



Kibwambok v Sitienei & another; KCB Bank (Interested Party) (Environment & Land Case E002 'B' of 2022) [2022] KEELC 14810 (KLR) (15 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14810 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E002 'B' OF 2022
FO NYAGAKA, J
NOVEMBER 15, 2022**

BETWEEN

ROSELYNE CHEPKATI KIBWAMBOK PLAINTIFF

AND

JUDAS CHEPSIROR SITIENEI 1ST DEFENDANT

ROSEBELLA KIPSUM 2ND DEFENDANT

AND

KCB BANK INTERESTED PARTY

RULING

1. The plaintiff brought this suit in her capacity as a sister to the 1st defendant and a sister in-law to the 2nd defendant. She sued the two relatives, claiming that in year 1991 they got themselves registered respectively as proprietors of Land Parcels No Kaplamai/Sirende Block 2/Ngonyek/58 in the name of the 1st defendant) and Kaplamai/Sirende Block 2/Ngonyek/56 and Kaplamai/Sirende Block 2/Ngonyek/57 in the name of the 2nd defendant's husband, one Albert Chepkwony Sitienei, now deceased.
2. Her claim was that the parcels of land belonged to the parties' late mother, one Maria Cheptarus, since the adjudication time of the area in 1971 and therefore by being registered as owners, the defendants did so in trust for her (the plaintiff). Her further claim was that sometime in 2001 the parties' mother called a family meeting (whose minutes were not given) and informed them that she owned approximately 25 acres of land in Kaplamai and wanted it to be registered in the alleged trust and also that the plaintiff be given her rightful share.
3. She averred that she sued to claim that the parcels of land were registered in trust for her (*sic*) and she was therefore entitled to the reliefs sought. It was common ground for the three parties, namely, the



plaintiff and the two defendants, that the mother had since passed away. The date of her demise was neither given in the parties' pleadings nor the documents filed but from the pleadings, it was clear that it happened after 2001 and the registrations took place in 1991.

4. It would appear that to the plaintiff, the parcel of land that the mother referred to was the one "subdivided" giving rise to the three parcels of land in issue. But the title documents attached to the list of documents show that the parcels of land were not subdivided but were acquired by the respective defendants from the government separately. What was unclear was how the claim of trust in the plaintiff's favour would arise because by the time of the alleged meeting called by the mother, it was ten years after the parcels of land were registered in the 1st defendant's and the 2nd defendant's late husband's name, and the mother was alive. By that time the mother did not raise the issue of the registrations or sue the two for fraudulent registration of the parcels in their respective names.
5. Other than the admission by the defendants that they were the registered owners of the suit lands, they denied the other averments. They raised the preliminary objection herein. It was dated July 6, 2022. It was as to the competency of the suit. Their contention in it was that the plaintiff lacked the *locus standi* to institute the suit since she was not a personal representative of the late mother, Maria Cheptarus, since she did not have letters of administration to her estate, through whom and which she claimed a relationship which would entitle her to being declared a beneficiary of the trust she prayed that the court does grant her.
6. The question this court is tasked to determine is whether or not the preliminary objection is merited. In making a finding on the issue, I am called upon to define a preliminary objection. If it succeeds, it is an issue that goes to the root of the matter before the court and would entitle the court to dismiss it.
7. A preliminary objection was defined in the seminal case of *Mukisa Biscuit Manufacturing Co Ltd -vs- West End Distributors Ltd* (1969) EA 696. Their lordships stated as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

8. As is clear from the meaning above, a preliminary objection constitutes only a point or points of law which can be pleaded or raised due to necessary implication. Its success or otherwise does not depend on facts lest it be a determination on merit. When it purports to arise out of reliance on facts, it would be a vague argument which grinds to nothing but a mere halt at its inception. Such an issue that falls outside the nature of a preliminary objection can and must await the meritorious inquiry and consideration of it by the court. Thus, in the case of *Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya* [2017] eKLR the Court of Appeal has held that:

“We agree with counsel for the appellant that grounds of preliminary objection were vague and did not specify the point of law that was in issue We find that the preliminary objection contained contested matters and was vague as far as the point of law was concerned.”



9. In *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] e KLR, the same court stated as follows:

“We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a preliminary objection and files in court a notice to that effect and is subsequently served on other parties to the suit, the preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the court to sufficiently prepare to meet the challenge. if it is only at the hearing that the preliminary objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”

10. In *Susan Wairimu Ndiangui v Pauline W Thuo & another* [2005] eKLR Musinga J as he then was held that:

“A preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

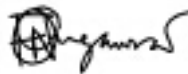
11. In this case, the first issue then to consider is whether the preliminary objection raised the threshold of one. The preliminary objection dated July 6, 2022 was that the plaintiff, as pleaded in paragraph 3 of the 1st and 2nd defendants’ defence filed on February 14, 2022, did not have the *locus standi* to sue on behalf of the estate of the late Maria Cheptarus as she did not have letters of administration thereto. In answer to this objection, in the pleadings the plaintiff averred that she did not require letters of administration to bring the suit because she did so “...under the trust of the estate of the late Maria Cheptarus (deceased)”. She pleaded this in paragraph 5 of her reply to the 1st and 2nd defendant’s statement of defence dated April 27, 2021 but filed on May 6, 2022.
12. It is clear that the argument on *locus standi* flows from the pleadings filed by the parties. This court need not look at further evidence than the pleadings themselves. Again, the issue of the competence of a party to be before the court in respect of the estate of a deceased person is an issue that flows from the law. Thus, the preliminary objection meets the criteria set down by courts in Kenya, starting from the case of *Mukisa Biscuit Manufacturing Co Ltd -vs- West End Distributors Ltd* (1969) EA 696.
13. From the pleadings of the parties herein, it is common ground between the plaintiff and the defendants that, although the date is not specified, their mother, one late Maria Cheptarus, died somewhere along the way after the alleged cause of action arose, but certainly after 2001. It also is the plaintiff’s admission in her reply to defence that she did not have letters of administration to the estate of the deceased mother. She averred that she sued for the suit land parcels as a sister to the parties in the varied capacities as explained above and therefore a beneficiary under a trust of the estate of the late Maria Cheptarus.
14. It is undisputed that the suit lands were registered in the names of parties sued during the life-time of their mother. Immediately after the registrations in favour of the alleged defendants, and unless the process was challenged successfully by the estate of the deceased Maria Cheptarus and cancellation of the titles effected and the parcels reverted to the estate of the late mother (since she is now deceased), the parcels of land ceased to, and did not any longer, belong to her estate. To be clear, if the plaintiff’s claim is anything to go by, then the properties ceased to belong to the estate of the late mother in 1991



when registrations were effected. Again, to sue on behalf of the mother's estate, one needed to have capacity to do so, and that is by either being granted letters of administration or a grant of letters ad litem. Absent of that, any claim in court by a person other than the one with capacity is incompetent as the person lacks locus standi to institute it.

15. In everyday life and society, not every property owned by a family member is held by such members in trust for the rest of the family members or siblings by virtue of being members of the same family. Sad would be the day this court or indeed any other would hold it that way. Even where the property, except matrimonial property, is owned by the parent and he/she for any reason transfers it to one child or other, except by will, it cannot be challenged and should not form the basis of viewing it as being held in trust.
16. The upshot of the analysis herein is that the preliminary objection dated July 6, 2022 is merited and is therefore upheld. The suit is hereby dismissed with costs to the defendants only since they are the ones who entered appearance and filed defence.
17. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIA ELECTRONIC MAIL THIS 15TH DAY OF NOVEMBER, 2022



**HON. DR. IUR FRED NYAGAKA
JUDGE, ELC KITALE**

