



Kasura (Suing as the Son, Next of Kin and Legal Representative of The Late Solomon Leperes Kasura) v Kioko (alias Magdalene Mwikali Kasura) & 2 others (Environment & Land Case E014 of 2021) [2022] KEELC 2989 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2989 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E014 OF 2021**

CG MBOGO, J

JUNE 23, 2022

BETWEEN

**NOAH PASIMEI KASURA PLAINTIFF
SUING AS THE SON, NEXT OF KIN AND LEGAL REPRESENTATIVE OF THE
LATE SOLOMON LEPERES KASURA**

AND

**MAGDALENE MWIKALI KIOKO (ALIAS MAGDALENE MWIKALI
KASURA) 1ST DEFENDANT
ANTHONY KIOKO MIGWI 2ND DEFENDANT
JOSEPH GETUUNO NYAMOMCHONGO 3RD DEFENDANT**

RULING

1. What is before this court for determination is a Notice of Preliminary Objection dated 28th September, 2021 and filed by the 1st defendant herein challenging the plaintiff's Notice of Motion application dated 5th July, 2021 on the following issues: -
 1. That the plaintiff lacks the requisite *locus standi* to institute and continue this suit and the notice of motion application for and on behalf of the estate of Solomon Leperes Kasura as vide Narok Law Courts Succession No. 12/2007 one Jonah Tobiko Kasura applied to be and was granted administrative powers in that regard and the same ought to be struck out with costs.
 2. That this application and suit as brought about by the plaintiff/applicant offends section 71 (2)(a) of the *Law of Succession Act* cap 160.
 3. That the plaintiff's application and the entire suit herein for grant of temporary injunction or any other relief that he purports to seek is *res judicata* as court of competent jurisdiction



in Nairobi High Court Case 3738 of 1994 adjudicated on the issue and rendered itself with finality a fact which the plaintiff is aware.

4. That the plaintiff is stopped by the legal doctrine of estoppel from rearguing the application and the suit for grant of temporary injunction or any other relief that he purports to seek on account of the suit property.
 5. That entertaining the applicant's application and the entire suit herein would amount to an abuse of the court process and wastage of the precious judicial time as a court of competent jurisdiction.
 6. That it is further true in that in Narok Law Courts Succession No. 12/2007 the only property in the name of the deceased herein Solomon Lepers Kasura was parcel no. Narok/Siyapei/ 58.
 7. That the present suit and the application is untenable, misconceived, bad in law, inept, incurably defective, mischievous and an abuse of this honourable court's process as it does not disclose any reasonable cause of action and the same should be struck out with costs.
2. In support of the preliminary objection, the 1st defendant relied on a copy of proceedings in Civil Case no 3738 of 1994, a copy of the Kenya Gazette dated 29th February, 2008 and succession proceedings in Succession Cause no. 12 of 2007.
 3. The parties disposed off the notice of preliminary objection by way of written submissions.
 4. The 1st defendant filed written submissions dated 15th January, 2022. The 1st defendant submitted that it is true upon filing for letters of administration two or three administrators can be appointed vide a single petition but in this case an administrator was already appointed vide succession cause no 12 of 2007 a fact which the plaintiff is aware of since the administrator-Jonah Tobiko Kasura is his uncle and for this reason, the plaintiff cannot apply for letters ad litem since the same can be done when a petition has not been filed hence the plaintiff has no locus standi.
 5. The 1st defendant further submitted that there is an administrator on account of the estate of the late Solomon Lepers Kasura hence he is the only legally authorized to transact in that account hence this suit fails on this account. Further that the injunction or relief sought is res judicata as the same was adjudicated upon in High Court Case No. 3738 of 1994 between the deceased and the 1st defendant and it rendered itself with finality beside other land adjudication quarters provided by the Land Adjudication Act undertaken in the life time of the deceased in respect of the parcel of land in question. That the suit is res judicata as the court of competent jurisdiction pronounced itself in Narok Chief Magistrates' court in Succession Cause No. 12 of 2007. The 1st defendant relied on the case of Independent & Boundaries Commission versus Maina Kiai & 5 Others and Section 7 of the Civil Procedure Act.
 6. The 1st defendant further submitted that the doctrine of estoppel is clear in that the title deed and the entire records reflects the 1st defendant as the registered proprietor and it was as such during the lifetime of the deceased and that it would also beat logic to state that the suit property is part of the deceased's property yet it wasn't then nor was it in the name of the of the deceased as at then as was parcel number Cis-Mara/Siyapei/58 and as such this court should note that the property in issue had a title in the name of the 1st defendant during the lifetime of the deceased and for the above reasons the suit and the application is misconceived, bad in law, inept, incurably defective and an abuse of the court process.
 7. The plaintiff filed written submissions dated 14th March, 2022. The plaintiff submitted that the notice of preliminary objection as filed is incompetent for the reason that on 28th September, 2021 the firm of S. Mogere & Company advocates entered appearance for the three defendants and there has not been



- any change of advocates for the firm of Ombati DB & Company to act alongside the firm of S. Mogere & Company Advocates and if there is, then the same has not been served on the plaintiff's advocates. As such the preliminary objection has been filed by a total stranger and should be struck out.
8. The plaintiff's further submitted that the plaintiff's case against the defendant is that the deceased was the legitimate allottee of the suit property and the 1st defendant fraudulently caused the suit land to be registered in her name and the preliminary objection as raised does not raise a pure point of law. The plaintiff relied on the cases of *Nitin Properties Limited versus Singh Kalsi & Another* [1995] eKLR and *Mukbisa Biscuits Manufacturing Co. Limited versus West End Distributors Ltd* (1969) EA 696.
 9. The plaintiff's further submitted that the 1st defendant has annexed proceedings in Nairobi High Court Civil Case No. 3738 of 1994 which proceedings end at a point where the defendant's application is dismissed for want of prosecution and is therefore not res judicata as per the provisions of Section 7 of the *Civil Procedure Act*.
 10. I have carefully analysed the preliminary objection, documents relied thereon and the rival submissions filed by both parties and the issues for determination are as follows: -
 - a. Whether the firm of Ombati DB & Company Advocates is properly on record to file the notice of preliminary objection.
 - b. Whether the notice of preliminary objection is merited.
 11. A perusal of the records in this file indicate that the plaintiff filed a Notice of Motion application under a Certificate of Urgency dated 5th July, 2021. The firm of Ombati DB & Company Advocates filed a Notice of Appointment of Advocates on behalf of the 2nd defendant dated 11th August, 2021. The firm of S. Mogere & Company Advocates filed a Notice of Appointment of Advocates on behalf of all the three defendants dated 27th September, 2021. The notice of Preliminary Objection is filed on behalf of the 1st defendant by the firm of Ombati DB & Company Advocates. According to the proceedings, while appearing before court on 3rd November, 2021, Miss Mogere for the defendants stated that she acts alongside Mr. Daniel Ombati. Again on 4th December, 2021 Mr. Ombati stated that he was acting alongside Miss Mogere for the Defendants.
 12. Courts have stated often that the right to legal representation should not be impeded. It is a constitutional right that is implicit in the provisions therein. The right to legal representation should not be unnecessarily hindered. For instance, in *Tom Kusienya & Others v Kenya Railways Corporation & others* [2013] eKLR, Mumbi Ngugi J. stated as follows: -

“However, I believe that the right to legal representation by counsel of one's choice in civil matters is implicit in the constitutional provisions with regard to access to justice, particularly Articles 48, 50 (1) and 159(2)(a) of *the Constitution*, and it is only in exceptional circumstances that this right should be taken away.”
 13. The Court of Appeal in *Delphis Bank Limited vs Channan Singh Chatthe and 6 Others* (2005)eKLR observed as follows:

“The starting point is, of course, to reiterate that most valued constitutional right to a litigant; the right to a legal representative or advocate of his choice. In some cases however particularly civil, the right may be put to serious test if there is a conflict of interests which may endanger the equally hallowed principle of confidentiality in advocate/ client fiduciary relationship or where the advocate would double up as a witness”.



14. It appears, that it is only the 2nd defendant who is represented by both Counsel whereas the 1st and 3rd Defendants are represent by the firm of S Mogere & Company Advocates. It is also clear that the firm of Ombati DB & Company Advocates filed the preliminary objection on behalf of the 1st Defendant whereas they are on record for the 2nd Defendant. The question then is, would it be in order for a firm that is on record for the 2nd Defendant to file a Preliminary Objection on behalf of the 1st Defendant and what prejudice would the plaintiff suffer in this case?
15. Order 9 Rule 5 of the *Civil Procedure Rules* provides for situations where a party wishes to change Advocates. In such a case, the change is not complete unless and until the Notice is filed and served on all parties. In this matter, the 2nd defendant did not change his Advocates whom he had instructed earlier: he only appointed another law firm to act alongside the initial firm.
16. Rule 6 (1) of The *Advocates (Practice) Rules 1996* provides as follows: “An advocate may act for a client in a matter in which he knows or has reason to believe that another advocate is then acting for that client only with the consent of that other advocate.” The relevant Rule (6(1)) refers to a situation where two or more Advocates can be on record for the same client. In such a case, the law (practice) requires that the Advocates already on record gives the new or subsequent Advocate consent to act. In my humble view, the Rule was enacted to prevent situations where Advocates ‘gate crash’ in other Advocate’s cases without instructions obtained from clients. The Rule presupposes that by the time the subsequent Advocate is instructed, the initial Advocate must have been briefed by his client that there is need, in his view, of more legal mind assistance. Also, there is no legal bar to a party appointing twenty or less or more advocates to represent him depending on his view if his case, and as long as he is able to pay them their fees.
17. The Rule is silent on how and the form of the consent is to be given. Nowhere does the rule require that a written consent be filed to evidence that. In such a case, it then is left to the parties to instruct Advocates to come on record to represent them, without necessarily filing a document to evidence that the Advocate already on record has given consent.
18. In this case neither of the advocates has protested nor raised any objections to the other advocate joining them in the matter, it is implied that consent is already granted. The adverse party has no business or reason whatsoever to micromanage the Advocates of the other parties. In any event, there are many ways of giving consent. The way I understand it, is that, the relationship between an Advocate and Client is contractual in nature. That being so, there are various ways in which contractual relationships can be created. It may be express or implied. It may be in writing or oral. In any case, I see no prejudice suffered by the plaintiff.
 1. On whether the notice of preliminary objection is merited, the threshold for preliminary objections is now well settled and there would be no reason to reinvent the wheel. Courts have held that a preliminary objection deals with purely points of law and where facts are not disputed. Where the court has to look outside the case for evidence to establish the facts presented, then this falls under a case where a full hearing has to be conducted to disprove certain facts. In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd* (1969) EA 696, the court stated as follows: -

"So far as I'm aware, 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."



This was followed up by the judgment of Sir Charles Newbold in the same case:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

19. Striking out of a case is a draconian measure which should be exercised in very clear cut cases where whether evidence is tendered the result or outcome would be the same. This does not mean that parties can go ahead and abuse court processes with the hope that the court will turn a blind eye to such glaring abuse.

20. In the case of *Lemitei Ole Koros & another v Attorney General & 3 others* (2016) eKLR, Munyao J. stated as follows:

‘Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection.’

21. A look at the pleadings would require in my view that evidence is placed before this court to determine the merits or otherwise of the claims therein. The same does not qualify for a preliminary objection. As such, I find that the notice of preliminary objection dated 28th September, 2021 lacks merit. It is hereby dismissed with no orders as to costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 23RD JUNE, 2022.

MBOGO C.G

JUDGE

23/6/2022

In the presence of: -

CA: Timothy Chuma

