



**Kiongo v Ndirigi (Environment and Land Appeal 5 of 2020)  
[2022] KEELC 3457 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3457 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 5 OF 2020**

**JO OLOLA, J**

**JULY 28, 2022**

**BETWEEN**

**PAUL KIONGO ..... APPELLANT**

**AND**

**FRANCIS NDIRANGU NDIGIRIGI ..... RESPONDENT**

**JUDGMENT**

1. This is an Appeal from the Ruling of the Honourable F. Muguongo, Senior Resident Magistrate delivered on January 29, 2020 in Nyeri CMC ELC Case No. 71 of 2019; Francis Ndirangu Ndirigi -vs- Paul Kiongo.
2. The Respondent herein Francis Ndirangu Ndirigi had vide a Complaint dated September 26, 2019 instituted a suit in the lower Court against the Appellant herein Paul Kiongo seeking for:
  - (a) A declaration that the Defendant has no locus to evict the Plaintiff out of the suit land;
  - (b) An order of permanent injunction restraining the Defendant jointly and severally by himself, his servant and/or agents or anybody claiming through him from illegally and forcefully evicting or in any way interfering with the Plaintiff's peaceful stay in LR No. Thegeenge/Unjiru/849 previously known as LR No. Thegeenge/Unjiru/705 or in any way dealing with the said property to the detriment of the Plaintiff; and
  - (c) Costs of the suit.
3. Upon being served with the suit papers, the Defendant/Appellant filed his Statement of Defence dated March 11, 2020 stating inter alia that he had no Letters of Administration in regard to the said parcel of land which was registered in the name of one Kamuri Kiongo who was by then deceased. The Appellant further contended that the Plaintiff/Respondent lacked the capacity to institute the suit as the property in question belonged to the deceased Kamuri Kiongo.



4. Filed contemporaneously with the suit was a Notice of Motion application also dated September 26, 2019 wherein the Respondent sought temporary orders of injunction to restrain the Appellant from dealing with the suit property pending the hearing and determination of the suit. The Appellant herein responded to the said application and also filed a Notice of Preliminary Objection dated October 14, 2019 in which he objected to the application and the suit on the grounds that:
  1. The suit raises no cause of action as the Applicant lacks capacity to sue the Defendant herein;
  2. That by virtue of Section 45 of the Law of Succession (Act), the Respondent has no Letters of Administration to the Estate of Kamuri Kiongo to whom the suit property belongs. Any dealing with the said property amounts to intermeddling, hence on this ground this suit/application must fail as parties lack capacity to deal with the property;
  3. As held by the Court of Appeal in Troustik Union International & Another -vs- Jane Mbeyu & Another (1993) (sic), an administrator is not entitled to bring an action as administrator before he has taken letters of administration, if he does the action is incompetent at the date of inception and vice versa. The Respondent has no letters of administration to the estate of the deceased to whose capacity (sic) he is being sued hence on this ground the Applicant lacks capacity to sue the Defendant herein; and
  4. The suit and application is therefore an abuse of the Court process, incompetent and discloses no cause of action hence should be dismissed with costs.
5. That Preliminary Objection was canvassed by way of written submissions. By a Ruling delivered as aforesaid on January 29, 2020, the Learned Trial Magistrate dismissed the Objection in its entirety. Aggrieved by the said Ruling, the Appellant moved to this Court on February 19, 2020 and lodged a Memorandum of Appeal dated February 7, 2020 faulting the Ruling on the grounds that:
  1. The Learned Magistrate erred in law and in fact in disregarding the procedural law and arriving at the wrong conclusion. A gross injustice was therefore occasioned;
  2. The Learned Magistrate failed in fact by dismissing the Appellant's Preliminary Objection dated October 14, 2019 which raises crucial points of law;
  3. The Learned Magistrate clearly misdirected herself in fact and in law thus causing gross injustice to the Appellant, as the suit property belongs to a deceased person one Kamuri Kiongo to which Letters of Administration are yet to be taken out;
  4. The Learned Magistrate erred in law by failing to recognize that the Appellant lacks capacity to be sued and the Respondent lacks capacity to sue;
  5. The Learned Magistrate erred in law by failing to acknowledge that the suit will amount to intermeddling with the deceased's free estate as Letters of Administration are yet to be taken out; and
  6. That the Learned Magistrate erred in law and in fact by failing to appreciate already established decisions by the Court of Appeal (in the) case (of) Troustik Union International & Another -vs- Jane Mbeyu (1983) (sic), on the issue of capacity of bringing a suit with regards to a deceased's estate among other case laws cited in the Appellant's submissions.
6. Following directions given herein on November 29, 2021 it was agreed that the Appeal be disposed of by way of written submissions. I have accordingly carefully studied the Record of Appeal as well as the submissions and authorities placed before me by the Learned Advocates for the parties herein.



7. The gist of the Appeal herein is that the Respondent lacks capacity to sue and that the Appellant equally lacks the capacity to be sued. According to the Appellant, the subject matter of the dispute is a parcel of land registered in the name of one Kamuri Kiongo. The said Kamuri Kiongo is said to be deceased and it is the Appellant's case that since neither the Respondent nor himself have taken out Letters of Administration for the estate of the deceased, none of them can sue the other in regard thereto.
8. In his Preliminary Objection raised before the Lower Court against the Respondent's suit, the Appellant contended that since the Respondent had not taken out the Letters of Administration, he lacked the capacity to sue and the suit filed against the Appellant was therefore incompetent and ought to have been struck out.
9. In the impugned Ruling delivered on January 29, 2020, the Learned Trial Magistrate agreed that both parties lacked capacity to sue and be sued. She however went on to conclude that given the circumstances in which the Respondent's rights and interest were threatened, the Respondent had a right with or without letters of administration to approach the Court for protection and the Court was under a duty to give him audience.
10. As Ombija J. Stated in *Law Society of Kenya -vs- Commissioner of Lands & 2 others* (2001) eKLR:

“Locus standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in a Court of Law. Further in the case of *Alfred Njau & Others -vs- City Council of Nairobi* (1982) KAR 229, the Court also held that:

“...the term locus standi means a right to appear in Court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in such and such proceedings.”
11. Considering a similar issue in *Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 others* (2014) eKLR, the Court held as follows:

“It is proper to note that the evaluation of locus ought to be based upon the constitutional consideration of capacity (Articles 3, 22 and 258); the nature of the suit and the enforceability of the orders sought. These considerations inform the enforcement mechanisms and coherent clarity of the following inquiries. Who will the orders be enforced against? Who bears the costs of litigation if at all? Who represents the parties in Court?
12. From the material placed before me herein, it was apparent that the disputants are cousins and that the Respondent herein had for a period of time been utilizing a portion of the suit property. By a letter dated 19<sup>th</sup> August 2019, the Appellant herein contending to be writing on behalf of the Kamuri Kiongo Family wrote to the Respondent as follows:

“Re: Encroachment In Piece of Land Thegenge/Unjiru/849

Take note that after expiry of six months from March 23, 2019 to September 23, 2019 we shall remove your moveable and immovable goods i.e. structures, coffee trees encroaching in the above piece of land. Be advised that you will be treated as a trespasser upon commencement of this exercise.

We are very concerned for you are waging a war against us and we are innocent inheritors who have nothing to do with the alleged dispute.



On our side we are ready for any consequences that may arise. Our piece of land does not belong to any other person it belongs to our father and is registered in his name and you have no legal basis to take us to court and we do not know why you are against us.”

13. That letter was clearly a threat to the Respondent’s rights and interest in the suit land and one cannot fault him for seeking recourse in a Court of Law. The Appellant who admits he has no letters of administration over the suit land cannot issue threats of eviction against the Respondent and then when the Respondent comes to Court, he again comes to claim he has no standing to come to Court to seek redress over the threats.
14. Given the admission that the Respondent has structures and Coffee trees on the land, the Respondent clearly has sufficient interest and has a right to come to Court to restrain those threatening to evict him from the subject matter of the dispute without recourse to the law.
15. That being the case, it was clear to me that the Learned Trial Magistrate had made the right call in dismissing the Appellant’s Preliminary Objection. The Appeal herein is therefore without any basis and is dismissed with costs to the Respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28<sup>TH</sup> DAY OF JULY, 2022.**

In the presence of:

Mr. Kiminda holding brief for Muchai for the Appellant

Mr. Wabandi for the Respondent

Court assistant - Kendi

**J. O. LOLA**

**JUDGE**

