



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC 7 OF 2020**

**DANIEL NJUGUNA MBUGUA (suing as the legal representative of**

**VIOLET NJOKI MBUGUA, Deceased daughter in law & beneficiary of the  
estate of NJUGUNA KIARII) .....RESPONDENT/APPLICANT**

**VS**

**PETER KIARIE NJUGUNA.....1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR, THIKA.....2<sup>ND</sup> RESPONDENT**

**HON ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The suit was filed by the Plaintiff against the Defendants on the 28/5/2020.
2. The background to this application is necessary. The Plaintiff and the 1<sup>st</sup> Defendant are nephew and uncle respectively. According to the pleadings on record, their deceased Patriarch namely Njuguna Kiarri owned LOC1 /MUGUMOINI/1026 the suit land among other lands. The Plaintiff has filed suit as the Legal Administrator of the estate of the said deceased Njuguna Kiarri.
3. The Plaintiff is the son of Herman Mbugua Njuguna, deceased the 1<sup>st</sup> born son of Njuguna Kiarri and brother of the 1<sup>st</sup> Defendant.
4. The Plaintiff avers that the estate of Njuguna Kiarri is yet to be succeeded and that there is pending a succession cause No 330/2008 in a Thika Court. That the suit land is subject to the said succession petition.
5. It is the case of the Plaintiff that on the 15/10/18 the 1<sup>st</sup> Defendant through fraudulent means acquired the suit land in exclusion of the other beneficiaries of the estate of the deceased Njuguna Kiarri, an act that he terms as intermeddling and disinheriting the rightful beneficiaries of the estate.
6. He sought orders inter alia; injunction restraining the 1<sup>st</sup> Defendant from wasting the asset; declaratory orders that the title in the name of the 1<sup>st</sup> Defendant is illegal, unlawful, fraudulent and null and void; orders of cancellation of the said title and reversion of the title in the name of Njuguna Kiarri, deceased.
7. The suit is opposed by the 1<sup>st</sup> Defendant vide the statement of defence and counterclaim filed on the 14/7/2020.
8. The 1<sup>st</sup> Defendant faults the Plaintiff for fraudulently obtaining letters of grant of administration in the estate of Njuguna Kiarri without his consent and that of other beneficiaries. That he had filed a revocation cause against the said letters of administration.
9. Under para 4 of the statement of defence the 1<sup>st</sup> Defendant admits that the suit land was registered in the name of his father. That before his death on the 8/7/1993, Njuguna Kiarri owned parcel No LOC1/MUGUMOINI/864 (mother title) measuring 2.31 hectares. That in 1989 the mother title was subdivided into three titles; LOC1/MUGUMOINI/1026, 1027 and 1028 which portions were given to the three sons as follows; to Herman Mbugua Njuguna – parcel LOC1/MUGUMOINI/1027; 1<sup>st</sup> Defendant – parcel 1026 and Timothy Mbui Njuguna – parcel LOC1/MUGUMOINI/1028.
10. In addition, he faults the widow of Herman Mbugua Njuguna namely Violet Njoki Mbugua for taking advantage of his ailing father and

for fraudulently engineering the subdivision and disproportionate transfer of the three parcels of land and accuses her of giving herself and her husband parcel LOC1/MUGUMOINI/1027 measuring 1.21 has while he and his brother Timothy Mbui Njuguna got smaller portions of 0.56 has each.

11. Reasons wherefore the 1<sup>st</sup> Defendant in his counterclaim sought the orders inter alia of the Court to cancel the said subdivisions of the mother title and revert the suit land to the name of Njuguna Kiarri.

12. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants denied the claim of the Plaintiff in its totality.

13. On the 1/10/2020 the Plaintiff sought leave to amend his plaint as the legal representative of the estate of Violet Njoki Mbugua, his mother and wife of the late Herman Mbugua Njuguna. He attached a certificate of grant in the estate of Violet Njoki Mbugua issued to him on the 9/9/2003.

14. Though the 1<sup>st</sup> Defendant filed a Replying Affidavit on the 15/10/2020, he failed to attend Court at the hearing of the application on the 15/10/2020 whereupon the Court allowed the application and granted leave to amend to the Plaintiff. See the amended plaint filed on the 6/11/2020.

15. Fast-forward the 1<sup>st</sup> Defendant proffered this application on the 19/11/2020 in which he sought this Honorable Court's orders that the Plaintiff's suit be struck out with costs for failure to disclose a reasonable cause of action or the suit is scandalous, frivolous, vexation and an abuse of Court process.

16. The application is premised on the grounds inter alia that; The Plaintiff is not an administrator of the estate of Njuguna Kiarri and that the letters wielded by him before were revoked by the Court on the 8/9/2020 upon application. That the estate of Njuguna Kiarri is yet to be succeeded and there is a pending succession cause to wit CMPA No 330 of 2008 at Thika. That the Plaintiff being the son of Njuguna Kiarri cannot in law succeed his grandfather in view of the precedence enjoyed in law by his living sons over him, the 1<sup>st</sup> Defendant included.

17. Further that under Order 3 Rule 7 the Plaintiff is prohibited from filing proceedings as an administrator unless the dispute involves the assets of the estate of the person he represents. That the dispute at hand involves the estate of Njuguna Kiarri and not the assets or estate of Violet Njoki Mbugua.

18. The Application is opposed by the Plaintiff/Respondent vide the replying affidavit filed on the 30/11/2020.

19. Despite service the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have not filed any response to the application.

20. The Plaintiff contends that he holds a certificate of confirmation of grant /letters of administration in the estate of the late Violet Njoki Mbugua, his late mother who was a beneficiary and daughter in law to the late Njuguna Kiarri and that he has locus to file the suit. That his mother's interest in the estate of Njuguna Kiarri devolved to him hence the standing in the suit.

21. Further the Plaintiff faulted the 1<sup>st</sup> Defendant for not disclosing to the Court he unlawfully and illegally registered himself as the owner of the suit land using forged documents before the estate of Njuguna Kiarri is settled. That the suit land is subject to the succession cause No 330 of 2008, Thika.

22. That on advice of the Learned Magistrate in Succ cause No 330 of 2008, he filed the suit in Environment and Land Court.

23. The 1<sup>st</sup> Defendant/Applicant submitted that the Plaintiff has no authority to file the suit on behalf of the estate of Njuguna Kiarri under whatever disguise or cover. That no letters of administration have been issued in the said estate and this Court as no jurisdiction to so entertain matters succession which is in the province of the probate Court hence the question of the capacity or otherwise to represent the estate of the deceased by the Plaintiff ought to be determined by the family Court in the first instance.

24. Maintaining that the Plaintiff is prohibited from bring suit for and on behalf of the estate of the deceased, the Applicant relied on Order 3 Rule 7 of the Civil Procedure Rules which provides as follows;

“No claim by or against an executor or administrator, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in of which the plaintiff or Defendant sues or is sued as executor or administrator, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.”

25. Further that the Court in the case of **Bolton Vs Salim Khanoi (1958) EA 360** held that a suit filed by a Plaintiff without letters of administration was null and void. That the Plaintiff lacks locus in the state of the Njuguna Kiarri without first obtaining the necessary letters of administration. Inter alia that a suit filed without obtaining such letters is invalid and cannot be cured by a party obtaining letters of grant of administration subsequently. See the case of **Isaya Masira Momanyi Vs Daniel Omwoyo & Anor ELC 167 of 2016**.

26. That at the time of filing the instant suit the Plaintiff had no letters to clothe with capacity or locus to represent the estate of the deceased father and grandfather.

27. The Plaintiff/Respondent submitted that his cause of action is based on fraudulent transfer of the suit land to the exclusion of the other beneficiaries of the estate of the deceased. That the letters of administration he holds in the estate of Violet Njoki Mbugua entitles him to sue in the estate of the late Njuguna Kiarri. That he is pursuing the share of his mother in the estate and the suit land. That his deceased mother is

a beneficiary in the estate of the deceased grandfather. Further that he and the 1<sup>st</sup> Defendant are family members a fact that has not been denied.

28. Relying on the case of the estate of **Ibrahim Hassan alias Sheikh Ibrahim Hassan Succ cause No 36 of 2017**, he submitted that the Court allowed a grandchild of the deceased to revoke the and or annul the letters of administration granted the Respondent who happened to be his aunt. That the Court in another case, in the estate of Joseph Namayi Lukongo Succ cause No 457 of 2005 allowed a granddaughter to revoke letters of administration of the estate of the deceased.

29. Whilst urging the Court to determine the ownership of the suit land, he relied on the case of the estate of M'Chokera Ramare Succ cause No 457 of 2010 where the Court held that controversies as to ownership dispute have to be determined in the ELC forum and the results submitted to the probate Court for implementation.

30. In further supplementary submissions the Respondent/Plaintiff by and large reiterated the contents of the earlier submissions.

31. The issues for determination are; whether the Plaintiff had/has locus to file this suit and if not, whether the suit should be struck out for being incompetent; who bears the cost of the application.

32. I will invert the issues by starting with the second issue. Order 2 Rule 15 of the Civil Procedure Rules states as follows;

“(1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

33. The power to strike out suits is vested in the Court by Order 2 Rule 15. The Court retains the discretion to strike out a plaint if it discloses no cause of action and to strike out a defence if it discloses no reasonable defence or to order their amendment.

34. A cause of action is defined in **Black's Law Dictionary 9<sup>th</sup> Edition** as Page 251 as;

“a group of operative facts which giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person”.

35. Pearson J in **Drummond Jackson – Vs – Britain Medical Association (1970)2 WLR 688 at page 616** defined a cause of action as:

“A cause of action is an act on the part of the Defendant, which gives the Plaintiff his cause of complaint. Therefore, what the Plaintiff needed to show was that he had a prima facie case against the Defendants.....”

36. It is not in dispute that the suit land was owned by the late Njuguna Kiarri before his demise in 1993. Later the mother title was subdivided into 3 portions; parcels LOC1/MUGUMOINI/1026, 1027 and 1028. It is also not in dispute that the estate of the late Njuguna remains unsucceeded as can be seen in Succ cause No 330 of 2008.

37. Section 45 of the Succession Act provides as follows;

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after

deducting any payments made in the due course of administration.”

38. Further Section 82 provides as follows;

“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;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant;

(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation: Provided that except so far as otherwise expressly provided by any will—

(i) no appropriation shall be made so as to affect adversely any specific legacy;

(ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the Court shall be required.”

39. In the case of **Alfred Njau –Vs- City Council of Nairobi [1983] KLR 625** the Court of Appeal, held inter alia that

“...Locus standi” literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding”.

40. In the case of **Julian Adoyo Ongunga –vs- Francis Kiberenge Abano Migori Civil Appeal No.119 of 2015**, Justice A. Mrima had this to say on the issue of a party filing a suit without having obtained a limited grant.

“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.

41. It is on record that the Plaintiff obtained letters of grant of administration in the estate of Njuguna Kiarri on the 11/5/2020. It is also evident from the pleadings of the parties that the said letters were revoked vide the ruling of the Court issued on the 30/6/2020 on the grounds that the said letters were obtained fraudulently.

42. It is evident that by the time of filing suit on the 28/5/2020 the Plaintiff possessed letters of grant of administration issued to him on behalf of the estate of Njuguna Kiarri. Both parties have admitted that the estate of Njuguna Kiarri is yet to be succeeded. Going by Section 45 of the Succession Act above any party that purports to file suit or deal with the estate of the deceased prior to obtaining letters of grant of administration is in law intermeddling and is committing a crime punishable in law.

43. The Plaintiff has argued that since he holds letters of administration in the estate of his mother, it gives him standing in suing in the estate of the late Njuguna Kiarri. That his mother is a beneficiary in the estate. To hold this position by the Plaintiff is incorrect to say the least. I say so because the parties are commonly agreed that the estate of the deceased is yet to be subdivided so as to determine the beneficiaries and secondly the free assets of the deceased estate.

44. I have perused the confirmation of grant of administration issued to the Plaintiff in the estate of Violet Njoki Mbugua and note that the suit land is not part of the estate of his deceased mother. Part of the assets of the late Violet Njoki Mbugua is parcel No LOC1/MUGUMOINI/1027 which devolved to Peter Kiarie Mbugua and John Mwangi Mbugua, the brothers of the Plaintiff. If I am not mistaken this parcel emanated from the mother title owned by the family partiach, Njuguna Kiarri. I say no more lest I wade into the arena of

probate proceedings that are pending in another fora.

45. Having said that it is imperative to point out that by the time the letters of administration in the estate of Kiarri were revoked, the Plaintiff lost the capacity to file suit and the act of amending the Plaintiff to bring himself under the armpt of his deceased mother's estate did nothing to cure the want of letters of administration which in my view is not a technicality but goes right to the heart of the suit.

46. It is now settled that striking out is a drastic remedy and it has been held that striking out procedure can be invoked only in plain and obvious cases and such discretion should be exercised with extreme caution. In the case of **D T Dobie K Limited Vs Muchina (1982) KLR** Justice Madan stated that if such a suit shows a semblance of a cause of action provided it can be injected with life through amendments, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it.

47. Exercising extreme caution as guided by the wisdom of the Justice Mdana (as he then was) in D T Dobie case, I find that this matter cannot be saved. It is plain white – the Plaintiff has no locus and has not exhibited any cause of action. He has no mandate to bring the suit in the absence of letters of grant of administration. Justice will be served to this case if the parties are let to pursue the succession of the estate and as any intermediate preservatory orders can still be obtained from the said probate Court.

48. It is for that reason that the application is considered meritorious. The suit is therefore struck out with costs to the 1<sup>St</sup> Defendant/Applicant.

49. It is ordered.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 4<sup>TH</sup> DAY OF MARCH 2021.**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

**Daniel Njuguna Mbugua in person**

**1<sup>st</sup> Defendant: Absent**

**AG is Absent for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

**Court Assistants: Kuyiki & Njeri**