



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO. 2 OF 2018

VICTORIA WANJIKU MACHARIA.....PLAINTIFF

-VERSUS-

NDUNGU KARIUKI.....1ST DEFENDANT

JAMES MACHARIA.....2ND DEFENDANT

LAND REGISTRAR, NYANDARUA DISTRICT

LAND REGISTRY.....3RD DEFENDANT

AND

ANNAH MUTHONI GICHUHI.....INTERESTED PARTY

RULING

1. By a notice of motion dated 14th April, 2021 grounded upon **Articles 50 & 159 of the Constitution of Kenya, 2010, Sections 1, 1A, 3A and 63 (e) of the Civil Procedure Act (Cap. 21), Order 1 Rule 9, Order 12 Rule 7, Order 21, and Order 51 Rule 15 of the Civil Procedure Rule 2010 (the Rules)**, the Plaintiff sought the following orders:

(a) That this honourable court do set aside the orders issued on 19th July, 2018 striking out this matter and issue orders reinstating this matter.

(b) That this honourable court do issue orders for resumption of the hearing of this suit.

(c) That this honourable court do provide a date for hearing of this matter.

(d) That costs of the application be in the cause.

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 14th April, 2021 and the exhibits thereto. It was contended that the court erred in law in striking out the Plaintiff's suit on 19th July, 2018 for lack of *locus standi*. It was further contended that the suit was not instituted for the purpose of administration of the estate of the deceased but merely for its preservation.

3. The Plaintiff's explanation for the delay in filing the instant application was that her previous advocate did not inform her of the striking out order until 20th February, 2021. It was her case that as a beneficiary of the estate of the deceased she would be greatly prejudiced if the application was not allowed and the suit reinstated for hearing on merit.

4. The 1st Defendant filed a replying affidavit sworn on 17th May, 2021 in opposition to the application. It was contended that the application was misconceived, frivolous, bad in law and an abuse of the court process. It was contended that the Plaintiff was not the administrator of the estate of the deceased hence she had no legal capacity to file suit on behalf of the estate hence the court was right in striking out the suit.

5. The 1st Defendant further contended that matters relating to administration or preservation of the estate of the deceased ought to be handled before the Succession Court and not the Environment and Land Court. He further stated that he had sued the administrator of the

estate of the deceased in Nyahururu CMCC No. 67 of 2019 whereby he obtained judgment against her with respect to the suit properties hence the instant suit was *res judicata*. The court was consequently urged to dismiss the application.

6. The record shows that the 2nd Defendant, 3rd Defendant and the interested party did not file any responses to the application. However, the Attorney General for the 2nd Defendant informed the court that he had no opposition to the application.

7. When the application was slated for hearing, it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the 1st Defendant's submissions were filed on 28th October, 2021 but the Plaintiff's submissions were not on record by the time of preparation of the ruling.

8. The court has considered the Plaintiff's notice of motion dated 14th April, 2021, the 1st Defendant's replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the main questions for consideration herein are as follows:

(a) Whether the Plaintiff has made out a case for setting aside the order made on 19th July, 2018.

(b) Whether the Plaintiff is entitled to the consequential orders sought.

(c) Who shall bear costs of the application.

9. The court has considered the material on record on the 1st issue. The record shows that vide a plaint dated 20th December, 2017 the Plaintiff pleaded that the various suit properties identified therein belonged to the estate of her late father, **Moses Gachuhi Macharia**, and that the same had been illegally and irregularly transferred to the 1st Defendant. Simultaneously with the filing of the suit, the Plaintiff also filed an application dated 22nd December, 2017 for an interim injunction pending the hearing and determination of the suit.

10. It would further appear that the Plaintiff is not the administrator of the estate of the deceased but one, **Hannah Muthoni Gichuhi**, who was sued as an interested party in the suit. So, when the application for interim orders was scheduled for hearing on 19th July, 2018, the court noted that the deceased had died in 2000 and that the Plaintiff had not exhibited any grant authorizing her to file suit. The court consequently held that the Plaintiff had no *locus standi* and struck out the suit in the absence of the parties.

11. The Plaintiff contended that the court erred in law in striking out the suit because it was filed merely to preserve the estate of the deceased. It was further contended that, in any event, the administrator of the estate had been joined as an interested party in the suit in accordance with **Order 31 of the Rules**. It was further contended that misjoinder or non-joinder of parties could not be a valid reason to strike out a suit in law. The Plaintiff relied, *inter alia*, upon **Thika ELC No. 222 of 2018- Daykio Plantations v National Bank of Kenya & 2 Others; D.T Dobie & Company (K) Ltd v Muchina & Another Nairobi Civil Appeal No. 37 of 1978; Nairobi HC. Civil Appeal No. E191 of 2020 – Kaiser Investments Ltd v Hua Run Company Ltd & 3 others; and Simon Thuo Mwangi v Unga Feeds Ltd Nairobi Civil Appeal No. 181 of 2003** in support of the application.

12. The 1st Defendant, on the other hand, submitted that *locus standi* is everything in legal proceedings and that unless a party has the legal capacity to sue, the merits of the case become irrelevant. It was submitted that it was not contested that it was the interested party and not the Plaintiff who was the administrator of the estate of the deceased. It was further submitted that a beneficiary of the estate of a deceased person had no capacity to file suit in such capacity without a grant of letters of administration. The 1st Defendant relied upon **Alfred Njau & 5 Others v City Council of Nairobi [1983] eKLR; Trouistik Union International & Another v Jane Mbeyu & Another [1992] eKLR; Juliana Adoyo Ongunga v Francis Kiberenge Abano Migori Civil Appeal No. 119 of 2015; and Hawa Shanko v Mohamed Uta Shanko [2018] eKLR** in opposition to the application.

13. The court is of the opinion that the authority which comes closest to the instant suit is the case of **Trouistik Union International (supra)** where the Court of Appeal held, *inter alia*, that:

“An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as at the date of inception.”

14. In the said suit, the widows and beneficiaries of the estate of the deceased had filed suit for damages against the Appellant under both the **Fatal Accidents Act (Cap. 32)** and the **Law Reform Act (Cap 26)** arising out of a road traffic accident. Although the High Court awarded them damages under the two **Acts**, the Court of Appeal set aside the award under the **Law Reform Act** since a claim under the **Act** for the benefit of the estate could only be filed by an administrator to whom a grant had been issued. The undisputed evidence before the Court of Appeal was that the widows had not obtained such grant prior to filing suit.

15. It is evident from the material on record that the Plaintiff is not the administrator of the estate of the deceased. The Plaintiff contended that the interested party who is the administrator of the estate is an elderly, indolent and incompetent lady who was not diligent in protecting the assets of the estate and that steps had been taken to have her replaced.

16. The court is not satisfied that there was any error of law or fact in striking out the Plaintiff's suit for want of *locus standi*. The Plaintiff has conceded that she is not the administrator of the estate of her deceased father. The mere fact that she considers the administrator to be incompetent or indolent cannot be a lawful justification or excuse for by-passing the lawful administrator appointed under the **Law of Succession Act (Cap. 160)**. The fact that the other beneficiaries have not applied for her replacement cannot legally confer upon the Plaintiff *locus standi* to file suit for the benefit of the estate of the deceased.

17. The court is further of the opinion that even if the court had erred in law in making the order of 19th July, 2018, an application for setting aside would not be the appropriate remedy in the circumstances. The effect of the application is that the Plaintiff is asking the court to reverse its own decision without pursuing the established channels such as review or appeal. The court is essentially being requested to sit on appeal over its own decision which is not permissible in law. The court, therefore, finds that the Plaintiff has failed to make out a case for setting aside the striking out order made on 19th July, 2018.

18. In view of the fact that all the consequential orders were dependent upon the Plaintiff succeeding on the 1st issue, it would therefore follow that the Plaintiff having failed on the 1st issue there would be no legal basis for granting the consequential orders. Accordingly, the Plaintiff is not entitled to any of the consequential orders sought.

19. The 3rd issue is on costs of the application. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Jammohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful parties should not be awarded costs of the application. Accordingly, the 1st Defendant who opposed the application shall be awarded costs of the application.

20. The upshot of the foregoing is that the court finds no merit in the Plaintiff's application for setting aside the orders of 19th July, 2018. Accordingly, the Plaintiff's notice of motion dated 14th April, 2021 is hereby dismissed with costs to the 1st Defendant only. It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 10TH DAY OF FEBRUARY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM

In the presence of:

Mr. Mundia Mwangi for the Plaintiff

Ms. Mungai holding brief for Mr. Rodi for 1st Defendant

No appearance for the 2nd Defendant

No appearance for AG for the 3rd Defendant

No appearance for the interested party

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Y. M. ANGIMA

JUDGE