



**Imbuye v Nangabo Co-operative Society Limited (Environment & Land
Case 22 (E018) of 2021) [2022] KEELC 3889 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3889 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 22 (E018) OF 2021
FO NYAGAKA, J
JULY 27, 2022**

BETWEEN

CALEB IMBUYE PLAINTIFF

AND

NANGABO CO-OPERATIVE SOCIETY LIMITED DEFENDANT

RULING

1. The Defendant's Notice of Preliminary Objection dated 10/11/2021 and filed on the same day seeks to strike out the suit in limine with costs on the following grounds:
 - (a) The Plaintiff herein being the beneficial owner has no locus standi to bring up this suit for want of grant Ad Litem;
 - (b) The Plaintiff has no cause of action against the Defendant since the subject matter of the suit is the property of the deceased and still registered in the name of SAMWEL IMBUYE, the (deceased) father to the Plaintiff.
2. It was disposed of by written submissions.

The Defendant's Submissions

3. In support of the Preliminary Objection, the Defendant filed its submissions on 19/05/2022. It submitted that the Plaintiff was the heir to the estate of Samwel Imbuye. It furthered that the deceased person, Samwel Imbuye, remains the proprietor of L.R. No. 1936/11, the suit land. Its submission was that since the Plaintiff failed to take out a grant of letters Ad Litem or otherwise, he lacked the locus standi to institute the suit. He faulted the Plaintiff for averring that he is the proprietor of the suit land. The Defendant accused the Plaintiff of being in flagrant breach of the 5th Schedule to the *Law of Succession Act*. Since the Plaintiff did not have a standing to sue, he could not be heard. It urged this court to find the Preliminary Objection with merit.



The Plaintiff's Submissions

4. In opposition to the Preliminary Objection, the Plaintiff relied on his submissions filed on 08/06/2022. The Plaintiff pointed out paragraph 3 of his Complaint where he pleaded that he is the beneficial owner of the suit land. He stated that it was not pleaded in the Complaint that the owner was Samwel Imbuye. He added that he did not file the present suit on behalf of Samwel Imbuye, his late father.
5. The Plaintiff continued that as the beneficial owner of L.R. No. 1936/11, he sold 46 acres and a subsequent 28 acres to the Defendant. The Plaintiff submitted that the Defendant had failed to settle the agreed consideration hence the suit. He added that in fact, the Defendant admitted that it entered into a sale agreement with the Plaintiff and was in occupation of the suit land. He could not therefore approbate and reprobate. He relied on the case of *Betha Kanini v. Agnes Ithiru Njoka* (2011) eKLR which held that a possessor of land can enforce rights thereof as those of an owner and that possession is good title against all except the true owner. He urged this court to dismiss the Preliminary Objection with costs.
6. I have considered the Preliminary Objection. I have also considered the respective rival written submissions by parties. The Preliminary Objection seeks to strike out the suit with costs for violating Schedule 5 of the *Law of Succession Act*. It is advanced that the Plaintiff has failed to take out letters of administration on behalf of the estate of his father. Consequently, he lacked locus standi to institute the present suit.

Analysis and Determination

7. The locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696 defined 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.”
8. If a fact forms the subject matter of a Preliminary Objection and which fact has to be ascertained upon adjudication, then that would not amount to a Preliminary Objection. According to the Defendant, the Plaintiff has failed to take out letters of administration on behalf of the estate of his father, who is the proprietor of the suit land. In order to establish these facts, I am guided by the averments raised by the parties in the pleadings since the Plaintiff opposes the Preliminary Objection.
9. To begin with I distinguish the authority relied on by the Plaintiff to oppose the Preliminary Objection. He relied on the case of *Betha Kanini v. Agnes Ithiru Njoka* (2011) eKLR. The case relates a claimant in possession. This is not the case. Thus, the authority is not relevant.
10. According to the Complaint, the Plaintiff is the beneficial owner of the suit land. He did not in any way express himself how he became the “beneficial owner” of L.R. No. 1936/11. He states in submissions that he is not the owner of the land but a beneficial owner thereof. He sued the Defendant for a declaration that the Defendant has no right of occupation of 28 acres of the said parcel of land and it



be ordered to move out therefrom. He also sued for a permanent injunction, preservation order over the 28 acres, among other prayers.

11. Flowing from the pleadings and the law the question that arises is whether a party in the capacity of a beneficial owner has locus standi to sue. Who is a beneficial owner in law? In Brian A. Garner in Black's Law Dictionary (Eleventh Edition) Thompson Reuters, 2019, at page 1331 a beneficial owner is described as "one recognised as the owner of something because use and title belong to that person, even though legal title may belong to someone else." From the pleadings herein, the Plaintiff claims to be the beneficial owner of the parcel of land in issue. My understanding of his argument is that he is entitled to the ownership of the suit land after the demise of his father. That may well be true but, in terms of the Law of Succession Act, Schedule 5 is he entitled to sue over that property in his personal capacity. One thing is clear, that under the Law of Succession Act, only an authorized legal representative of the property of a deceased person may sue or deal in the property of the deceased. One does so when he is given a grant of letters of administration, is the executor of the will of the deceased or has limited grant of letters (Grant of Letters Ad Litem) for purposes of the suit.
12. The Plaintiff herein does not purport to state that he has any of the authority documents stated in the previous paragraph which would give him locus to sue. Without these, any activities in the properties of the deceased person amounts to meddling with the estate, and is punishable by law.
13. I therefore find that the Preliminary Objection is merited and compromises the suit at this inchoate stage. Consequently, the Preliminary Objection dated 10/05/2022 and filed by the Defendant is upheld and is hereby allowed with costs to the Defendants. The suit is hereby struck out but each party will bear its own costs

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 27TH DAY OF JULY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

