



**Achoki & another v Zephania (Environment & Land Case
E005 of 2022) [2022] KEELC 3258 (KLR) (1 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3258 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E005 OF 2022**

**JM KAMAU, J
AUGUST 1, 2022**

BETWEEN

BENJAMIN ONYANCHA ACHOKI 1ST PLAINTIFF

EZEKIEL ORANG'O ACHOKI 2ND PLAINTIFF

AND

PETERSON AYIEMA ZEPHANIA DEFENDANT

RULING

1. The Plaintiffs brought this suit as the beneficial owners of Plot No. 31B Kebirigo Market which is registered in the name of their late father Achoki Onyancha since 1982. The Plaintiffs' claim is that the Defendant has trespassed on the suit land and started constructing premises thereon. The Plaintiffs therefore pray for Judgment against the Defendant for the following orders: -

- “(a) A mandatory injunction compelling the Defendant either by himself, servants or agents from continuing to build and/or trespassing on the plaintiff's parcel of land Plot Number 31b Kebirigo Market.
- (b) A perpetual injunction restraining the Defendant either by himself, servants and/or agents from occupying, trespassing or in any other way interfering with the Plaintiff's quiet enjoyment of the subject parcel of land to wit Plot Number 31b Kebirigo Market.
- (c) A declaration that the Plaintiffs are the beneficial owners of the Plot Number 31b Kebirigo Market.
- (d) An order directing that the Defendant to demolish his house which is on the Plaintiffs' suit land Plot Number 31b Kebirigo Market and the Defendant to give vacant possession of the Plaintiffs' portion of the suit land.



- (e) Costs of this suit and interest thereon.
 - (f) Any other relief that this Honourable Court may deem fit and just to grant.”
2. In their statement the Plaintiffs claim that there was a dispute between their father against the owner of Plot No. 35 which dispute went through Kisii High Court Civil Case No. 22 of 1983 and an eviction order was issued and demolition effected before Plot No. 35 was sold to the Defendant herein. The Plaintiffs therefore pray for the enforcement of High Court Order of Kisii High Court No. 22 of 1983.
 3. On 25/7/2022 the Defendant issued a Notice of Preliminary Objection to the effect that the Plaintiffs lack the requisite *locus standi* and capacity to lodge the suit before obtaining a Grant limited for that purpose and that the suit is statutorily time barred having been filed after the lapse of the statutory period set out under Sections 4 and 7 of the [Limitation of Actions Act](#). I allowed both Counsel to address me on the above Preliminary Objection.
 4. Order paragraph 3 of the plaint, the Plaintiffs aver that the Plaintiff are the beneficial owners of the suit land which has been encroached into by the Defendant
 5. In their suit the Applicants aver that the suit land they are alleging has been affected by the acts of the Defendant belonged to and is still registered in the name of their late father Achoki Onyancha. The Defendant has stated that the Plaintiffs have no capacity to bring this suit. It was submitted that the Plaintiffs have not taken Letters of Administration to the Estate of the said Achoki Onyancha and that a family does not confer capacity. It is indeed not in doubt that the Plaintiffs herein have not availed any evidence to show that they are the Administrators of the estate of Achoki Onyancha and that they therefore have capacity to bring this suit on behalf of the said estate. Section 45 of the [Law of Succession Act](#) Cap 160 Laws of Kenya which reads as follows: -

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

Any person who contravenes the provisions of this section shall: -

 - (a) Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”
 6. Further, *Section 79 of the [Law of Succession Act](#) provides as follows: -

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”
 7. What should the Plaintiffs have done in the circumstances such as this where the urgency of the matter cannot be overemphasized? A Limited Grant of Letters of Administration Ad Litem is usually used when the Estate of a deceased person is required to be represented in court proceedings. It is granted to enable someone represent the Estate where the Estate has been sued or where the Estate intends to



sue but a full grant has not been given. It is granted to enable someone represent the Estate where the Estate has been sued or where the Estate intends to sue but a full grant has not been given. It is useful in 3 main instances:

- a. If the limitation period for filing a case is running out and one is afraid they won't get the full grant before it expires one can rush to court and apply for grant ad litem.
 - b. In case one needs to defend a suit in Court.
 - c. In case of a suit to be filed urgently to restrain some adverse activities.
8. An administrator Ad Litem is a person appointed by a probate court to represent the interests of an Estate for the purposes of a lawsuit. The Plaintiffs in this case therefore ought to have gained capacity to sue the Defendant against Trespass by first obtaining the Grant of letters of Administration Ad Litem before instituting this suit.
9. I therefore find and hold that the Plaintiffs have fallen short of the requirements of the provisions of the Section 79 of the Law of Succession Act. They indeed have no capacity to bring this suit in Court on behalf of the said Estate and I accordingly strike out the entire Suit but spare the Plaintiffs the costs thereof.
10. But I must add that the Defendant does not have a right to intermeddle with the Deceased's Estate. He would equally be guilty under Section 45 of the Law of Succession Act Cap 160 Laws of Kenya.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 1ST DAY OF AUGUST 2022.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Sibota

Mr. Onyancha for the Plaintiffs

Mr. Agwata for the Defendant

