



REPUBLIC OF KENYA.
IN THE HIGH COURT OF KENYA AT BUSIA.

CIVIL SUIT NO. 4 OF 2012 (O.S)

IN THE MATTER OF LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NO. BUKHAYO/MUNDIKA/329

AND

IN THE MATTER BETWEEN

AGRIPINA NEKESA WAFULAAPPLICANT/PLAINTIFF

VERSUS

VINCENT WESONGA OSIMATA.....RESPONDENT/DEFENDANT

R U L I N G.

This ruling relates to the preliminary objection raised by Mr. Gacheche Advocate, appearing for the defendant. Counsel submitted that the notice for this preliminary objection was contained in paragraph 6 and 7 of the defendant's replying affidavit sworn on 8th July, 2012. The counsel raised the issue on whether or not the plaintiff has the locus standi to file and prosecute this case in view of the pleadings that the land had been bought by her late husband in 1997. This, he submitted raises the issue whether the plaintiff has capacity to file this suit. There is nothing to show that the plaintiff has complied with the provisions of the Law of Succession Act, Cap 160 of the Laws of Kenya, so as to have capacity to sue for the estate of her late husband. Counsel therefore asked the court to dismiss the suit.

Mr. Jumba Advocate for the plaintiff opposed the preliminary objection submitting that the issues raised in preliminary objection should only be issues of law and not issues of facts. He said there is no provision of the law that has been cited by the defendants counsel to make this court down its tools and asked the court to allow the case to proceed to hearing.

The court has carefully considered submissions by both counsel and from the onset, would want to restate the position of the law, that a party suing on behalf of the estate of a deceased person, need to be duly authorized in accordance with the provisions of the Law of Succession Act cap 160 of Laws of Kenya. **In Busia High Court Civil Appeal No.8 of 2012 Chrispinus Nyongesa Ouna –vs- Wabwire Okonyolo & 2 others**, the court referred, with approval, to the case of **Republic -vs- Chairman Matungu Land Disputes Tribunal exparte Electina Wang'ona (2012)eKLR** where Gikonyo j, held;

‘The presence of proper parties before the tribunal is matter of jurisdictional significance. The absence of proper parties does not make the case feeble, rather, it goes to the

jurisdiction of the tribunal with the result that the tribunal had no jurisdiction.”

Looking at the originating summons dated 16th January, 2012, and filed on 17th January, 2012, Agiripina Nekesa Wafula, is described as the applicant/plaintiff. In the issues that are to be determined, specifically issue number 1, 2 and 3, the plaintiff has referred to the involvement of her late husband in the process of purchasing the land and taking possession thereof. Looking at issue number 2 and 3, it is quite clear that the plaintiff claims to have been an active player in moving onto the land and planting some trees on it. Issue number 4, and 6 concerns only the plaintiff and there is nothing in the prayer to suggest that the applicant is suing on behalf of her late husband's estate. The court is of the view that the plaintiff filed this case for her benefit and not for the benefit of her deceased husband's estate. The documents attached to the plaintiff's supporting affidavit sworn on 16th January, 2012 and marked ANW2A, ANW2B, ANW2C, and ANW2D contains the names of Agiripina Nekesa Wafula (plaintiff) as the purchaser. These documents do not contain the names of her deceased husband.

From the foregoing, the plaintiff before this court has sued the respondent for the land for her benefit. Had she sued the Defendant for the benefit of her deceased's husband estate, without being duly appointed as the administrator or legal representative of the said estate, this court would have held that she is without capacity and the suit would have been dismissed.

The preliminary objection raised by the Defendant's counsel is therefore without merit and same is rejected with costs to the plaintiff.

It is so ordered.

S. M. KIBUNJA,

JUDGE.

Delivered on 24th day of July, 2013.