



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

(Deceased v Land Adjudication Settlement Officer Igembe Tigania West & 20 others (Environment & Land Case E019 of 2021) [2022] KEELC 15365 (KLR) (14 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15365 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E019 OF 2021
CK NZILI, J
DECEMBER 14, 2022

BETWEEN

**ABRAHAM MUTHEE M'ETHAIBA (SUING AS LEGAL REPRESENTATIVE OF
ETHAIBA M'TUOROI (DECEASED PLAINTIFF**

AND

**LAND ADJUDICATION SETTLEMENT OFFICER IGEMBE TIGANIA
WEST 1ST DEFENDANT**
LAND REGISTRAR MERU COUNTY 2ND DEFENDANT
ATTORNEY GENERAL 3RD DEFENDANT
SEKUNDU MURIIRA IBAYA 4TH DEFENDANT
EDWARD AYUB MBOGORI 5TH DEFENDANT
ROMANO NTONGAI 6TH DEFENDANT
GEOFFREY K IGWETA 7TH DEFENDANT
JUSTUS GITUMA 8TH DEFENDANT
KALAWA IBAYA 9TH DEFENDANT
BENARD IBAYA 10TH DEFENDANT
FRANCIS KIRIAKABU 11TH DEFENDANT
JOSPHAT MWITI 12TH DEFENDANT
MWONKARI NKUBIRIA 13TH DEFENDANT
DOREEN KAIRIGO 14TH DEFENDANT
GIDEON GITONGA 15TH DEFENDANT
GEORGE MWITI IGWETA 16TH DEFENDANT



COUNTY GOVERNMENT OF MERU	17 TH DEFENDANT
JAPHITA NTONGAI	18 TH DEFENDANT
TITUS WAMBUA	19 TH DEFENDANT
ISAAC MUKARIA MUTABARI	20 TH DEFENDANT
JESSEE KAUME	21 ST DEFENDANT

RULING

1. Before the court is the notice of preliminary objection dated May 9, 2022 by the 4th, 7th to 14th, 16th, 18th and 21st defendants on the basis that:-
 - i. The plaintiff lacks capacity or *locus standi* to bring the suit since the limited grant *ad litem* was spent by June 4, 2021.
 - ii. The court lacks jurisdiction since a decision made under sections 17 & 20 (3) of the [Land Consolidation Act](#) is final under sections 19 & 26 thereof.
 - iii. The suit offends sections 7 & 8 of the [Civil Procedure Act](#) due to a prior suit Meru H C Misc 67 & 68 of 2009.
2. In respect to the preliminary objection parties filed written submissions dated August 1, 2022, August 15, 2022 and September 26, 2022 respectively.
3. The proponents of the preliminary objection submitted that under section 82 of the [Law of Succession Act](#), personal representatives have powers to enforce a suit all causes of action which by law survive the deceased.
4. Guided by the holding in *Trouistik Union International & another vs Jane Mbeyu & another* (1993) KLR 230 the court held that an administrator is not entitled to bring an action as an administrator before he has taken letters of administration, the suit brought by the plaintiff was incompetent at the date of inception since the letters held by him had expired by June 7, 2021.
5. Secondly, the proponents submitted that a suit challenging decision in A/R objection are under sections 19 & 26 (3) of the Land Consolidation Act incompetent since they are a disguised appeal.
6. In this suit, it is submitted that prayer (a) of the plaint seeks the court to declare interest in land under adjudication which jurisdiction this court lacks as held in *Tobias Achola Osindi and 13 others vs Cyprian Otieno Ogola & 6 others* (2013) eKLR.
7. Thirdly, the proponents submitted that in previous suits Meru HC Misc JR 67 & 68 of 2009, the plaintiff had sought orders of *certiorari* and prohibition to quash the same A/R proceedings and decision but were dismissed and no appeals were lodged which fact the plaintiff has admitted at paragraph 10 of his plaint. Therefore, the proponents argue the court should strike out this suit guided by holding in Meru Petition No E009 of 2021, *Benjamin Gitonga Andrew vs Aggrey Muraga Ethangatha & 12 others* as well as *M'Kirigia Kiarunyi vs Doris Ciombaka Imathiu & another* (unreported).



8. While supporting the preliminary objection, the 15th defendant has submitted that the objection proceedings and the decision related to the plaintiff and the 1st defendant as per the bundle of documents dated May 9, 2022.
9. In opposing the preliminary objection, the plaintiff submitted that the preliminary objection failed to meet the threshold of *Mukbisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd* (1969) EA 696 which stated that there should be no contest on facts or an issue raised which falls for a court's discretion as a basis of a preliminary objection.
10. In this case the plaintiff submitted that what has been raised invites the court to determine certain facts by making an investigation on where the respective parties draw their legal rights over the property, how the adjudication process was concluded and if there were any appeals filed.
11. On the aspect of *locus standi*, the plaintiff submitted that there is no law which states a full grant needs to be issued before a suit is filed and as per paragraph 14 of Schedule 5 of the [Law of Succession Act](#), a limited *grant ad litem* will suffice for a suit to recover assets or liabilities for the estate of a deceased person.
12. In this case the plaintiff submitted that he had obtained such a grant in Tigania SRM E018 of 2022. Under section 54 of the [Law of Succession Act](#) on the issue of jurisdiction the plaintiff submitted that under sections 12 & 15 of the [Civil Procedure Act](#) and the Environment and Land Court Practice Direction, the need to achieve the overriding objectives requires the efficient and timely disposal of matters as guided by *Nguruman Ltd vs David Nkedianye and 6 others* (2018) eKLR, balancing the interests of parties should be the ultimate aim. Reliance was placed on *Lemitei Ole Koros & another vs AG and 3 others* (2016) eKLR on the proposition that a preliminary objection is not automatic where there is a contested determination of facts.
13. On *res-judicata*, the plaintiff submitted that the issue of the ruling previously made is a question that needed to be proved by production of evidence. In any event the plaintiff takes the view that the previous decision was not on merits of the case unlike in the present suit where issues revolve around fraud and illegality on the part of the defendants. Reliance was placed on *Republic vs AG and another ex parte South and Central Thika Investments Ltd & another* (2016) eKLR & *Muhu Holdings Ltd vs James Muhu Kangari* (2017) eKLR, on the proposition that where there is need for evidence to ascertain *res-judicata*, the court should refrain from handling such a preliminary objection.
14. The primary pleadings in this suit are the plaint dated May 25, 2021, defences dated September 21, 2021, September 16, 2021 and May 9, 2022.
15. In the aforesaid statements of defence, the suit is based on alleged fraud and or illegality allegedly committed during the adjudication process and subsequent collusion to register the parcels in dispute by the 1st-2nd defendants in favour of 4th – 21st defendants. The plaintiff seeks for declaratory orders that; the titles issued thereto were fraudulently demarcated; registered and issued rectification of the register and to revert to the plaintiff; vacant possession and permanent injunction. The 1st and 2nd defendants averred that the governing statute to the A/R objection was the Land Consolidation Act and not the [Land Adjudication Act](#); that the subdivisions and transfer were legitimately and statutorily done and that the plaintiff lacked legal capacity to institute the suit.
16. The 4th, 7th to 14th, 16th, 18th and 21st defendants admitted the A/R objections were handled under the Land Adjudication Act, cap 284, JR no 's 67 and 68 of 2009 were brought over the said A/R objection decision but were struck out for being filed out of time. The decisions were final; the court lacked



jurisdiction since the plaintiff did not file a minister's appeal or exhaust the internal dispute mechanism under cap 284; he lacked *locus standi* to sue and the suit lacked merits.

17. The 15th defendant averred that L R no Nyambene/Uringu/885 was not a resultant subdivision of L R no 1056; he was not party to the judicial review proceedings since they did not concern L R no 885; denied the alleged illegal subdivision and or registration; that there was no appeal against an adjudication committee decision over the plaintiff's objection no 1228 to the Land Adjudication Committee or by an appeal to the High Court and hence the suit was *res-judicata* in view of the aforesaid objection proceedings.
18. What amounts to a preliminary objection was discussed in [*Hassan Ali Jobo & another vs Suleiman Said Shabbal & 2 others*](#) (2014) eKLR and [*IEBC vs Jane Cheperenger and 2 others*](#) (2015) eKLR.
19. The Supreme Court of Kenya held that a preliminary objection serves two purposes of merits; first as a shield for the originator against profligate deployment of time and other resources and secondly, a public cause of sparing scarce judicial time for only the deserving cases of dispute settlement.
20. The court warned that it was improper for a party to resort to a preliminary objection or as a sword for winning a case otherwise destined to be resolved judicially and on the merits.
21. The preliminary objection herein is three pronged based on lack of capacity to sue, lack of jurisdiction and *res-judicata*.
22. On the 1st ground, it was averred that the letters of grant *ad litem* expired on June 4, 2021 before the suit was filed on June 7, 2021. Therefore, under section 54 of the Law of Succession Act the plaintiff lacks capacity to institute the suit for and on behalf of the estate of the deceased.
23. The plaintiff has described himself as the legal representative of the estate of Ethaiba M'Thiori.
24. *In Re- the Estate of Helena Wangechi Njoroge (deceased)* 2015 eKLR the court held that a grant of letters of administration *ad litem* envisages a suit to be filed on the strength of a grant which is not a probate to succession case but rather a civil suit and a grant of representation was only necessary where one intended to file a civil suit to protect or defend the estate against third parties.
25. Section 82 Laws of Succession Act provides that a personal representative shall subject only to any limitation imposed by their grant, have powers to enforce a suit or otherwise all causes of action by virtue of any law, survive the deceased or arise out of his death.
26. Legal Notice no 39 of 2002 is clear on the form to be used. The grant dated March 14, 2021 is not specific on the form used and under what section of the law in line with Probate and Administration Amendments Rules to the Fifth Schedule 2003.
27. It is not clear if the grant was in line with form 90 (B) as held in *Joel Muga Opija vs East African Sea Food Ltd* (2013) eKLR.
28. In *Morjaria vs Abdalla* (1982-1984) KLR 490 the court said a grant *ad colligenda* was inappropriate to bring a suit.
29. Further in *Rajesh Pranjivan Chudasama vs Sailesh Pranjivan Chudasama* (2014) eKLR, the Court of Appeal held that a litigant is clothed with *locus standi* upon obtaining a limited or full letters of administration in cases of intestate succession.
30. In *Juliana Adoyo Ongunga vs Francis Kiberenge Abano* Court of Appeal no 119 of 2015, the court held the issue of *locus standi* is so cardinal such that it runs through the heart of a case and therefore a party without *locus standi* lacks the right to institute or maintain it even where a valid cause of action subsists.



31. It is trite law that the estate of the deceased vests in the personal representatives who then have capacity to file or defend a suit and who are normally appointed by the court.
32. There is no dispute that the plaintiff obtained a grant *ad litem*. The problem is that it had a time frame of 90 days for him to institute the suit. The limitation was based on section 54 of the Law of Succession Act and paragraph 14 of schedule 5.
33. In Julian Adoyo (*supra*) the court held that the wording of the grant has to be considered as held in Peter Owade Ogwang vs Jared Obiero Ouga (2014) eKLR.
34. In *Elijah Nderitu Gachaga vs Francis Gakuo Gachaga & 2 others* (2019) eKLR, the wording had not included the institution and maintenance of the suit. Evidence of rectification in order to give *locus standi* to the plaintiff was also lacking. The court cited with approval *Macfoy vs United Africa Co Ltd* (1961) 3 ALL ER 1169 at 1172 that if an act is void it is in law a nullity and is automatically null and void without much ado. The court held that the issue of *locus standi* as a pure point of law and not a matter requiring the exercise of discretion or requiring the court to investigate it by way of evidence.
35. In *Nicholas Kiptoo Arap Korir Salat vs IEBC & 3 others* (2013) eKLR, the Court of Appeal held that lapses in form and procedure do not go to the jurisdiction of the court, the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party and ought not to attract punishment of the offending party.
36. Section 72 of the Interpretation and General Provisions Act, provides that whenever expressly provided, when any form is prescribed by any written law, an instrument or document which purports to be in that form shall not be void by reason of any duration therefrom which does not affect the substance of the instrument or document and which is not calculated to mislead. See *In the Matter of the Estate of Morarji Bhanji Dhanak* (deceased) (2000) eKLR.
37. What I decipher from the respondents is that they are not challenging the substance and merits of the limited grant *ad litem* but the failure by the plaintiff to file the suit within the time frame set out in the said grant.
38. According to the 4th, 7th to 14th, 16th, 18th and 21st respondents, the limited grant was valid for only 90 days from March 4, 2021 to June 4, 2021, yet the suit was filed on June 7, 2021.
39. There is no evidence that the said limited grant has been invalidated by a competent court of law through an application for setting aside or revocation. The grant does not expressly state the suit must be filed within 90 days. It qualifies itself by using the words “and until further representation were granted by this court” by the plaintiff.
40. The 15th defendant has also admitted that his parcel number had a A/R objection unlike the parcel no 1056 and its resultant sub divisions. So, in other words the issues of jurisdiction and *res judicata* as to the A/R objections, previous decision(s) and the implications of whether a minister’s appeal ought to have been filed prior to resorting to court and if the A/R decisions were final as per the Land Consolidation Act, are to my mind inseparable and raised both matters of law and facts requiring evidence to determine.
41. Further, the court has looked at the ruling in the previous suit. The matter was not determined on merits.
42. In the Benjamin Gitonga Andrew case (*supra*) an appeal was pending at the Court of appeal. The issues were both on *res sub-judice* and *res judicata*. Parties were the same in the previous suit and the suit



before the court. The prayers were the same in the two suits. A clear decision on merits had been made and an attempt to re-open already decided matters was at hand.

43. Similarly, in M'Kirigai Kirungi case (*supra*) the suit was sitting on all fours within the parameters of *res judicata* as set out in *IEBC vs Maina Kiai & 5 others* (2017) eKLR.
44. In my considered view therefore, whereas the applicants have endeavored to demonstrate the three points as raising pure points of law, unfortunately the pleadings and the subsequent documents filed by both sides are pointing otherwise. They call for an invitation to this court to delve into both evidence and the exercise of court's discretion.
45. The upshot is the three points fall short of the threshold of a preliminary objection as set in Mukhisa case (*supra*). The notice of preliminary objection dated May 9, 2022 is dismissed with no order as to costs. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 14TH DAY OF DECEMBER, 2022.

In presence of:

C/A: Kananu

Ondari for plaintiff

Gitonga for 15th defendants

Koech for C P Mbaabu for defendants

HON C K NZILI

ELC JUDGE

