



Cheruiyot v Chief Land Registrar Nakuru & 2 others (Environment & Land Case E3 of 2022) [2022] KEELC 15186 (KLR) (5 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15186 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E3 OF 2022
LA OMOLLO, J
DECEMBER 5, 2022**

BETWEEN

SIMON KIPSANG CHERUIYOT PLAINTIFF

AND

CHIEF LAND REGISTRAR NAKURU 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

ESTATE OF DOMINIC MUKUI KIMATA (SUING THROUGH HILDA MUKUI) 3RD DEFENDANT

RULING

Introduction

1. This ruling is in respect of the 3rd defendant's preliminary objection which is on the following grounds:
 - a. The 1st defendant and the 3rd defendant herein are not legal entities capable of suing and being sued.
 - b. This matter is *res judicata*, and the court lacks jurisdiction to adjudicate the same.
 - c. This matter is time-barred under the *Limitation of Actions Act*.
 - d. No legal representation of the estate of the deceased 3rd defendant has been enjoined herein.
 - e. This entire suit is incompetent, bad in law, unsustainable, an abuse of court process, and is null and *void ab initio*.



Factual Background

2. The plaintiff herein commenced this suit on January 31, 2022 *vide* the plaint dated December 31, 2022. He prays for judgement as follows:
 - a. A declaration that the disputed piece of land; Dundori-Muguathi Block 2/81 belongs to the late Kipsoi Arap Kirech.
 - b. A declaration that the Nakuru Lands Registry processes the title documents of the property; Dundori-Muguathi Block 2/81 in the name of the late Kipsoi Arap Kirech.
 - c. A declaration that all other foul and existing title deeds over the same property from both Simon Changwany Kandagor and Dominic Kimata Mukui and/or any other be confiscated removed, deleted and/or expunged permanently from the system.
 - d. Declaratory orders that the green book pertaining to this property Dundori-Muguathi 2/81 be released for extensive scrutiny.
 - e. Plaintiff be awarded costs of this suit.
3. The 1st and 2nd defendants stated that they would not be participating in the hearing of the preliminary objection.

The 3rd Defendant's Contention

4. The 3rd defendant, in addition to the preliminary objection, filed an affidavit on February 28, 2022 sworn on the same date by the advocate on record.
5. Counsel for the 3rd defendant states that she swears the affidavit on purely formal and uncontestable matters which are already on the court record.
6. She also depones that she only swears the affidavit in order to place on record previous Judgements of the court relating to the same subject matter and the same parties herein.
7. It is her deposition that she only does so for ease of reference of the court and of the parties.
8. She has annexed copies of the judgement and decree in Nakuru ELC Case No 371 of 2013 and Nakuru ELC JR No 3 of 2019 and a replying affidavit of one Samson Kiplangat Ng'etich in the said JR No 3 of 2019.
9. Counsel for the 3rd defendant urges the court to call for and peruse the entire court files in the said cases, for a full grasp of the facts and determination therein.
10. It is her contention that the said cases were on the same dispute of ownership of the suit land between the same parties herein or parties claiming through or under them. The further states that said cases were finally determined by this court and cannot therefore be re-litigated upon.
11. It is her further contention that the plaintiff avers that he is suing on behalf of the estate of his deceased father and also on behalf of his living siblings who include one Samson Kiplangat Ng'etich. She contends that the said Samson Kiplangat Ng'etich was the defendant and interested party in the aforesaid cases.



12. She further contends that no grant of letters of administration and no authority to bring a representative suit has been filed by the plaintiff herein.
13. She contends that the plaintiff therefore has no locus standi and the suit is bad in law and only fit for striking out.
14. She also contends that according to her personal knowledge as the advocate for the 3rd defendant, no grant of letters of administration or probate has been sought or granted to Hilda Mukui.
15. She further contends that no such grant has been produced or filed by the plaintiff and the 3rd defendant is therefore not a proper or legal party and their name should be removed or struck out from the suit.

Issues For Determination

16. The 3rd defendant filed submissions dated May 24, 2022 while the plaintiff filed his submissions dated July 25, 2022.
17. The 3rd defendant submits that the suit is *res judicata* because the dispute herein is over land parcel No Dundori/Muguathi Block 2/81 which has previously been adjudicated upon and finally determined by this court in two different suits between the same parties and parties claiming through them.
18. It was submitted that the plaintiff stated in the plaint that the suit land belonged to his late father Kipsoi Arap Kerich who was survived by his six children that included Samson Kiplangat Ngetich who was the 9th defendant in Nakuru ELC No 371 of 2013 and the interested party in Nakuru ELC JR No 3 of 2019.
19. The 3rd defendant also submits that the plaintiff admitted that he is bringing the suit on behalf of the estate of his late father and his siblings and also expressly admitted that he had not taken out grant of letters of administration in respect of the estate.
20. It is the 3rd defendant's submissions that in Nakuru ELC No 371 of 2013, judgment was delivered on March 29, 2017 on the issue of ownership of the suit property in this matter and it was between the 3rd defendant and the plaintiff's brother Samson Kiplangat Ngetich who was the 9th defendant.
21. It is further submitted that Samson Kiplangat Ngetich who is the plaintiff's brother was also claiming the suit property on behalf of their deceased father. The court in its judgement declared that Samson Kiplangat Ngetich had no right whatsoever over the suit property registered in the name of Dominic Mukui Kimata and this suit is therefore *res judicata*.
22. The 3rd defendant relies on section 7 of the *Civil Procedure Act* 2010 and the Supreme Court case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR in support of his arguments.
23. On the question of *locus standi*, the 3rd defendant reiterates that the plaintiff does not hold a grant of letters of administration to the estate of his late father Kipsoi Arap Kerich (deceased) and the suit is therefore incompetent.
24. The 3rd defendant relies on the cases of *Isaya Masira Momanyi v Daniel Omwoyo & another* [2017] eKLR, *Rajeshi Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR among other cases in support of his arguments.
25. The 3rd defendant also submits that the plaintiff's claim is barred by limitation of time under section 7 of the *Limitation of Actions Act* as the cause of action arose in 1995 and by the time the present suit was filed, twenty-two years had passed. The 3rd defendant relied on the cases of *Dickson Ngige Ngugi*



v Consolidated Bank Ltd (Formerly Jimbu Credit Corporation Limited) & another [2020] eKLR and *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104.

26. The 3rd defendant also submits that a suit cannot be instituted against the government after expiry of twelve months as provided for under the *Government Proceedings Act* cap 40 and the *Public Authorities Limitation Act*, cap 39. The 3rd defendant relied on the case of *Alberta Mae Gacie v Attorney General & 4 others* [2006] eKLR in support of his argument.
27. The 3rd defendant concludes his submissions by seeking that the suit be dismissed for want of jurisdiction and further that the suit is generally bad in law, frivolous and an abuse of court process.

Plaintiff's Submissions

28. The plaintiff in his submissions identified the following issues for determination:
 - a. Whether the suit is bad for *res judicata* (*sic*)
 - b. Whether the flaws in the suit can be cured.
29. On whether the suit is *res judicata*, the plaintiff relied on section 7 of the *Civil Procedure Act* and the case of *Uhuru Highway Development Ltd v Central Bank & 2 others* Civil Appeal No 36 of 1996 and submitted that the parties in Nakuru ELC Case No 317 of 2013 and Nakuru ELC Judicial Review No 03 of 2019 are not the same parties herein and that the courses of actions are not similar.
30. The plaintiff further submitted that the 3rd defendant is making an assumption that Samson Kiplagat who has been adversely mentioned in their pleadings is a representative of the other brothers and that it is a wrong assumption.
31. The plaintiff also submits that the basis of his suit is to find out how the 3rd defendant came into possession of the suit property.
32. The plaintiff further submitted that both Nakuru ELC Case No 317 of 2013 and Nakuru ELC Judicial Review No 03 of 2019 were never heard to conclusion.
33. On the second issue, the plaintiff relied on the case of *The Co-operative Merchant Bank Limited v George Fredrick Wekesa* Civil Appeal No 54 of 1999 and submitted that the various defects pointed out by the 3rd defendant can be cured.
34. The plaintiff submitted that the fact that the plaintiff has not taken out letters of administration *ad litem* can be cured by the plaintiff taking out limited letters of grant ad litem in order to get capacity to sue on behalf of his dead father.
35. The plaintiff pointed out that the second defect was that he had sued the 3rd defendant as the estate of Dominic Mukui Kimatta (suing through Hilda Mukui) and yet the deceased's wife had not yet taken out letters of administration. He submits that this can be cured as they have already taken out a citation.
36. The plaintiff further pointed out that the third defect relates to suing the Chief Lands Registrar Nakuru which he submits can be cured by way of an amendment.
37. The plaintiff concluded his submissions by stating that the suit herein is not *res judicata* as the same he has never filed a suit and reiterated that he has admitted the various elements of the suit are defective which he intends to regularize.



Analysis And Determination

38. After considering preliminary objection, the affidavit and the submissions the only issue that arises for determination is whether the 3rd defendant's preliminary objection has merit.

39. The court in the case of *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Limited* (1969) EA 696 defined a preliminary objection as follows:

“...a “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

40. In the present matter, the preliminary objection raised is that:

- a. The plaintiff lacks locus standi to institute the present suit.
- b. The 3rd defendant is not capable of being sued.
- c. The suit is *res judicata*.
- d. The suit is time-barred under the *Limitation of Actions Act*.

41. This court will make a determination of the question of *locus standi*. Should I find in the affirmative, it shall not be necessary to determine the other aspects of the preliminary objection, which I acknowledge are also points of law and are capable of determining this suit.

42. The court in the case of *Lemitei Ole Koros & another v Attorney General & 3 others* [2016] eKLR held as follows:

“Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection.”

43. In the plaint, the plaintiff has indicated that the suit property belonged to his late father who died on September 9, 2001.

44. In his submissions the plaintiff concedes that he does not have letters of administration ad litem which letters would have empowered him to institute the present proceedings on behalf of his late father.

45. The court in the case of *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] eKLR held as follows:

“...Further the issue of *locus standi* is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. 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. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.

29. In this matter therefore the respondent lacked the requisite locus standi to institute and/or maintain the suit. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked the legal capacity to do so. They are indeed a nullity and as such lack the legal leg to stand on."

46. For a party to have *locus standi* in a suit filed in the interest of a deceased person, he or she must first obtain a grant limited to that purpose. As pointed out before, the plaintiff concedes that he did not obtain a grant *ad litem* to allow him to file this suit. He, however, submits that he intends to cure the defect by taking out letters of administration. This is stated at paragraph 18 of his submissions.
47. The plaintiff also concedes that the suit is defective for various reasons such as the 3rd defendant not being an administrator of the estate of the Dominic Mukui Kimata. He makes spirited submissions on why the suit should not be struck out. He submits that he has a plan to cure the numerous defects that have been pointed out by the 3rd defendant as preliminary objections.
48. It is apparent that if this court were to proceed with this suit, it will be perpetuating an illegality. This suit is null and void. It shall not be necessary to address the other questions raised in the preliminary objection, some of which the plaintiff concedes and proposes a cure for.

Disposition

49. The upshot of the foregoing is that the 3rd defendant's preliminary objection is merited to the extent that the plaintiff has no *locus standi* to institute and/or maintain this suit. Consequently, this suit is hereby struck out with costs to the 3rd defendant.
50. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5th DAY OF DECEMBER 2022.

LA OMOLLO

JUDGE.

In the presence of: -

Miss Omondi for the plaintiff.

Mr Waiganjo for the 3rd defendant.

No appearance for the 1st and 2nd Defendant

Court Assistant; Ms Monica Wanjohi.

