



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO.447 OF 2018

SAMUEL NDUNGU KAMAU

GRACE WAIRIMU KAMAU

(suing as the legal representative of DAVID KAMAU NJOROGE (DECEASED)).....PLAINTIFFS

VERSUS

IBRAHIM MOHAMMED ALL.....1ST DEFENDANT

YUSUF ADAN MAALIM.....2ND DEFENDANT

RULING

1. The Plaintiff instituted this suit by way of the plaint dated 17th October 2018. The Defendants filed a joint statement of defence dated 5th December 2018. They also filed a Notice of Preliminary objection to the entire suit dated 25th June 2019 on grounds:-

a. That the suit is incompetent, bad in law and should be dismissed as the Plaintiff did not obtain authority to file suit on behalf of the beneficiaries of the estate of David Kamau Njoroge (Deceased) and therefore have no capacity to sue on their behalf.

b. That the suit herein is bad in law, incompetent and should be dismissed with costs as the purported capacity to sue the Defendants as the legal representatives of the estate of David Kamau Njoroge has been challenged on the ground that the initial grant was obtained by fraud and the matter is pending before the High Court in Kiambu Civil Appeal No.50 of 2019 and before the director of criminal investigations office.

2. On the 28th July 2021, the court with the consent of parties directed that the preliminary objection be heard first. The court also directed that parties do file and exchange written submissions.

The Defendants' /Applicants' submissions

3. They are dated 20th November 2021. Counsel for the Defendants submitted that the lease agreement which is the subject of the suit was entered on 12th May 2017 and signed by several persons as lessors, some of whom did not give authority for this suit to be filed and they have applied to be joined as interested parties herein.

4. He submitted that as per order 1 Rule 8 (1) & (2) and Order 1 Rule 13 of the Civil Procedure Rules, the Plaintiffs have no capacity to sue on behalf of other beneficiaries for lack of authority from other beneficiaries. He relied on the case of **Free Pentecostal Fellowship in Kenya v Kenya Commercial Bank [1992]e KLR** and the case of **Katana Mwango & Another v Cannon Assurance K.Ltd[2013] e KLR**, both cited in **Shadrack Mwamuu Nzioka & 2 Others v Tropical Blooms Limited[2020]e KLR**.

5. He added that other beneficiaries have raised an objection in the High Court, Family Division in succession cause **Kiambu HCFA/50/2019** where they have obtained an injunction against the Plaintiffs given on 20th September 2021 which means that the Plaintiffs have no authority to transact on behalf of the deceased's estate.

The Plaintiffs'/Respondents' submissions

6. They are dated 22nd November 2021. Counsel for the Plaintiffs cited **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969]EA696** to submit that an objector cannot introduce any factual issues in controversy and must stick to pure points of law. He also relied on the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger [2015] e KLR** to submit that this dispute is better off being resolved judicially than summarily.

7. He further submitted that at the time of instituting this suit on 17th October 2018, the grant of letters of administration to the estate of David Kamau Njoroge (deceased) had been issued on 13th August 2018 and the certificate of confirmation of grant issued on 27th August 2018 which mean that the Plaintiffs were and are the lawful legal representatives of the estate of David Kamau Njoroge.

8. He added that despite there being an appeal, **Civil Appeal No.50 of 2019**, the confirmation of grant has never been revoked to date and the lawful legal representatives of the estate of David Kamau Njoroge are Samuel Ndung'u Kamau and Grace Wairimu Kamau who are Plaintiffs in this matter and who are performing their functions as per Section 82 of the Law of Succession Act.

9. On whether **Civil Appeal No.50 of 2019** filed in the High Court at Kiambu bars this matter from going on, he submitted that the substantive appeal with regards to the revocation of grant is yet to be heard and as is, the confirmed Grant of letters of administration appointing the Plaintiffs is still valid.

10. He also submitted that on 29th July 2021, C Meoli J delivered a ruling granting a temporary injunction pending the determination of the appeal to restrain the administrators of the estate of David Kamau Njoroge and all the beneficiaries to the estate (including the Intended Interested Parties) from alienating, transferring, selling or in whatever manner dealing adversely with the assets of the estate.

11. He added that the said order to an extent applies to the Defendants as the intention by personal representatives is to be accountable to the estate as to where the supposed rent is to be deposited.

12. I have considered the preliminary objection and the grounds. I have considered the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether the preliminary objection is merited.

13. To determine whether the Defendant's preliminary objection is proper, the court is guided by the decision in **Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Limited(supra)**, where it was held that: **"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion."** *The court further stated that; "a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit."*

14. The Defendants objection is based on matters of capacity. The Defendants argued that the Plaintiffs lost capacity to sustain this suit since other beneficiaries raised an objection in this suit and in **Civil Appeal No.50 of 2019** filed in the High Court at Kiambu where they obtained an injunction against the Plaintiffs.

15. A deceased estate can only be represented by a person who is duly authorized to do so on behalf of the estate. Only a person who has been issued with grant of letters of administration has capacity to represent the estate of a deceased person as set out under Section 82 of the Law of Succession Act, (Cap 160 of the Laws of Kenya). In **Virginia Edith Wambui Otieno v Joash Ochieng Ougo & another [1987] eKLR** the Court of Appeal held that: **"But an administrator is not entitled to bring action as administrator before he has taken out letters of administration. If he does, the action is incompetent at the date of its inception"**

16. This suit was commenced by way of a plaint on 17th October 2018. Letters of administration intestate were issued to Samuel Ndung'u Kamau and Grace Wairimu Kamau on 3rd August 2018. They are the Plaintiffs who brought this suit as legal representatives of the estate of David Kamau Njoroge (deceased). They instituted this suit with full capacity, having been granted of letters Administration Intestate.

17. The order issued on 29th July 2021 in **Civil Appeal No. 50 of 2019** filed in the High Court at Kiambu is on record. It is an order restraining the Respondent/Administrators of the estate of David Kamau Njoroge and all beneficiaries from alienating, transferring, selling or in whatever manner dealing adversely with the assets of the deceased.

18. The said orders did not revoke letters of administration issued to the Plaintiffs, thus they still have capacity to sustain this suit. However, the orders also restrained the Plaintiffs from dealing adversely with the assets of the deceased. The question whether by sustaining this suit, the Plaintiffs are dealing with the estate of the deceased adversely in contravention of the succession court orders is an issue where facts have to be ascertained to determine it thus it cannot be a proper objection on a point of law.

19. I find no merit in the preliminary objection and the same is dismissed with costs to the Plaintiffs.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 24TH DAY OF MARCH, 2022

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Kogi for the Plaintiffs

Mr. Gekonge for the Defendants

Steve - Court Assistant