



REPUBLIC OF KENYA



KENYA LAW
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**Chumo v Langat (Environment & Land Case 28 of 2016)
[2022] KEELC 14875 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14875 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 28 OF 2016
MC OUNDO, J
NOVEMBER 17, 2022**

BETWEEN

PHILIP KIPKEMOI CHUMO PLAINTIFF

AND

DAVID LANGAT DEFENDANT

(Originating from Magistrate's Court as Civil Suit No 9 of 2012)

RULING

1. By a plaint dated May 17, 2016, the plaintiff herein sought for the following orders.
 - i. A declaration do issue that the exchange agreement between the plaintiff and the deceased Bornes Chepkemoi Chemosit over land registration No Kericho/Chesoen/654 and 1997 and land Registration No Kericho/Chesoen/409 was frustrated and failed.
 - ii. An eviction order do issue against the defendant by himself his agents, servants, legal representatives and or assigns from the suit land.
 - iii. A permanent injunction do issue restraining the defendant by himself, his agents and/or servants from remaining in the suit land and purporting to develop or put up structures or pull down any existing structures if any in the suit land.
 - iv. An order do issue directing the plaintiff and of (sic) his agents and or assigns to retake possession of land registration No Kericho/Chesoen/654 and the suit land do revert to the plaintiff.
 - v. Cost of the suit to be provided for.
 - vi. Any other relief this honorable court deems fit to grant.



2. In their defence and counterclaim, dated the July 11, 2016, the defendant denied in totality the plaintiff's averments stating that the exchange of the land agreement between the plaintiff (now defendant) and the defendant (now plaintiff) deceased's mother had not been breached and was still valid. That since the plaintiff (now defendant) was in possession and ownership of LR No Kericho/Chesoan/410, the plaintiff (now defendant) be ordered to transfer LR No. Kericho/Chesoan/654 to the defendant (now plaintiff) since the exchange was between LR No Kericho/Chesoan/410 and 654 and the deal was complete. The defendant (now plaintiff) sought for the plaintiff's suit to be dismissed with costs and in his counterclaim, sought for the following orders;
 - i. That the honorable court do declare that the plaintiff's (now defendant's) claim is time barred and there is no cause of action arising between the parties and the exchange agreement between the plaintiff (now defendant) and the defendant (now plaintiff) is valid as was involving No LR No Kericho/Chesoan/654 and 410.
 - ii. The honorable court do declare that the defendant (now plaintiff) has acquired title through adverse possession.
 - iii. The plaintiff (now defendant) do sign transfer forms to transfer ownership of the title Kericho/Chesoan/654 to the defendant (now plaintiff) and in default, (sic) Deputy Registrar be authorized to sign transfer documents to facilitate transfer of title to the defendant (now plaintiff.)
3. Upon parties having complied with pre-trial directions, the matter had proceeded for hearing wherein the plaintiff had closed its case and the matter was slated for defence. It was while pending the hearing of the defence case that the defendant had filed the present application dated the February 28, 2022.
4. The said application is brought pursuant to the provisions of section 3A of the Civil Procedure Act, order 4 rule (1) (a) & (b) of the Civil Procedure Rules and all enabling provisions of the law where the applicant, through his application and submissions, seeks that the court sets aside the order of substitution of the deceased defendant's mother with the defendant. That the suit be struck out with costs for being fatally defective and incompetent because the applicant/ defendant initially lacked the locus standi to be sued him having not obtained letters of administration to the estate of Bornes Chepkemoi Chemosit.
5. That indeed at para 2 of his defence, he had indicated that he had not filed succession proceedings hence he had no *locus standi* to sue. That he had been sued on a breach of contract to which he was not a party as the same was between the plaintiff and Bornes Chepkemoi Chemosit (deceased). That the deceased, who was not even a party to the suit died on the September 13, 2009, the applicant got the Letters *ad Litem* on March 21, 2019, the suit had been filed on the May 20, 2016 and the defence on July 11, 2016, which was before obtaining the Letters *ad Litem*. The Letters *ad Litem* could therefore not act retrospectively.
6. The applicant's submission was that by seeking to substitute Bornes Chepkemoi Chemosit via an order of the court of July 2, 2019, the same was bad in law as the said deceased had not been sued and was therefore not a party to the suit. The applicant relied on the cases of *Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited* (1969) EA and *Alfred Njau & Others vs City Council of Nairobi* (1982-88) 1KLR 299 to buttress his submissions.
7. The application was opposed by the respondent through his grounds of opposition dated the March 15, 2022, his replying affidavit sworn on April 5, 2020 and his submissions in which he stated that the application had been overtaken by events and the same was misconceived, frivolous, incompetent and vexatious and a gross abuse of the court process. That it had been brought in bad faith late in the



day after the defendant having realized that he had no plausible defence to counter the plaintiff's suit. That the court should administer justice without undue procedural technicalities in the spirit of the provisions of article 159 (2) (d) of the Constitution.

8. That the matter had initially been instituted in the Magistrate's court as Civil Suit No 9 of 2012 wherein an *ex-parte* judgment had been delivered, but had been set aside and a fresh suit filed. That the applicant ought to have raised the issue of the capacity of the parties at the earliest opportunity but failed to do so. That the applicant had participated in the proceedings and had immensely benefited from the discretion of the lower court. That the application was a ploy to delay the finalization of the matter and a gimmick by the applicant to illegally continue staying on the suit land thus tormenting the respondent. The respondent sought for the application to be dismissed.

Determination.

9. I have carefully considered the applicant's application, and the respondent's response herein, the submissions, the law applicable and the authorities herein cited. The issue for determination herein is whether the defendant/applicant herein had the *locus* to be sued and if not, whether the suit should be struck out for being incompetent.
10. Order 2 rule 15 of the Civil Procedure Rules states as follows;
 - (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
 - (2) No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made.
 - (3) So far as applicable this rule shall apply to an originating summons and a petition.
11. Indeed there is no dispute that this matter had initially been instituted in the Magistrate's Court as Civil Suit No 9 of 2012 wherein an *ex-parte* judgment had been delivered. That the same had been successfully set aside wherein the current suit had been filed a fresh. It is also not in dispute that the course of action giving rise to the present suit was premised on an oral agreement, on the exchange of land, between the defendant's mother, one Bornes Chepkemoi Chemosit, the proprietor of land parcel No Kericho/Chesoan/409 and the plaintiff who was the proprietor of land parcel No Kericho/Chesoan/654. Somehow, the agreement did not fall through thus giving rise to the filing of the suit.
12. It is further not in dispute that Bornes Chepkemoi Chemosit passed away on the September 13, 2009, wherein the suit was filed on the May 20, 2016 and the defence on July 11, 2016 and despite the defendant having raised an objection that he had no capacity to be sued as he had not obtained the letters of administration (see para 2 of his defence), the said objection had not been disposed of and/or attended to. Subsequently the defendant was issued with the limited grant of letters of administration ad litem on the March 21, 2019.
13. It is therefore not in dispute that by the time the suit was filed the defendant herein had no capacity to be sued as an administrator to the estate of Bornes Chepkemoi Chemosit as no copy of a grant of letters



- of administration or any evidence had been produced by the plaintiff to prove otherwise. The capacity of the defendant having not been proved, he was therefore a stranger to the estate of the deceased wherein no judgment could be entered against him. The case filed against him was incompetent ab initio as he could not be sued before he has taken out letters of administration which would then vest the deceased's estate in him. The plaintiff herein ought to have taken out citation proceedings under rules 21 to 24 of the [Probate and Administration Rules](#) before instituting the suit against the defendant.
14. It is also clear that the at the time the matter was initiated, up to the time when the plaintiff closed their case, the court had not been furnished with any evidence to prove that there had been any grant of representation to the estate of the original owner of parcel of land No Kericho/Chesoan/409 land which was registered in the name of Bornes Chepkemoui Chemosit which in essence meant that the defendant had no *locus standi* to defend the suit and/or be sued until such a time as the letters of administration would have been taken out regarding the estate of Bornes Chepkemoui Chemosit. The defendant herein was therefore non-suited to the plaintiff's claim.
 15. The issue of *locus standi* was defined in the case of [Alfred Njau & 5 Others vs City Council of Nairobi](#) [1983] eKLR to mean- "the right to appear in Court." Indeed the Court of Appeal in this case had held as follows:

".....to say he has no *locus standi* means he cannot be heard, even on whether or not he has a case worth listening to."
 16. The Court of Appeal has authoritatively delivered itself on the issue of *locus standi* in [Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another](#) (1982-99) 1 KAR, [Morjaria v Abdalla](#) [1984] KLR 490 and in [Trouwistik Union International & Another v Jane Mbeyu & Another](#) Civil Appeal No 145 of 1990 to the effect that *Locus standi* is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.
 17. The defendant had been sued in his own capacity yet the subject in issue herein being LR No. Kericho/Chesoan/409 belonged to the estate of Bornes Chepkemoui Chemosit where no grant of representation had been applied for and/or obtained. The limited grant of letters of administration ad litem were issued to the defendant on the March 21, 2019. Almost three years after the plaintiff had instituted suit, meaning that the matter had proceeded when the defendant had no *locus-standi*. Obtaining the limited grant of letters of administration ad litem late in the day could not validate a legally invalid matter.
 18. 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. The issue of *locus standi* becomes even more serious in a case such as this one where the matter involves the estate of a deceased person that might involve several other beneficiaries and/or interested parties.
 19. Indeed in the case of [Isaya Masira Momanyi v Daniel Omwoyo & another](#) [2017] eKLR, the court had held as follows:

"A party can thereof not commence a suit on behalf of the estate of a deceased person without letters of administration and thereafter obtain the letters of administration subsequently. Where a suit is commenced without letters of administration in respect of a deceased estate such a suit is null and void *abinitio* and cannot be cured by a party subsequently obtaining the letters of administration."
 20. The power to strike out suits is vested in the court by order 2 rule 15. The court retains the discretion to strike out a plaint if it discloses no cause of action and to strike out a defence if it discloses no reasonable defence or to order their amendment. The issue of *locus standi* being a point of law which goes to the



root of any suit cannot be termed as a mere technicality. This matter having been filed and substantially prosecuted in its absence, renders a suit fatally defective. I shall not dismiss the suit but shall proceed to strike it out with costs to the defendant

DATED AND DELIVERED VIA ZOOM CONFERENCE AT KERICHO THIS 17TH DAY OF NOVEMBER 2022



M.C. OUNDO

ENVIRONMENT & LAND – JUDGE**

