



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC NO. 236 OF 2020**

**PRAVINCHANDRA JAMNADAS KAKAD.....PLAINTIFF**

**VERSUS**

**The Estate of**

**LUCAS OLUOCH MUMIA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**HABAYAQWEZA MAWAZO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ANTOINETTE OMULISA OLUOCH.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

The Plaintiff filed this suit seeking orders directing that the status quo pertaining to properties known as House erected on L.R No. 7158/36 and LR 209/8294/380 or any other property owned and or registered in the names of the 1<sup>st</sup> Defendant as of 16<sup>th</sup> November, 2020 be maintained. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be restrained whether by themselves, their family, next of kin, legal representative, agents or any other person deriving authority from them from transferring the properties know as House erected on L.R No. 7158/36 and LR 209/8294/380 or any other property owned and or registered in the names of the Defendants to any other person or entity pending the hearing and determination of this application. Secondly that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be restrained whether by themselves, their family, next of kin, legal representative, agents or any other person deriving authority from them from transferring the properties known as House erected on L.R No. 7158/36 and LR 209/8294/380 or any other property owned and or registered in the names of the Defendants to any other person or entity pending the hearing and determination of the existing suit being HCC No. 582 of 2012 and Civil Appeal No. 174 of 2019 and that the costs of this application be provided for.

The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants though served, entered appearance, but failed to file their respective Statements of Defence to controvert the Plaintiff's averments. The 2<sup>nd</sup> Defendant filed submissions.

**Brief Facts of the Case**

***Plaintiff's Case***

The plaintiff filed a suit against the Estate of the 1<sup>st</sup> Defendant/Respondent seeking an injunctive order against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Respondents so that they are restrained from disposing, selling or transferring the properties of the estate of the 1st Defendant and their own properties pending the hearing and determination of an existing suit being HCC NO. 582 of 2012 and Civil Appeal No. 174 of 2014.

The plaintiff contends that the 1<sup>st</sup> Defendant/Respondent obtained a colossal amount of Kesh206,926,300/= from the plaintiff by making false presentation for his business activities alleging that the Central Bank of Kenya owed him substantial sums. The plaintiff allege that claim by the Defendant turned out to be untruthful and outright fraudulent. In his plaint he has set out the particulars of misrepresentation and fraud which according to him he acted on the faith and in belief that what the 1<sup>st</sup> Defendant was presenting was true and released a sum of Kesh 20,926,300 to the 1<sup>st</sup> Defendant. The Plaintiff avers that search of the 1<sup>st</sup> Defendant's properties shows that there is an attempt at collusion by registering the 1<sup>st</sup> Defendant's properties in the joint names with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

Further the Plaintiff avers that any transfer of the 1<sup>st</sup> Defendant's property may be done with the sole purpose of alienating it from the Plaintiff and rendering nugatory the existing suit against the 1<sup>st</sup> Defendant even when the suit will succeed.

***Defence case***

The 2<sup>nd</sup> Defendant on her part in the replying affidavit states that she is a stranger to the allegation to any of the suits that the plaintiff/applicant claims to have instituted against the 1<sup>st</sup> Defendant who is her husband during his life-time on matters of fraud allegations. She contends that she cannot transfer the 1<sup>st</sup> Defendant's/Respondent's property for the purpose of alienating the property and therefore render nugatory the Plaintiff's suit against the 1<sup>st</sup> Defendant/Respondent. Further that the application is controversial since the documents annexed to the application by the plaintiff provides evidence that all suits instituted against the late Lucas Oluoch Mumias have not yet been proved. She therefore contends that the plaintiff has not proved any prima facie case.

The 3<sup>rd</sup> Defendant/Respondent did not file any documents in court.

### **Analysis and Determination**

I have considered the application herein, the rival affidavits and the submissions where appropriate and the issue that commends itself for determination is whether the Applicant merits the prayers sought in the application.

Order 24 rule 4 (4) of the Civil Procedure Rules provides as follows;

*“4. (1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.*

(2) .....

*(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased Defendant. (emphasis is mine).*

The law is clear on what happens when one of the Defendants dies and the cause of action survives or continues. Upon an application made, the Court shall cause the legal representative of the deceased to be made a party or to be substituted in place of the deceased party to proceed with the case.

Section 2 of the Civil Procedure Act defines legal representative as follows;

*“means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.*

The Applicant is seeking to have an injunction issued directing that the status quo pertaining to the property known as House erected on L.R No. .7158/36 and L.R 209/8294/380 or any other property owned and or registered in the names of the 1<sup>st</sup> Defendant as of 16<sup>th</sup> November 2020 be maintained. The Applicant is also seeking to have the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves, their families, next of kin, legal representatives, agents or any other person deriving authority from the from transferring the properties known as House erected on L.R. No. 7158/36 and L.R 209/8294/380 or any other property owned and or registered in the names of the Defendants to any person or entity pending the hearing and determination of this application.

At the same time the application seeks to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> defendant from dealing with the suit property or any other property owned and or registered in the names of the Defendants or to transfer to any other person pending the hearing and determination of the existing suit being HCC No. 582 of 2012 and Civil Appeal No 174 of 2019.

Other than the mention of 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as being alleged wives to the 1<sup>st</sup> Defendant, no evidence has been tabled to show that they are the legal representatives of the 1<sup>st</sup> Defendant as contemplated by the above definition, that is to say, the legal representative of the estate of the 1<sup>st</sup> Defendant. The rule requires substitution of a Defendant with a party clothed with legal representation where a defendant is deceased which is the case in the suit at hand. The 1<sup>st</sup> Defendant was demised in December 2019.

It is in doubt whether the Applicant has followed the aforesaid procedure in seeking a legal representative of the deceased 1<sup>st</sup> Defendant's estate. The Applicant is at liberty to so cite the intended substitute as per the provisions provided in the Succession Act for the purposes of the pending proceedings. No material has been presented to this Court that indeed the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who he states are alleged wives are such legal representative(s) of the 1<sup>st</sup> deceased Defendant nor whether the Applicant has filed citation proceedings in that regard.

The Applicant has explained that the 1<sup>st</sup> Defendant's dependants (the intended substitute included) have shown an attempt at collusion by registering the 1<sup>st</sup> Defendant's properties in the joint names with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant. There is no evidence presented in court to support this claim. Further that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants will act in haste to dispose of the 1<sup>st</sup> Defendant's properties or may fail to disclose or conceal the appointment of the legal representative solely to defeat the plaintiff's claim against the 1<sup>st</sup> Defendant and or his estate. This claim too is not substantiated by way of evidence. The provisions of the Succession Act has a cure for the Applicant's frustration.

Though that is the position in the Succession Act, it is important to point out here that in any event this Court does not have jurisdiction to determine matters relating to succession. Its' jurisdiction is limited to determining disputes on the environment, and use, occupation of and title to land under Article 162(2) (b) of the Constitution as well as the Environment & Land Act. Therefore the Plaintiff will have to settle the issue of succession in the right court in view of the fact that the ELC Court only steps in when the succession issue is settled.

The application for substitution with the legal representative of a deceased defendant must be made within one year in default of which the suit shall abate as against the deceased Defendant. In **Kenya Farmers' Cooperative Union Ltd. Vs. Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) eKLR** 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 nor to hear and determine a suit that has already abated by operation of law.

In the case at hand, the 1<sup>st</sup> Defendant died on 18/12/2019 and to date no substitution has been made. The application under consideration was filed in Court on the 17/11/2020 which is eleven months after the death of the 1<sup>st</sup> Defendant. However there are no documents to show that there is a legal representative who can be sued since there is not substitution that has been done.

The Advocates appearing for the 2<sup>nd</sup> defendant submitted that the Plaintiff had not established ground for a prima facie case relying on cases of *Nguruman Limited v Jan Bonde Nielsen & 2 others*, CA No. 77 of 2012; [2014]eKLR, *Giella -v- Cassman Brown & Co. LTD (1973) EA 358*, *Mrao Ltd v First American Bank of Kenya and 2 others* among others. Notably, the Plaintiff admitted in the plaint that no petition or application for a grant has been made. Without a grant, no one can deal with a deceased's property including the preservation or collection of the estate. Leave of the Court is not required to take out letters of administration. The plaintiff ought to have first filed an application for a grant limited to the filing of the suit.

Sections 45 and 46 of the Law of Succession Act deals with issues of grant of letters and protection of the estate of the deceased from intermeddling. Section 45 deals with intermeddling of an estate when no grant has been issued. Section 46 deals with the estate itself to avoid wastage.

The issue at hand is whether the Plaintiff requisite locus to file this application in view of the fact that they did not obtain a limited grant before filing the application in Court.

Section 45 of Cap. 160 states as follows: -

**(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**

**(2) Any person who contravenes the provisions of this section shall-**

**(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and**

**(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.**

Section 46 of the Law of Succession Act deals with duties of officers in relation to protection of a deceased's property.

The issue as to whether a party can file a suit involving a deceased's estate before obtaining a limited grant has been the subject of several Court cases. 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 to 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.

The leave of the Court is not required before one seeks a grant limited to the filing of the suit. The plaintiff ought to have sought a limited grant first before filing this application seeking an injunction. The Judgement by Justice **M.A. Ang'awa** (as she then was) in **Nairobi Succession Cause No.1731 of 2000**, in the **matter of the estate of MORAJI BHANJI DHANAK** (deceased) delivered on 30<sup>th</sup> November, 2000 is to the effect that a grant limited to the filing of a suit has to be issued before the suit is filed.

In the case of **MORJARIA V ABDALLA [1984]KLR, 490** holding No.7 of the Court of Appeal reads as follows as page 491:-

**Notwithstanding that the grant of letters of administration ad colligenda bona was not a form of grant appropriate for this case and that it did not follow Form 47 in the First Schedule to the Law of Succession Act as provided by rule 36(2) of the Probate and Administration Rules, the grant was specifically limited to "the purpose only" of representing the appellant in his appeal and those words in themselves constituted a valid grant under rule 14 enabling the appellant's son and his step-mother to represent the appellant in this appeal.**

In the case of **JULIAN ADOYO ONGUNGA V FRANCIS KIBERENGE ABANO Migori Civil Appeal No.119 of 2015**, Justice **A. Mrima** had this to say on the issue of a party filing a suit without having obtained a limited grant.

**"Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since**

***in most cases the estate involves several other beneficiaries or interested parties.”***

The effect of the above cases is that for a party to have *locus standi* and appear in a case involving a deceased person, he or she must first obtain a grant limited for that purpose.

There is no dispute that the plaintiff did not obtain a limited grant allowing them to file this application. Such a grant is the key which allows the plaintiff access to the Court. Without a limited grant being issued allowing the filing of the application, the plaintiff would be like someone who has entered a closed room without opening the door. All that the court can tell someone who is before it without having obtained a grant limited to the filing of the application is that despite the validity of the application or the strength of the case, the court cannot hear the application as the initiator thereof lacks the capacity to bring that application to court. The correct procedure is not to allow the plaintiff to go back and obtain a limited grant for that purpose and then allow him to continue with the application. The application as initiated becomes ***void ab initio*** and cannot be resuscitated by the issuance of a subsequent limited grant.

Section 54 of the Law of Succession Act provides as follows: -

***A court may, according to the circumstances of each case, limit a grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule.***

Similarly, the 5<sup>th</sup> Schedule to the law of succession Act provides for grants limited for specific purposes. There is a general consensus that paragraph 14 of the 5<sup>th</sup> Schedule empowers the Court to issue a grant for the sole purpose of filing a suit. The paragraph reads as follow:-

***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 administration is unable or unwilling to act, letter of administration may be granted to the nominee of a party in the suit, limited for the purposes of representing the deceased therein, 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 matter at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.***

The Law of Succession Act clearly allows a party to obtain a grant limited to a specific purpose. Section 67 of the Act provides that a limited grant need not be publicized for purposes of inviting objections. Rule 36(1) of the Probate and Administration Rules states as follows:

***Where, owing to special circumstances the urgency of the matter is to great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased.***

All the above provisions are avenues enabling a party obtain the relevant grant before approaching the Court. The mere fact that one is owed by a deceased defendant is not sufficient. That the plaintiff is owed by the deceased defendant does not give the *locus standi* to the plaintiff to meddle in the estate of the deceased in order to secure his interest before obtaining limited grants. One's standing and interactions with the deceased does not clothe such a party with the *locus standi*. It is the limited grant which does.

Since the plaintiff did not obtain a grant limited to the filing of the suit, I do find that the suit herein cannot be sustained. However, the 2<sup>nd</sup> and 3<sup>rd</sup> defendant should be made aware that transferring a deceased's property to another person without obtaining a confirmed grant is unlawful and punishable by imprisonment.

I do find that the application is not properly before the court. The application is therefore lacking in merit. The plaintiff is at liberty to file a fresh suit after obtaining a limited grant for that purpose or can decide to file a succession cause before the relevant Court or any other Court as the case may be. The Court where a succession is filed will be able to issue orders restraining the intermeddling of the estate.

In the end the Court finds the application devoid of merit and is dismissed with costs to the Respondent (2<sup>nd</sup> Defendant).

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JANUARY, 2022.**

.....

**MOGENI J**

**Judgement read in virtual court in the presence of:**

**Ms. Koki..... For the Plaintiff**

**Mr. Muchiri H/B for Mr. Omari for the 2<sup>nd</sup> Defendant**

**N/A for the 3<sup>rd</sup> Defendant**

**Mr. Vincent Owour- Court Assistant.**