



Muga & another v Ogola & 2 others (Being the administrator of the estate of the deceased Hesborn Ogola Muga) (Environment and Land Case Civil Suit E006 of 2022) [2022] KEELC 14763 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14763 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND CASE CIVIL SUIT E006 OF 2022
AY KOROSS, J
NOVEMBER 17, 2022**

BETWEEN

THOMAS OSCAR MUGA 1ST PLAINTIFF

COLLINS BOB MUGA 2ND PLAINTIFF

AND

JEREMIAH ODUOR OGOLA 1ST DEFENDANT

ALFRED ODHIAMBO OGOLA 2ND DEFENDANT

MARGARET APONDI OTOYO 3RD DEFENDANT

**BEING THE ADMINISTRATOR OF THE ESTATE OF THE DECEASED
HESBORN OGOLA MUGA**

RULING

Defendants' Case

1. The application that is the subject of this ruling is a notice of motion application by the defendants against the plaintiffs dated June 14, 2022. The motion was moved pursuant to the provisions of article 159 of the *Constitution*, sections 1A and 3A of the *Civil Procedure Act* and order 51 rule 1 of the *Civil Procedure Rules*. They sought the following reliefs;
 - a. The honourable court be pleased to strike out this suit with costs for being in contravention with section 82(a) of the *Law of Succession Act* and thus was fatally defective and an abuse of the court process; and
 - b. Costs be provided for.



2. The motion was based on the grounds set out on its face and on the supporting affidavit of the 3rd defendant Margaret Apondi Muga dated July 14, 2022.
3. The 3rd defendant deponed *inter alia*, her last name was not ‘Otoyo’ but ‘Muga’. That pursuant to section 82 (a) of the [Law of Succession Act](#), the plaintiffs lacked *locus standi* to institute suit because their mother Margaret Achieng Muga was a co-administrator together with her on the administration of plaintiffs’ father’s estate one Charles Evans Muga [“deceased”]; the administrators had also not issued the plaintiffs with a consent to institute these proceedings; the authority to act by the 2nd plaintiff to the 1st plaintiff was not properly witnessed and contravened the provisions of section 88 of the [Civil Procedure Act](#) and pursuant to section 9 (a) of the [Magistrates’ Courts Act](#), it was the lower court that had jurisdiction to handle this suit.

Plaintiffs’ Case

4. In opposition, the 1st plaintiff Thomas Oscar Muga with the authority of the 2nd plaintiff filed a replying affidavit dated July 21, 2022. He deponed *inter alia*, their claim was on customary and constructive trust; they were agitating for their rights in their personal capacities without necessarily being administrators of the estate of the deceased; the co-administrators of the deceased’s estate were at loggerheads and had even filed a suit against each other and therefore a consent was untenable in the circumstances; section 88 of the [Civil Procedure Act](#) was not applicable in the circumstances of this case; the court should be guided by article 159 (2) (d) of the [Constitution](#) and pursuant to the provisions of article 165 (3) and (5) of the [Constitution](#), this court had jurisdiction.

Parties’ Submissions

5. As directed by the court, the defendants’ Counsel Mr Ochanyo filed written submissions dated August 16, 2022. Counsel identified 3 issues; (i) whether the defendants’ application had merit (ii) whether the honourable court had jurisdiction to hear and determine the suit and (iii) costs.
6. On the 1st issue, Counsel reiterated that it was the plaintiffs’ mother and the 3rd defendant who had *locus standi* to institute suit on behalf of the deceased and not the plaintiffs. He placed reliance on the case of [Isaya Masira Momanyi v Daniel Omwoyo & another](#) [2017] eKLR where Mutungi J stated thus:

"Where a suit is commenced without letters of administration in respect of a deceased estate, such a suit is null and void *ab initio* and cannot be cured by a party subsequently obtaining the letters of administration..."
7. On the 2nd issue, Counsel submitted that as espoused by article 169 (1) of the [Constitution](#) and section 9 (a) [Magistrates’ Courts Act](#), the instant suit ought to have been filed at the Magistrates’ Court. On the 3rd issue, Counsel prayed for costs.
8. In response, the plaintiffs’ Counsel Mr Mugalo filed written submissions dated August 19, 2022. Counsel set out 3 issues for this courts’ determination; (i) whether this court had jurisdiction (ii) whether the suit had been filed on behalf of the estate of the deceased and whether the plaintiffs had *locus standi* and (iii) whether section 88 of the [Civil Procedure Act](#) was applicable in the circumstances obtaining in this case.
9. Counsel submitted that the *locus classicus* case of [Owners of the Motor Vessel ‘Lilian S’ v Caltex Oil \(Kenya\) Limited](#) [1989] eKLR held that jurisdiction was everything. Counsel contended that pursuant to the provisions of article 165 (3) and (5) of the [Constitution](#), this court had jurisdiction to determine



this suit and, in any case, this court had jurisdiction within the provisions of section 18 of the Civil Procedure Act to transfer this suit to the lower court.

10. On the 2nd issue, Counsel contended that the suit was founded on section 28 of the Land Registration Act and therefore this court had jurisdiction; the plaintiffs had sought customary trust over the suit property. Counsel relied on the case of Law Society of Kenya v Commissioner of lands & others; Civil Case Number 464 of 2000 Nakuru High Court where the court held as follows;

‘Locus standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in a court of law’.

11. On the 3rd issue, Counsel submitted that an authority to plead did not take the form of an affidavit and was therefore not subject to section 88 of the Civil Procedure Act and that in any case, the defendants’ authority to plead indicated the acceptor as one John Ochieng Anania and not the 3rd defendant and therefore, the defendants’ affidavit should be struck out.

Analysis and Determination

12. Before dealing with the issues I have identified, I must address certain preliminary issues that emerged from the defendants’ motion. Most of the grounds and averments in the 3rd defendants supporting affidavit were at variance with the reliefs sought. It is trite law that parties are bound by their pleadings and courts cannot enter into the realm of litigation to infer the intent of the parties.
13. I have carefully considered the motion, its grounds, affidavits and respective parties’ rival submissions and the issues falling for determination are;
 - a. Whether this court has jurisdiction to hear and determine the suit;
 - b. Whether the plaintiffs had locus standi to institute the suit; and
 - c. What about costs?

a. Whether this court has jurisdiction to hear and determine the suit

14. Article 162 (2) (b) of the Constitution of Kenya is the enabling provision that establishes this court which provides that there shall be established courts with the status of the High Court to hear and determine disputes related to the environment and the use and occupation of, and title to, land. While section 13 of the Environment and Land Court Act gives this court original and appellate to hear disputes on environment and land.
15. It was not in dispute that the ELC has jurisdiction over this suit. The only point of departure between the parties’ Counsel was whether this suit should be handled by this court or the magistrates’ court.
16. Article 169 (2) of the Constitution, section 26 (3) and (4) of the Environment and Land Court Act and section 9 (a) of the Magistrates’ Courts Act establishes magistrates’ courts that adjudicate disputes relating to environment, use and title to land. The delineation between the ELC and magistrates court is the issue of pecuniary jurisdiction. The pecuniary limit for the magistracy on the value of a subject matter is capped at Ksh 20,000,000/- see section 7 of the Magistrates’ Courts Act. I have analysed the pleadings and they do not disclose the value of land parcel number North Gem/Ndere/93 [‘the suit property’] and, in the absence, it is my finding that I have jurisdiction.



b. Whether the plaintiffs had locus standi to institute the suit

17. The Law of Succession states as follows;

“(82) 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 arising out of his death for his personal representative;”

18. The decision of *Isaya Masira Momanyi v Daniel Omwoyo* (*supra*) that was cited by Mr Ochanyo indeed reflects the legal position. From the pleadings, it is apparent that there were certain instances where the plaintiffs were pursuing their personal interests of customary and constructive trust over the suit property while in others they were pursuing interests on behalf of the estate of the deceased. In the latter situation, legally, they would have to be the administrators of the estate of the deceased. From the pleadings, the line is very thin and Mr Ochanyo’s arguments are not farfetched.

19. Would this call for throwing out the baby with the bathwater? My answer is in the negative. Striking out of pleadings is a drastic measure that should only be resorted to where pleadings are a complete sham.

20. The plaintiffs have raised *bona fide* issues on customary and constructive trust in their individual capacities and it would be in the interests of justice if they would not be denied the opportunity to ventilate their grievances on merit and at the hearing and conclusion of the trial, parties can address this court on the issue of *locus standi*.

21. Being conscious that I should restrain myself from making findings that may prejudice a party, it is my finding that at this juncture, the motion is not merited. The issues raised of *locus standi* shall have to abide the hearing and determination of the main suit. The motion is dismissed. Costs shall abide the outcome of the main suit.

DELIVERED AND DATED AT SIAYA THIS 17TH DAY OF NOVEMBER, 2022.

HON. A. Y. KOROSS

JUDGE

17/11/2022

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in open Court in the Presence of:

M/s Muchocho h/b for Mr. Mugalo for plaintiffs

Mr. Magesa for the defendants

Court assistant: Ishmael Orwa

