



FAUSIA MOHAMED FARAHPLAINTIFF

VERSUS

MAULANA HABIB

ABDISHAKUR MOHAMED ALI

FATMA MOHAMED ALIDEFENDANTS

RULING

Mr. Lughanje (counsel for the defendants) filed a notice of preliminary objection dated 3-7-09 in this matter on grounds that:

- (1) The plaintiff is not the registered owner of the portion of land which is the subject matter of this case.
- (2) The alleged Asha Ibrahim Rabe is deceased.
- (3) The plaintiff has not obtained any letters of administration to bring this matter to court.

Therefore the suit should be dismissed with costs.

At the hearing of the preliminary objection Mr. Lughanje submitted that the owner of the parcel is deceased and the plaintiff herein has stated as much in paragraph 6 of the plaint to the effect that the plot is registered in the name of her late cousin sister and paragraph 9 confirms that she is yet to obtain letters of administration. It is his argument that under the circumstances, the plaintiff has no locus and the suit cannot stand. To support this argument, Mr. Lughanje has relied on the decision in **Otieno v Ougo and Anor KLR 1987 pg 407 – 426** and **Tabitha Waruguru Nganga v Natinal Bank of Kenya HCCC 297 of 2004**. He drew this court’s attention to the passage on page 422 of **Otieno’s** (supra) case which recognized that a woman can take up letters of administration of her husband’s estate under the Law of Succession.

Then follows this passage from Ougo’s case:

“The difficulty remains that the general rule in relation to administration is that a party entitled to administration can do nothing as administration before letters of administration are granted. Section 80(2) of the Law of Succession Act provides that grant of letters of administration, with or without the will annexed, shall only take effect from the date of the grant...”

The origin of this doctrine dates back to an English decision **Wankford v Wankford KB(1702)** where Powys J said:

“but an administrator cannot act before letters of administration granted to him”

Mr. Lughanje then invited this court to consider the steps that are required to be followed before one can bring a suit in respect of a deceased person as was discussed in Tabitha’s case at pg 4 and that it would seem those steps have not been taken by the plaintiff.

The preliminary objection is opposed, and Mr. Okuto for the respondent submitted that the plaintiff is not laying claim of ownership over the property but is merely seeking orders to restrain the defendants from evicting her or carrying out any developments while the suit No. 193 of 2001 is pending in court.

Mr. Okuto argues that the preliminary objection is raised simply so as to confuse the court and the plaintiff is within her rights in coming to court. He explains that it was not necessary for plaintiff to obtain letters of administration, the bottom line is that she is being evicted from a property which is still in dispute and it would be proper to hear the parties before any adverse orders are made.

He explains that, the plaintiff’s cousin died in 2003 and since then, no letters of administration have been taken by her close relatives and since the deceased was a Muslim, obtaining letters of administration was not a prerequisite. He further explains that the deceased was the owner of the suit property and it is unclear how the property was transferred from the name of the deceased, to her husband’s and that the defendants have not come to court with clean hands. He argues that the authorities cited are not relevant and he wonders why the preliminary objection is silent on the suit No. 193 of 2001 which is pending in the lower court.

To this, Mr. Lughanje’s response is that although there is a suit pending in the magistrate’s court, yet no orders are being sought in relation to that suit and in any event, parties to that suit are long deceased and are not parties in this suit. Mr. Lughanje points out that what plaintiff has done is to institute a fresh suit without trying to save the other suit from abating and that in fact SPMCC 193 of 2001 has long abated and plaintiff cannot seek to draw authority from a case that has abated.

The plaintiff’s prayer in the main suit is for orders to restrain the defendants from evicting her from plot No. 874 Watamu or carrying on any developments while civil suit 193 of 2001 is still pending. This is a very curious situation where the plaintiff is living on property which does not belong to her, indeed in paragraph 8 of her pleadings, she states as much.

She is not relying on the doctrine of adverse possession, she does not and has not obtained letters of administration in respect of her late cousin sister, so as to deal with the said property – in fact her late cousin’s husband obtained letters of administration. Now that she refers to the suit No. 193 of 2001 which involves the same suit property and is pending before the Senior Principal Magistrate’s court, then why couldn’t she seek to be joined as an interested party in that matter and seek the restraining orders thereto?

In what capacity then is plaintiff seeking the prayers in this matter? She appears to be a live off dependants who wishes to carry on life as had been under the wings of her late cousin, but that does not confer on her any legal right over the property. Surely how does the court allow one who has not demonstrated her legal right over the property to restrain parties who have obtained rights over the property following dealings with the administrator of the estate. If the application for injunction were to be argued, one of the features to be considered would be whether plaintiff has a prima facie case – which would be a non starter as she has no legal, right to the property, she may name sentimental values to it, but those are not recognized as conferring legal rights. The preliminary objection has merit, plaintiff has no locus to file this suit. Consequently the preliminary objection is sustained and both the application and the entire suit are struck out with costs to the defendants.

Delivered and dated this 27th day of **October 2009** at Malindi.

H. A. OMONDI

JUDGE