



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU  
CIVIL CASE 116 OF 2005**

**RUTH DAMARIS WAMBUI MBIYU.....1<sup>ST</sup> PLAINTIFF**  
**DAVID NJUNU KOINANGE.....2<sup>ND</sup> PLAINTIFF**  
**EDDAH WANJIRU MBIYU.....3<sup>RD</sup> PLAINTIFF**  
**MARGARET NJERI MBIYU .....4<sup>TH</sup> PLAINTIFF**

*(Suing as the administrators of the estate of Mbiyu Koinange (Deceased))*

VERSUS

**MOSES LESIAMON OLE MPOE.....1<sup>ST</sup> DEFENDANT**  
**JOSEPH KAKURE OLE MPOE.....2<sup>ND</sup> DEFENDANT**  
**JOSEPHAT MUNKE OLE MPOE.....3<sup>RD</sup> DEFENDANT**  
**DENIS SANARE OLE NKURUNA.....4<sup>TH</sup> DEFENDANT**  
**STEPHEN LAANDI SIMARI.....5<sup>TH</sup> DEFENDANT**

**RULING**

The plaintiffs herein, being the administrators of the estate of the Mbiyu Koinange (*deceased*) filed suit seeking to restrain the defendants by themselves, their agents and/or servants from entering, leasing out or in anyway interfering with the plaintiff's parcel of land known as LR No. 8669/3 (*Muthera Farm*) (*hereinafter referred to as the suit land*). Contemporaneous with filing the suit, the plaintiff filed an application seeking to have the defendants restrained by means of a temporary injunction from interfering with the plaintiff's ownership and possession of the suit land. When the defendants were served with the application, they duly entered appearance and filed a notice of preliminary objection. The said notice was coached in the following terms:

***“That the plaintiffs’ suit is incompetent in that it is not supported by a verifying affidavit or a compliant verifying affidavit which is contrary to the provisions of Order VII rules 1, 2 & 3 of the Civil Procedure rules (and) which omission is not a mere irregularity that can be remedied in anyway but one which is fatal to the suit”.***

On the day scheduled for the hearing of the application, the defendants were allowed to raise the preliminary objection.

Mr Karanja, Learned Counsel for the defendants submitted that the plaintiffs were not the administrators of the estate of the late Mbiyu Koinange (*hereinafter referred to as the deceased*) because the order which they annexed in support of their application as proof that they were administrators of the estate of the deceased was not in the format (*Form 41*) envisaged by **Rule 25 of the Probate and Administration rules**. Learned Counsel submitted that the only letters of administration recognized in law must be in the form provided by the law. In the absence of the plaintiffs producing such order, then the plaintiffs have not established that they are the administrators of the estate of the deceased.

Mr Karanja further submitted that the affidavit verifying the plaint was incompetent as the same was sworn by one plaintiff instead of all the four plaintiffs. He argued that none of the three other plaintiffs had authorized the 3<sup>rd</sup> plaintiff to swear the verifying affidavit on their behalf. Learned Counsel submitted that the verifying affidavit had to be signed by all the plaintiffs unless the other plaintiffs had given authority in writing to the plaintiff who swears the verifying affidavit. The defendants further submitted that the plaintiffs had failed to disclose that they had filed another suit against the defendants over the same subject matter which suit was still pending hearing and determination by this court. The defendants argue that the matters in dispute in this suit are similar or the same as the matters in dispute in Nakuru HCCC No. 341 of 2004. The defendants submit that there was no reason why the plaintiffs did not file the application for injunction in the said pending suit. For the three legal reasons, the defendants urged this court to strike out the plaintiffs' suit with costs to the defendant. Learned Counsel relied on several decided cases in support of his submissions.

Mr Mbiyu, Learned Counsel for the plaintiffs opposed the preliminary objection. He submitted that the preliminary objection raised did not have any merit. He submitted that the plaintiffs had established that they were the administrators of the estate of the deceased by annexing an order which was issued by the court. He submitted that the fact that the said order was not extracted in the form contemplated by **Rule 25 of the Probate & Administration Rules** did not make the said order any less an order signifying that the plaintiffs were the administrators of the estate of the deceased. Learned Counsel urged this court to apply substantive justice in this case instead of being at haste to strike out pleadings based on technicalities. He argued that the plaintiffs had properly brought this suit as the legal representatives of the estate of the deceased. He submitted that the law enjoined them to file the suit together but any one of them could execute the verifying affidavit. In Mr Mbiyu's view, the affidavit filed in verification of the plaint was sufficient to sustain the suit.

On the issue of the pending suit, he submitted that the cause of action in the said pending suit was different from the current suit. He stated that the plaintiffs could not file the application for injunction in the other suit as there was another pending application for injunction by the defendants herein in the other suit. He argued that the plaintiffs were wrongly joined as parties in the said pending suit. He further submitted the trespass which the plaintiffs were seeking to restrain by means of a temporary injunction had not arisen during the pendency of the suit in question. He submitted that the provisions of **Order VII Rule 2(a) of the Civil Procedure Rules** only applied to a plaintiff and not to defendants. He argued that the defendants used the wrong procedure in seeking to have the plaintiffs' suit struck out by raising a preliminary objection. He submitted that the defendants ought to have filed an appropriate application to strike out the suit under the provisions of **Order VI Rule 13 of the Civil Procedure Rules**. It was contended on behalf of the plaintiffs that the suit herein was not filed by the plaintiffs in their personal capacity but filed in their capacity as the administrators of the estate of the deceased. He submitted that one of the persons who swore an affidavit in support of the application for interlocutory injunction was employed as a manager of the suit land and therefore was aware of all that was taking place in the suit land. It was therefore not necessary for him to obtain a power of attorney before swearing the affidavit in support of the application.

I have carefully considered the preliminary objection raised by the defendant. I have also read the decided cases that have been referred to this court by both the counsel for the defendants and plaintiffs. The defendants have raised three points challenging the validity or the competence of the suit filed by the plaintiffs. The first issue is that the plaintiffs had not established that they were the administrators of the estate of the deceased. The defendants have argued that the order annexed to the application did not prove that the plaintiffs were duly appointed as the administrators of the estate of the deceased. Having

carefully perused the said order, I have noted that the plaintiffs were appointed the administrators of the estate of the deceased after a protracted legal tussle. The said order contains other matters which had been presented to the court for its adjudication. In the circumstances therefore the order as extracted containing all the issues that were placed before the judge who determined the issues in dispute.

Whereas I agree with the argument by the defendants that the plaintiffs ought to have extracted the order granting them letters of administration to the deceased estate as contemplated by **Rule 25 of the Probate and Administration rules**, in my humble view the fact that the said order was not extracted in the format required does not in any way diminish or lessen the effect of the order issued by the court appointing the plaintiffs as the administrators of the estate of the deceased. This failure is an irregularity which can be rectified by the plaintiffs before the main suit is heard. Further, the defendants have suffered no prejudice by the fact that the appointment of the plaintiffs as the administrator of the deceased estate is in form of an order instead of the format provided in **Rule 25 of the Probate and Administration Rules**. The preliminary objection on that point therefore lacks merit and is disallowed.

On the second preliminary point raised, the defendants have argued that the verifying affidavit in support of the plaint is incompetent as it was executed by only one of the four plaintiffs. The defendant referred this court to the decision of **J. N. Ngoka t/a Electrical Enterprises & 16 others –vs- Eldoret Municipal Council Eldoret HCCC No. 60 of 2002** (*unreported*) and **Justo Ngoka & 225 others –vs- Raiplywoods (K) Ltd Eldoret HCCC No. 69 of 2001** (*unreported*) in support of this argument. Having read the two decisions, I wish to distinguish them as regard the present case. The plaintiffs in the cases referred filed suits in their own personal capacities. In the present case, the plaintiffs have filed this suit in their capacity as the administrators of the estate of the deceased. In this regard, the powers of administrators of estates of deceased persons is governed by the provisions of the **Law of Succession Act** and **the rules** made thereunder. Having read **Section 82 and 83 of the Law of Succession Act**, I am satisfied that where more than one administrator has been appointed to administer an estate of a deceased person, then any one of them can swear an affidavit to verify a plaint filed on behalf of an estate of a deceased person. In my considered view, an administration of an estate of a deceased person confers upon the administration powers and duties which are defined by the **Law of Succession Act**. That role cannot be extended to a situation where each of the administrator of a deceased estate (*where there are more than one administrator*) is required to swear an affidavit to verify a plaint filed on behalf of the estate of a deceased person. The second preliminary objection raised by the defendants is likewise disallowed.

The third and last preliminary point raised in objection to the suit filed by the plaintiffs is that the plaintiffs unnecessarily filed this suit whereas there was another suit pending between the parties to this suit. The defendants argued that this suit ought to be struck out in view of the said pending suit. Having read paragraph 15 of the plaint filed herein, I noted that in the said pending suit, the plaintiffs were sued by one of the defendants. The said defendant sued the plaintiffs claiming ownership of the suit land. It is unfortunate that neither the plaintiffs nor the defendants thought it necessary to annex a copy of the plaint in the said suit so that this court could make an informed determination one way or the other whether this suit is a duplication of the already existing suit.

In the absence of such annexure, this court cannot with certainty agree either with the defendants or disagree with the plaintiffs by making a determination whether or not the present suit is a duplication of the already existing suit. The plaintiffs have explained that the act of trespass that they are complaining of arose after the said suit had been filed. This fact was not seriously challenged by the defendants. If that is the true position, then the cause of action in this suit arose much later than the previous pending suit. The two suits could not therefore be said to be similar or the same although they involve more or less the same parties. The defendants have not established to the satisfaction of this court that the said pending suit have been duplicated by the plaintiff's filing the current suit. For the reasons stated the third preliminary point raised in objection to the plaintiff's suit by the defendants is similarly disallowed.

The upshot of this ruling is that the preliminary objection raised by the defendants lack in merit and the same is dismissed with costs to the plaintiffs. The plaintiffs shall be at liberty to prosecute their application for injunction before another court other than this court.

**DATED at NAKURU this 21<sup>st</sup> day of September 2005.**

**L. KIMARU**

**JUDGE**