PLAINTIFF'S SUBMISSIONS**

Counsel listed the following issues for determination by the court namely:

- a) Was the plaintiff one of the squatters on Greenville Plantations Limited.*
- b) Was the Plaintiff entitled to 5 acres of land together with the other squatters who were given land in Eldoret HCC No 152 of 2001?*
- c) Was the Plaintiff represented by an advocate who also represented one Joseph Kipkemei Mengich who was given land*
- d) Is the Plaintiff entitled to the orders sought?*

Counsel for the Plaintiff reiterated the evidence on record and submitted that there was an apparent collusion between the advocates on record in the **HCCC 152 OF 2001** to have all the Defendants therein sign notices to act in person after recording a consent in court on 13th June 2003 and have the said Joseph Mengich withdraw the application to be joined as Interested Parties.

Counsel urged the court to find that the exclusion of the deceased Plaintiff in the settlement was unfair and discriminatory.

### **DEFENDANT'S SUBMISSIONS**

Counsel relied on Order 32 Rule 15 of the Civil Procedure Rules and submitted that Thomas Kibichii did not become the Plaintiff by virtue of substitution, but only a next friend and as such this status changed after the demise of the Plaintiff, Malakwen Sitienei. Counsel further submitted that such a status, like power of attorney powers, would abate upon the demise of the donor hence Thomas Kibichii lacked the locus standi to proceed with the suit.

Ms Kibichy submitted that failure to take out letters of administration made the null and void as was held in the case of **Margielyne Mulaya v Kefa Ludenyo & another [2016] eKLR** where the court cited the case of **Beth Wanjiru Kamau v Savings & Loan (K) Ltd [2006] eKLR**.

Counsel further relied on the case **Kenya Farmers' Cooperative Union Ltd v Charles Murgor (deceased) t/a Kiptabei Coffee Estate [2005] eKLR** where the court held that a Court of law has no jurisdiction to order for substitution where the suit has already abated by operation of law or to hear and determine such a suit.

Ms Kibichy also submitted that the plaintiff lived on the suit land by the authority of his employer hence he did not qualify to be a squatter as per the definition of a squatter in the Black's law dictionary. That if the Plaintiff was a squatter on the suit land, the defendant would

have sued him in the criminal and civil cases already determined.

It was counsel's submission that the Plaintiff ought to have pursued his interest in **HCCC 152 of 2001** because that is where he sought to be joined as an Interested Party and further that the Plaintiff should have sought a review of the consent Judgment in **HCCC 152 of 2001**.

Counsel also submitted that the Plaintiff's claim on the suit land is on discrimination which is not a legally recognized mode of acquiring interest over land, as the ways for acquisition are through purchase, succession, gift or adverse possession. The suit land being private land, the Defendant could not be forced to donate its interests on the land.

Counsel therefore urged the court to find that the Plaintiff is not entitled to the reliefs sought and dismiss the suit with costs.

### **ANALYSIS AND DETERMINATION**

The issues for determination are as to whether the suit is competent and whether the Plaintiff is entitled to 5 acres from the Defendant as a squatter.

This case has a long history as stated in the evidence of the parties. There were two cases filed against the squatters by the Defendant, one being a criminal case for trespass and another a civil case **HCCC No 152 of 2001**.

The court notes that in both cases the Plaintiff herein was not a party and that explains why the Plaintiff was not given 5 acres like the other Defendants in the cases. It is on record that there was an attempt to join the Plaintiff in the civil case where the Plaintiff was represented by an advocate but the application was withdrawn and a consent Judgment entered marking the matter as settled.

The Plaintiff did not challenge the consent Judgment that locked him out of the settlement and hence cannot be heard to complain against the advocates in this current case. The Plaintiff did not call the said advocate to explain the circumstances under which the consent was entered which in any event would not have been relevant in this case as it would have been an exercise in futility.

The other issue is what is the legal implication of where a party is appointed as a next friend and the original party to the suit dies. It is trite law that suits filed on behalf of persons adjudged to be of unsound are to be brought by the "next friend." Which is provided for under Order 32 rule 15 of the Civil Procedure Rules.

Barron's dictionary of Legal Terms" defines the phrase "Next Friend" as follows;

***"a competent person who, although not an appointed guardian, acts on behalf of a party who is unable to look after his or her own interests or manage his or her own lawsuit; one who represents an infant or other party, who by reason of some disability, is not sui juris. A next friend is not considered a party to the suit, but is regarded as an agent or officer of the court to protect the rights of the disabled person."***

Thomas Kibichy was substituted due to the infirmity of Malakwen Sitienei and as a next friend did not become a party to the suit. He is regarded as an agent of officer of the court to safeguard the rights of the person who for reason of disability or infirmity was not able to proceed with the case.

Upon the demise of Malakwen Sitienei while the matter was pending before the court, Thomas Kibichy the next friend ceased to have such authority to proceed with the case without applying for letters of administration to enable him have locus standi in this matter. The same was neither sought nor granted to regularize his position as a legal representative of the deceased Malakwen Sitienei.

In the case of **Ibrahim v. Hassan & Charles Kimenyi Macharia, Interested party [2019] eKLR** the court explained:

***"Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues."***

Further in the case of **Hawo Shanko v Mohamed Uta Shanko [2018] eKLR** the court observed that:

***".....The general consensus is that a party lacks the Locus standi to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the Plaintiff or Applicant has not been formally authorized by the Court by way of a grant limited for that purpose, then it will be difficult to control the flow of Court cases by those entitled to benefit from the estate. If each beneficiary is allowed to file a suit touching on a deceased's estate without first obtaining a limited grant, then several suits will be filed by the beneficiaries. It is the Limited grant which gives the plaintiff the locus stand before the Court and argue the case. It does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same. One has to first obtain a limited grant that will give him/her the authority to file the suit."***

If Thomas Kibichy wanted to proceed with the case, then he should have sought and obtained limited grant as his authority to proceed terminated upon the demise of the Plaintiff Malakwen Sitienei.

I have considered the pleadings, evidence and submissions by counsel and find that this case is incompetent and is dismissed with each party bearing their own costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 31<sup>st</sup> DAY OF JANUARY, 2022.**

**M.A. ODENY**

**JUDGE**

*NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.*