



REPUBLIC OF KENYA



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Mwalingo & 542 others v Hedge Farm Limited (Environment and Land Case Civil Suit 224 of 2017) [2022] KEELC 3617 (KLR) (15 August 2022) (Ruling)

Neutral citation: [2022] KEELC 3617 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE CIVIL SUIT 224 OF 2017**

**MAO ODENY, J
AUGUST 15, 2022**

BETWEEN

**MWALUNGO MWAMBUI MWALINGO 1ST PLAINTIFF
JULIUS JALO MWADEGE 2ND PLAINTIFF
GABRAEL KARISA KENGA 3RD PLAINTIFF
CHIKO MWALUNGO 4TH PLAINTIFF
DONALD DZOMBO & 538 OTHERS 5TH PLAINTIFF**

AND

HEDGE FARM LIMITED DEFENDANT

RULING

1. This ruling is in respect of two Notices of Motion dated 10th December 2020 and 17th November 2021 by the Defendant and Plaintiffs respectively seeking for the following orders: -
 - a) That the Plaintiffs' Originating Summons dated November 10, 2017 and filed on November 20, 2017 be struck out with costs to the Defendant.
 - b) That the costs of this Application and the suit be provided for.
2. By an application dated 11th November 2021 the Plaintiff sought the following orders:-
 - a) Spent
 - b) That this Honourable Court be pleased to issue temporary conservatory orders stopping the Defendant either by itself, its employees, servant and/or agents whomsoever from erecting a perimeter wall and/or in any manner interfering with Plot L.R Subdivision No. 470 (Original



No. 5/3) Section III/M.N. (C.R. 5770/19) pending the hearing and determination of this application.

- c) That this Honourable Court be pleased to issue temporary conservatory orders stopping the Defendant either by itself, its employees, servant and/or agents whomsoever from erecting a perimeter wall and/or in any manner interfering with Plot L.R Subdivision No. 470 (Original No. 5/3) Section III/M.N. (C.R. 5770/19) pending the hearing and determination of this suit.
 - d) That this Honourable Court be pleased to make any other or such further Orders as it may deem fit and just to grant.
 - e) That the cost of this application be provided.
3. Counsel agreed to canvas both applications by way of written submissions which were duly filed. I will therefore deal with the Defendant's application first and if it is allowed then there will be no reason to determine the Plaintiff's application for injunction.

Defendant's Submissions

4. Counsel gave a brief background to the case and stated that by an amended Originating Summons dated 16th June, 2018, the Applicants suing as representative of 538 others prayed for an Order that they be registered as absolute proprietors of all that parcel of land known as Plot L.R Subdivision No. 470 (Original No. 5/3) Section III/M.N. (C.R. 5770/19) (herein referred as Suit Property) instead of Hedge Farm Ltd (the Defendant herein) on the grounds that they have since become entitled to ownership thereof by virtue of adverse possession.
5. Subsequently, on October 9, 2018 the Applicants filed a Notice of Motion seeking an order that the Plaintiffs have brought the suit against the Defendant in their own capacity and as representative of 538 others on the grounds that the suit is for adverse possession to which the Plaintiffs named therein and the 538 are occupants of the suit parcel of land which the Defendant opposed on the ground that the suit offends Order 1 Rule 8 of the [Civil Procedure Rules](#) hence the Plaintiffs have no *Locus standi* to institute the present suit on behalf of any other person and/or persons.
6. It was counsel's submission that on December 5, 2019, Honourable Justice Olola delivered a Ruling with respect to the above mentioned motion filed by the Plaintiff and in dismissing the said Motion the court held that;-

 " As it were, the Applicants allege that they occupy the suit property together with the 538 listed persons. There is however no evidence that those persons are aware of these proceedings and/or have authorized the Applicants herein to file any suit on their behalf.

 In the circumstances I did not find any merit to the Application. The same is dismissed with Costs to the Defendant/Respondent."
7. Counsel relied on Order 1 Rule 8 of the [Civil Procedure Rules](#) and submitted the Order allows for representative suits where parties have a common grievance or interest, however, the Rules provides that the person representing the other aggrieved person should have authority from them stating that they have given authority for the party representing them to act on their behalf and that from the suit filed the applicant does not have the requisite authority and/or *locus standi* to appear, plead and/or act on behalf of all the Plaintiffs in this case.
8. Counsel cited the case of [Republic v Musanka Ole Runkes Tarakwa & 5 others Ex-parte Joseph Lesalol Lekitio & others](#) [2015] eKLR where the court held that authority in a case where there are several



litigants is critical, for it is the only way that others can be bound by what one person files and that it is not a matter to be taken casually as one cannot purport to bind others unless with their authority.

10. It was counsel's further submission that the Plaintiffs 'Originating Summons should be struck out as it is *res judicata* Mombasa Miscellaneous Application 142 of 2014 [*Salim Bakari Mwinyi & others v Mohamed Ali Moses alias Gandhi & Others*](#); and ELC Petition No. 2 of 2018 [*Henry Wambega & 733 others v The Hon. Attorney General & Others*](#).
11. It was counsel's submission that the two former suits were instituted by and on behalf of the occupants of the suit property where they sought to be declared owners of the suit property by virtue of adverse possession or ancestral domain but Munyao J dismissed the Petition on 22nd October 2020 stating that the suit was private property owned by the Defendant herein.
12. Counsel cited Section 7 of the [*Civil Procedure Act*](#) and cases of [*IEBC v Maina Kiai & 5 Others*](#) [2017] eKLR, [*Diocese of Eldoret Trustees \[Registered\] v Attorney General \[on behalf of the PS Treasury\] and another*](#) [2020] eKLR, and submitted that that the issue as to who is the rightful owner of the suit property has already been determined in ELC Petition No. 2 of 2018.
13. On the Plaintiff's application for injunction, counsel submitted that the Plaintiff does not have *locus standi* hence the application for injunction should be dismissed with costs.

Plaintiffs' Submissions

14. Counsel submitted that the application did not specify or disclose the reason why the Plaintiffs' suit should be dismissed and stated that striking out of pleadings is discretionary and must be exercised judiciously.
15. Counsel relied on the cases of [*Simon Kirima Muraguri & another v Equity Bank Kenya Limited & another*](#) [2021] eKLR; and [*Cooperative Merchant Bank Limited v George Fredrick Wekesa*](#) Civil Appeal No. 54 of 1999.
16. On the issue of *res judicata*, counsel submitted that the Plaintiffs never participated in the said former suits as such their existence could only be litigated and determined at a full trial.
17. On the application for injunction counsel reiterated the contents of the application and urged the court to allow the application as prayed.

Analysis and Determination

18. The issues for determination are whether the Plaintiffs lack locus stand to sustain the present suit, whether this suit is *res judicata* and whether the Plaintiffs are entitled to conservatory orders as prayed.
19. The definition of *locus standi* was well explained in the case of [*Law Society of Kenya v Commissioner of Lands & 2 others*](#) [2001] eKLR where the court stated thus: -

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of [*Alfred Njau and Others v 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”.
20. Order 1 rule 8 of the [*Civil Procedure Rules*](#) provides as follows: -



8. One person may sue or defend on behalf of all in same interest [Order 1, rule 8.]
- 1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
 - 2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.
 - 3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.
21. It is trite law that a party must have locus standi in order to institute a suit in a court of law. The issue of *locus standi* is a point of law that touches on the jurisdiction of the court to hear and determine a matter. There are no two ways about it. It is either you have it or do not bother filing a suit as it will be struck out. A party without capacity to sue in a civil suit lacks the right to institute or even maintain a suit even where a valid cause of action subsists. Any proceedings maintained by a party with no such capacity or authority are null and void.
22. In the case of *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] eKLR although the objection was in relation to an estate of a deceased person, Mrima J explained as follows: -
- “Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings.”
23. The Plaintiffs instituted this suit as representatives of other 538 alleged occupants of the suit property and by way of an Amended Originating Summons dated 26th June 2018, they sought orders inter alia that they be registered as absolute proprietors of the suit property by virtue of adverse possession.
24. It is on record that the Plaintiffs unsuccessfully sought to comply with Order 1 rule 8 of the *Civil Procedure Rules* which the court dismissed *vide* a ruling dated 5th December 2019 for failure to demonstrate that they issued any notices to the said persons sought to be represented and for failure to produce any authority from the 538 persons. That notwithstanding, two years on, the Plaintiffs have not in any way attempted to comply with rule 8 above hence the Plaintiffs have no authority to sustain this suit.
25. In the case of *Kabindi Katana Mwangi & Another vs. Cannon Assurance K. Ltd* (2013) eKLR, the court stated as follows:
- “Indeed, Order 4 Rule 4 of the *Civil Procedure Rules* requires that where the Plaintiff sues in a representative capacity, the Plaintiff shall state the capacity in which he sues. The Plaintiff’s Originating Summons does not state whether the Jeuri Community Based Organization, through the two Plaintiffs, suing on behalf of 41 others is a representative suit or not. That, in my view, renders the suit incurably defective. As at the time of filing the suit, the Plaintiffs were under an obligation to show the written authority entitling them to sue on behalf of



“Jeuri Community Based Organisation” or on behalf of 41 others in accordance with the provisions of Order 1 Rule 13 of the *Civil Procedure Rules*, 2010. The Applicant cannot just annex a list of the inhabitants on whose behalf he purports to be acting which is not signed by any of the persons listed therein.”

26. There was no such written authority to show that the named Plaintiffs on whose behalf the suit was brought had been sought and obtained. Written authority from parties is to ensure that whatever suit is filed on their behalf bind them in terms of the orders sought and if they are successful or unsuccessful that they will be bound to pay the attendant costs or enjoy the fruits of their judgment jointly and severally. A person cannot just wake up without authority and file a suit on behalf of parties without their consent.
27. On the issue as to whether this suit is *res judicata* Section 7 of the [Civil Procedure Act](#) provides:
- No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court...
- Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.
28. It is noteworthy that the judgment delivered in Mombasa ELC Petition No. 2 of 2018 on 22 October 2020 shows that the suit property herein was part of the subject properties in the former case. The issue raised herein is substantially similar to those raised in the aforementioned Petition.
29. Even though the Plaintiffs claim that they never took part in those proceedings in Mombasa hence the doctrine of *res judicata* cannot apply. The Plaintiff’s argument is erroneous as Explanation 6 above is quite clear that where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating. The Plaintiff’s claim is for adverse possession which claim had already been adjudicated upon and determined *vide* Mombasa ELC Petition No. 2 of 2018
30. Having found that the Plaintiffs do not have locus standi to bring this case on behalf of 538 others for lack of authority and having found that this suit is *res judicata*, I will therefore not deal with the application for injunction as it is superfluous.
31. The upshot is that the Defendant’s application to strike out the Plaintiffs ‘Originating Summons is hereby allowed as prayed and the Originating Summons is struck out with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF AUGUST, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

