



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 616 of 2006

**JOSEPHINE NDUNGE NZUSYO (*Suing on her own behalf and as
the Administrator of the Estate of***

**JOHN WACHIRA GICHERU) – (Deceased)PLAINTIFF
VERSUS**

HOUSING FINANCE COMPANY OF KENYA LIMITED..DEFENDANT

RULING

What has fallen for my determination is the preliminary objection dated 26th February, 2007. The Defendant contends that the Plaintiff has no capacity to bring or prosecute this suit on behalf of the estate of **John Wachira Gicheru** and the suit is consequently incompetent and bad in law and should be struck out.

Mr. Ougo Advocate submitted that the Plaintiff has no capacity to bring and prosecute this suit against the Defendant. And when challenged to show her capacity to bring the present suit, the Plaintiff filed a supplementary affidavit on which she annexed a limited grant of letters of administration. The Plaintiff relied on the said grant. However, it was limited to the activities mentioned on the face of the grant.

Mr. Ougo Advocate further submitted that the choice of action which survived the deceased can only be for the benefit of the estate and not for any other persons therefore, the contention by the Plaintiff that she is suing on her own behalf is completely wrong. And that unless a person has full and proper capacity he cannot bring a suit on behalf of an estate. **Mr. Ougo** Advocate also submitted that under Section 2(1) of the Law Reform Act, the only person who has authority in law to sue is the Administrator of the Estate. And the Plaintiff herein is not an Administrator of the estate. He relied on the famous case of:

Trouistik Union International & Another vs Mbeyu & another Civil appeal No.145 of 1996
(unreported),

and

(2) **Coast Bus Services Ltd vs Lai Civil Appeal No.6/1996** *(unreported)*.

Mr. Ochola Advocate for the Respondent was of the view that **Mr. Ougo** Advocate had misapplied and misread the law. He termed the objection as one lacking any merit and based on matters of facts, which needs to be established or ascertained. He stated that the pleadings clearly show that the Plaintiff is suing on her own behalf and as an administrator of the estate. She has authority to bring the suit on her own behalf and as an administrator of the estate.

Mr. Ochola Advocate also was of the view that the letters of administration which allowed the Plaintiff to be a signatory also entitles her to bring the present suit. He contended that when the Plaintiff became a signatory she had all the rights that a normal signatory would have to a bank account. And in the event of fraud, she indeed would have a right to file a claim against the Defendant.

There is no dispute that sometimes in the year 1995 the deceased husband of the Plaintiff entered into a loan agreement with the Defendant. The loan was secured by a mortgage over a residential property **L.R. No. Nairobi/Block 134/462**, the suit property herein. The Plaintiff calls that property the family residential property. The husband to the Plaintiff passed on before the completion of the loan.

On or about 14th September, 2006 the Defendant through its agent caused to be served on the Plaintiff a Notice of redemption in respect of the suit property. As expected the Plaintiff protested but nevertheless the suit property was advertised for sale on 2nd November, 2006. And as a result the Plaintiff filed the present suit alleging that the sale will occasion irreparable harm to her and the family of the deceased. In her supporting affidavit in paragraph 1, the Plaintiff states:

“That I am the Plaintiff herein having a legal and beneficial interest in the suit property herein and therefore competent and able to swear this affidavit”.

The Plaintiff alleges that she has a legal and beneficial interest in the suit property, therefore she has the capacity to bring and prosecute the present suit. No doubt the case is about a property charged by the deceased to the Defendant. The Plaintiff claims to be the widow and filed the present suit. It means the cause of action is vested in the estate and it is only the administrator who can competently bring such a suit. The question is whether a person can bring a suit in respect of a choice in action vested in another person. Such an action is ordinarily and legally vested in the estate of the deceased. And it is only the estate who can complain or benefit through their legal representative.

The law is that the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of the grant and all property of the deceased shall vest in the personal representative of the estate. See **Section 79 of Cap 160** Laws of Kenya.

Section 82 of Cap 160 states:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce by suit or otherwise all causes of action which by virtue of any law, survive the deceased or arise out of his death for his estate.**
- (b) To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them.**
- (c) To appropriate, at any time after confirmation of the grant any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased.**

It is the case of the applicant/Defendant that the Plaintiff lacks standing and/or capacity to present and prosecute the present suit for the benefit of the deceased’s estate.

In **Civil Appeal No.145/1990** (unreported) the case of **Trouistik Union International** the Court of Appeal composed of a bench of 5 Judges held:

“Accordingly to determine who is empowered to enforce that cause of action, for what purpose and when in point of time, one must look at that Act and allied relevant legislation. One such enactment is the Law of Succession Act (Cap 160). Section 2 of that Act provides in Mandatory terms that unless any other written law provides otherwise, the provisions of the Act shall constitute the law in Kenya in respect of

and shall have universal application to all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act”.

The deceased who charged the subject property died intestate and according to **Section 3 of Cap 160** Laws of Kenya an administrator or executor means a person to whom a grant of letters of administration has been made in his favour. And the law is very clear that it is only the personal representative of the deceased who bring and agitate by a suit any cause of action vested in the estate. The only legitimate person who can fit the description of a personal representative is the administrator of the estate of the deceased.

My position is that a suit filed by an entity or person with no legal capacity is incompetent and bad in law. It is incompetent because the cause of action is not vested in the person who instigated the suit. It means the cause of action is not the property of the individual who filed the suit. It is clear that the charge over the suit property was created by the husband of the Plaintiff. The Plaintiff was not a privy to that contract and in any case she cannot step into the shoes of her late husband without first acquiring proper sanction of the court. The only way to be sanctioned by the court is to obtain proper letters of administration to enable the party to qualify to be an administrator or personal representative of the estate.

The Plaintiff claims to be administrator of the estate of the deceased and in support of that contention, she exhibited limited grant of letters of administration dated 23rd September, 1999. First and foremost that grant was in favour of the Plaintiff and another person called **John Karobia Karuma**. The grant was limited to the purpose of being a signatory in two accounts. One of the accounts was at the time being held by the defendant herein. It was granted until further representation and to render a true and just account.

In my view the two accounts were in respect of the estate of a deceased person and in fact it was in relation to the husband of the Plaintiff. The Plaintiff sought and obtained limited grant of letters of administration because she could handle the affairs of her deceased husband. Equally she cannot salvage and/or protect the charged property without the requisite letters of administration. It is mandatory to obtain letters of administration for persons seeking to step into the shoes of deceased persons. In deed that is why the Plaintiff sought for and obtained limited grant to operate the previous accounts of her deceased husband. She could not legally acquire capacity before the mandatory requirement of obtaining letters of administration. The Plaintiff in this case has not obtained letters of administration to bring the present suit. The suit is a non starter, therefore legally defective as incompetent. It is incompetent because the Plaintiff has not obtained grant of letters of Administration. It means, she has no capacity to bring and prosecute this suit.

In the premises the objection is upheld, therefore, it means the suit is incompetent and the same is struck out with costs to the Defendant.

Dated and delivered at Nairobi this 13th day of March, 2007.

M. A. WARSAME

JUDGE