



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**ELC CASE NO.68 OF 2013**

**CATHERINE WAMBILYANGA .....PLAINTIFF**

**VERSUS**

**JUSTINA SYOMBUA MUSYOKA..... 1<sup>ST</sup> DEFENDANT**

**DANIEL KIOKO .....2<sup>ND</sup> DEFENDANT**

**VERONICA MUMBUA.....3<sup>RD</sup> DEFENDANT**

**MAXWELL OTTAWA MAERO.....4<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. By a **Plaint** dated **29.8.2013** and filed on 30.8.2013, the Plaintiff instituted instant suit seeking injunctive relief and costs. Upon service of the summons the Defendants filed Defence on 11.11.013 where they pleaded that the Plaintiff lacked locus standi to institute suit and also raised the issue that the subject matter was subject to Nairobi HC.Succ.No.503/2013 and thus ELC court lacked jurisdiction to entertain the suit. The Defendants intimated that they will raise a preliminary point of law at an opportune time.

2. On 1.9.2014 the Defendants lodged application dated 26.8.2014 seeking to strike out the instant suit on the grounds that, the suit land belongs to a deceased person and are subject to HC.Succ.503/2013 filed before the instant suit. Further, the plaintiff lacked requisite locus to institute suit as she has not obtained letters of administration to the estate of the deceased owner to enable her institute the instant proceedings.

3. The Defendants thus aver that the suit is fatally defective, grossly incompetent and bad in law for want of capacity by the plaintiff to institute the instant proceedings. The Application is also supported by the affidavit of Maxwell Ottawa Maero, 4<sup>th</sup> Defendant sworn on 18.9.2014 which reiterates the aforesated grounds on the Application. The Respondent has opposed the application and has filed a replying affidavit sworn on 4.11.2014

4. On her part the Respondent/Plaintiff aver that she claims on her own right not on behalf of the estate, thus the issue of locus standi does not arise. She alleges that the suit plots are matrimonial properties which they acquired with the deceased husband though registered in his names. She avers that the HC.Succ.503/2013 is dealing with distribution of her deceased husband's estate and herself is claiming her right of the matrimonial property.

5. Parties have filed submissions pursuant to the court direction to canvass the application. The Applicant relies on the authority of Section 2(1) of Cap. 160 and the case of **TERESIA WAIRIMU KIRIMA VS. FATHER ROMEO AND ANOTHER (2013) eKLR**. To support contentions that only a party who has obtained grant of representation can institute claim on behalf of a deceased estate. The Applicant submits that since the suit lands are registered in the deceased names and they are subject of **HC.Succ.503/2013 Nai**, the Plaintiff should ventilate her claim before the court handling succession matters.

6. The Respondent submits that under the law and especially Article 68 of the Constitution, and section 28 of Land Registration Act, she is entitled on her own right to claim matrimonial property. The Plaintiff argue that she can ventilate her issues in the HC.Succ.503/2013, however, only 4<sup>th</sup> Defendant is a family member and the rest are strangers.

7. She submits that in the authority of the **estate of NGEERA (Deceased) 2011] eKLR Makau J.** held that injunction under order 40 of Civil Procedure Rules cannot be granted in succession cause; thus, submits that the only recourse to the Plaintiff in the circumstances of the case is to revert to ELC court which can determine her occupation, use, and title to land disputes and issue injunctions under Section 13 (7) ELC Act. After going through the affidavits and submissions, the court finds the following issues arising herein:

1. Whether the Plaintiff has capacity to institute suit herein?
2. Whether the court has jurisdiction to entertain the claim?
3. Whether the suit should be struck out?
4. What is the order as to costs?

8. In the Plaintiff in the instant suit the Plaintiff claim on her own behalf and not on behalf of the Estate of her deceased estate. The Defendants are sued for the acts of 3.8.2013, 13.8.2013 and 24.8.2013 of damages and disruption of her occupation of Syokimau plots 17 and 18 on LR.12719/479 which she claims is a matrimonial property she acquired with her deceased husband and which she occupies even after her husband died on 31.12.2013. On the face of the pleadings the Plaintiff is seeking to protect her possessory right against trespass by the Defendants.

**STREET ON TREATISE ON LAW OF TORTS 6<sup>TH</sup> Edition at page 63 states:**

***“the tort of trespass protects the interest of Plaintiff in having land in physical intrusion i.e. prevents interference with possession”.***

The Plaintiff seeks court intervention to protect her from the aforesaid acts. The Plaintiff is not claiming any property from the Defendants nor does she claim on behalf of the estate, she seeks to injunct the Defendants from the repeated acts complained of.

9. If the Plaintiff has to claim on behalf of the estate of her deceased husband, she would be caught up by the requirement of her to have capacity to institute suit in terms of Section 2(1) of Cap 160 and the authority of **TERESIA WAIRIMU KIRIMA, supra**. On the first issue, the court finds that she has capacity to lodge complaints via suit the way she did against the Defendants. The relief sought is a permanent injunction which might lead to conflict with the eventual distribution of the deceased estate which appears to include the suit property.

10. The Plaintiff is yet to prove of her matrimonial property share thereof. The court herein cannot be expected to undertake determining her share or ownership while still same is being distributed in the HC.Succ.No.503/2013. One has to undertake the task as to whether she has a share and the extent and thus decide whether to distribute or award it to the Plaintiff. In **JANE MUTHONI VS. JOSEPH NJUGUNA (2014) eKLR**, the court held in similar case:

***“that to avoid confusion in decisions of the court and or conflict it is prudent to have court determining succession case to hear issues including plaintiff’s claim during the distribution”.***

In line with the above decision, the court has jurisdiction but to avoid conflict and confusion in decisions the Plaintiff will have to prove her claim in the **HC.Succ.503/2013 Nai**.

11. The final issue is whether the court should strike out the suit. The dictates of justice demand that as the Plaintiff ventilate her claims in the succession case No.503/2013 Nai, she has to be protected. The court thus makes the following orders:

1. This suit is **stayed to await Nai HC.Succ.503/2013** to be heard and determined.
2. The Defendants will not interfere with her occupation and user of the suit premises, pending the determination of the **Succession Case No.503/2013**.
3. Costs in the cause.

**Signed and Delivered at Machakos this 16<sup>th</sup> day of January, 2015.**

**CHARLES KARIUKI**

**JUDGE**