



Akokor & another v Kitelapong & 2 others ((Legal Representatives of The Estate of James Mariachi Kokita (Deceased)); Kokita & 3 others (Interested Parties) (Environment and Land Miscellaneous Application 7 of 2020) [2022] KEELC 2825 (KLR) (29 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2825 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 7 OF 2020
FO NYAGAKA, J
JUNE 29, 2022

BETWEEN

VERONICA CHESEMES AKOKOR 1ST PLAINTIFF

PAULINE KOKITA 2ND PLAINTIFF

AND

VERONICA C. KITELAPONG 1ST DEFENDANT

SOLOMON PKACH KOKWO 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

**(LEGAL REPRESENTATIVES OF THE ESTATE OF JAMES MARIACHI KOKITA
(DECEASED))**

AND

CHRISPINE TOROITICH KOKITA INTERESTED PARTY

PATRICK MAYWA KOKITA INTERESTED PARTY

TOBIAS KEMEI KOKITA INTERESTED PARTY

ANASTACIA CHEPTOO KOKITA INTERESTED PARTY

RULING

1. The Notice of Preliminary Objection dated 27/11/2021 and filed on 29/11/2021 by the defendants seeks to strike out the suit with costs. It is premised on the ground that the suit is incompetent for being filed by persons who are not beneficiaries to the pleaded trust.



THE SUBMISSIONS

The Defendants' Submissions

2. In their joint submissions dated May 31, 2022 and filed on June 3, 2022, the Defendants submitted that the Preliminary Objection was fortified by the wordings of section 57 of the *Trustee Act*, chapter 167, Laws of Kenya. They submitted that the Plaintiffs lacked locus standi to institute the present proceedings and had no cause of action against the Defendants. The objectors contended that the plaintiffs sought to challenge the validity and legality of the transaction between the 1st and 2nd defendants. They pointed out that the Plaintiff conceded that the 1st defendant held land parcel No. West Pokot/Keringet "A"/2728 in trust for the interested parties. They concluded that in light of the above, neither the deceased nor his estate had any proprietary interest in the suit land. Their argument was that under section 57 (1) of the *Trustee Act*, any application concerning any interest in land which is subject to a trust must be made by a person beneficially entitled in the land subject to a trust. They cited two authorities; *Re Sheikh Fazal Ilahi Noordin Charitable Trust* (2020) eKLR and *Khadija Khamis Shafi & 3 others v Aliya Zabran* (2017) eKLR for this submission. They further laid out that the interested parties were successfully struck out as plaintiffs as they had no cause of action against the defendants. They did not give authority to the plaintiffs and actually renounced the action. The plaintiffs, thus, lacked authority or instructions from the interested parties, the beneficiaries to the trust, to institute the suit against the defendants. They urged this court to allow the preliminary objection by dint of section 57 of the *Trustee Act*.

The Plaintiffs' Submissions

3. In opposition to the Preliminary Objection, the plaintiffs submitted that the trust created in Kitale HCCC No. 74 of 2002 was intended to safeguard the interest of the interested parties (the deceased and 1st defendant's issues who were born during the pendency of their marriage). They added that the 1st defendant was required to maintain the trust until the children had attained the age of majority. They maintained that the Preliminary Objection was intended to hoodwink this court from unearthing the 1st defendant's mismanagement of the trust created by court. They submitted that the estate was interested in ensuring that the interested parties benefit from the trust hence had locus standi. They relied on section 82 (a) of the *Law of Succession Act* for the proposition that personal representatives may bring a cause of action on behalf of the estate of a deceased person. They further invoked section 19 (1) of the *Environment and Land Court Act* for the proposition that the court shall act expeditiously without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. They advanced that the defendants had no right to deprive the interested parties of their rights on the trust. They voiced that the Preliminary Objection was res judicata as this court in its ruling delivered on 26/01/2021 at paragraph 11 stated that the plaintiffs', prima facie, had capacity to institute some proceedings on behalf of the estate. They made further references to article 43 the *Constitution* and section 4 of the *Children's Act* urging this court to dismiss the preliminary objection with costs.
4. I have considered the Preliminary Objection filed by the defendants. I have also considered the respective rival written submissions by parties. The Preliminary Objection seeks to strike out the suit with costs for violating section 57 of the *Trust Act*. According to the objectors, the Plaintiffs lacked locus standi to initiate the present proceedings as they were not beneficiaries to the trust, the subject of the present proceedings. The Plaintiffs conversely maintained that the suit was proper as the estate of the deceased was intent on safeguarding the interests of the deceased's children, the interested parties, following the creation of the trust. They disputed the sale of land parcel No. West Pokot/Keringet "A"/2728 for being sold before the cestuis que trust attained the age of majority hence was illegal.



Analysis and Determination

5. The learned judges in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 defined what constituent elements must be entrenched in a Preliminary Objection as follows:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... 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 the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

6. Where it is found that a Preliminary Objection raises facts that can only be determined at a hearing, the Preliminary Objection must fail. In the present case, the defendants maintained that the Plaintiffs were in breach of section 57 (1) of the [Trustee Act](#). I will reproduce the same verbatim as follows:

“An order under this Act for the appointment of a new trustee, or concerning any interest in land, stock or thing in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock or thing in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.”

7. The above provision is also rehashed in Rule 4 of the [Trustees Rules](#). My interpretation of the above provision is that any order relating to an interest in land under the said Act can only be initiated by a person beneficially interested in the said land. The only other person authorized to apply for any orders under this Act is a person duly appointed trustee thereof.

8. The substance of the Originating Summons herein impugns the sale of the suit land by the 1st defendant to the 2nd defendant. According to the plaintiffs, the suit was instituted because the 1st defendant failed to retain the suit land in trust for the interested parties until they attained the age of majority.

9. A cursory perusal of the pleadings reveals that, firstly, the plaintiffs have no beneficial interest in the suit land. As conceded, the property was held in trust for the interested parties by the 1st defendant as trustee. They thus have no interest in the affairs of the suit land which does not form part of the estate. Secondly, the interested parties, when applying to be struck off the proceedings, intimated that they had neither instructed any Counsel nor the plaintiffs to institute the suit on their behalf. The third parties actually renounced the claim. The plaintiffs and learned counsel remain unauthorized to urge the suit. In their pleadings, they did not disclose that the interested parties granted them authority to institute suit. Thirdly, the plaintiffs are not trustees of the suit land in question.

10. From the foregoing thereof, I find that the plaintiffs indeed have no standing to sue. Neither the trustees nor the beneficiaries have any issue as between themselves in the manner that the plaintiffs have tendered or at all. Going by the provisions of section 57 (1) of the [Trustee Act](#), I find no reason to leave the suit sustained while it is incompetent and improperly before the court. The above provision of the law relied on has hereby caused the suit to be determined at the preliminary stage. Consequently, I find that the Preliminary Objection November 27, 2021 and filed on November 29, 2021 is merited. I hereby strike out the suit in its entirety with costs to the 1st and 2nd defendants.

Orders accordingly.



**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS
29TH DAY OF JUNE, 2022.**

DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

