



**Nyaboke & 3 others v Nyambeki (Environment and Land Appeal
E001 of 2024) [2024] KEELC 3591 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3591 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E001 OF 2024**

M SILA, J

MAY 2, 2024

BETWEEN

ZIPPORAH NYABOKE 1ST APPELLANT

DORCA BIRONGA 2ND APPELLANT

RUTH MORAA 3RD APPELLANT

OSEKO SHEM 4TH APPELLANT

AND

LEAH NYAMBEKI RESPONDENT

*(Being an appeal against the judgment of Hon. C.N. Sindani, Principal Magistrate
delivered on 29 December 2023 in Ogembo SPMCC/ELC No. E031 OF 2023)*

JUDGMENT

1. The genesis of the suit before the trial court was a plaint filed on 14 November 2023, by Leah Nyambeki, the respondent herein. She sued the appellants on the basis that the appellants wished to bury the remains of their mother, Magucha Onyancha (deceased) on the land parcel Bassi/Bogetaorio II/1035. She averred that she was the first born of Abel Mbera Orwoba (Abel) who she pleaded was the sole administrator to the suit land where the respondents were residing as squatters. In her suit, she sought the following orders (slightly paraphrased for brevity) :
 - a. A declaration that her decision as the first born child to the late Abel Mbera Owroba who was the sole administrator to all that parcel of land known as Bassi/Bogetaorio II/1035 is proper, right and that the defendants and all other persons are bound to respect her decisions on matters touching on the said land.



- b. A permanent injunction to restrain the defendants from burying the remains of the late Magucha Onyancha and/or interfering whatsoever with the property Bassi/Bogetaorio II/1035.
 - c. Costs.
 - d. Such other relief that the court may deem just and expedient.
2. Together with the plaint, the respondent filed an application under certificate of urgency to have the burial of the late Magucha Onyancha stopped pending hearing of the suit which was allowed.
3. The evidence presented by the respondent was that the late Magucha Onyancha was not a wife of her father Abel Mbera Orwoba. It was said that Abel Mbera had married Esther Obachi (mother to the respondent) as his first wife, though they separated, and that he may have had a second wife called Suzzie Stewart but he never married Magucha Onyancha nor recognized her as his wife. Part of the evidence that the respondent presented in order to support her case were the proceedings and judgment delivered on 4 February 2022 in the suit Nairobi Milimani Commercial Courts, CMCC No. E080 of 2022, Magucha Onyancha vs Leah Nyambeki & 5 Others (hereinafter simply referred to as 'the Nairobi case') wherein the now deceased Magucha Onyancha had filed suit seeking orders that she is entitled to bury the remains of Abel Mbera who had died on 12 January 2022. She claimed to be the second wife of the said Abel Mbera. That suit was dismissed with the trial court making a finding that Magucha Onyancha had not proved that she was a wife to Abel Mbera and she therefore did not have the legal right to bury the body of Abel. The final order made in that case was that the body of Abel be released to his daughters, Leah Nyabeki and Gloria Magoma, for cremation. The respondent asserted in the present suit that Magucha Onyancha together with her children were mere squatters and therefore her children had no right to bury her remains on the suit land. She also called evidence that in June 2020, her late father wished to demolish the structures on the suit land so as to have Magucha Onyanca evicted from the land.
4. Her evidence regarding ownership of the suit land was that she owns the land that her father gave her. She produced a Land Control Board consent dated 23 September 2015 which appears to be a letter of consent given to Abel to subdivide the suit land into three portions. She also produced a letter written by her father dated 23 September 2015 addressed to the Kisii Land Registry applying to subdivide the suit land into three portions and directing the portions to be assigned to the respondent (0.3809 Ha), Isaack Nyamboga Orwoba (1.973 Ha) and Gloria Magoma Orwoba (1.603 Ha). Gloria and the respondent are daughters of the late Abel whereas Isaack Nyamboga is his brother. Cross-examined, she acknowledged that she had not produced the title deed to the suit land nor a search of it. She testified that she obtained title and stated that it would be a lie to say that she has never been registered as owner of the land. She stated that she filed suit because it is her land. She asserted that she had locus standi to bring the suit.
5. The case of the appellants was that they were children of Machunga Onyancha and Abel Mbera and that they lived on the disputed land where they had a house. They averred that Machunga was the second wife of Abel with the respondent's mother being the first wife. They did not know of any other wife. Regarding the title to the suit land, their contention was that the title is in the name of Eunice Birongo their grandmother (mother to Abel). They claimed that it was Gloria who wished to evict them from the land in 2020 and not their father. DW-3 Mary Nyanduko Nyakundi, who was a sister in law to Abel (wife to his step-brother) testified that the suit land did not belong to Abel. She testified that her father in law had three wives, Eunice Birongo Orwoba, Sarah Orwoba Ongoro and Rebecca Nyabate Orwoba. Her position was that the land belongs to Eunice. She stated that Eunice had three children, Abel, Isaac Nyamboga and Tabitha Onyongo, and she thought that those entitled to inherit



the land were Abel and Isaac. She stated that Magucha was married by Abel in 1997 and she came to live on the suit land. She was working as a teacher. Cross-examined, she reiterated that Abel did not have title to the land but was pursuing it. She denied that Abel subdivided the land and gave it to the respondent.

6. After assessing the pleadings and the evidence, the trial court, delivered judgment in favour of the respondent in terms of prayer (b) of the plaint. He referred to the Nairobi case and its judgment and held that he had no business interfering with the holding therein. Regarding ownership of the land he held as follows :

“The defendants argue that their mother was married to the family of Abel Mbera and should be buried there. They have also raised the issue that the land was registered in the name of their grandmother Birongo (mother to Abel) as such the plaintiff has no locus standi. As I sit hereby no party has availed any present current search and confirm the actual status of registration. The plaintiff produced copy of the letter of application for consent to the land control board and another showing that consent had been granted in equally put at disadvantage since I am, told the parcel file is missing at the lands registry as such I am only stuck with the latest document being the consent. I can’t tell if the transfer and title was issued to the plaintiff as she claims. However as its trite law who alleges must prove the defendants claim that the transfer nor title was given. They claim that the consent documents were forgeries and yet have not availed any other proof even a present search to confirm the same. I am persuaded to assume that indeed the consent was issued to the plaintiff as such she has locus standi herein.”

7. The trial court declined to grant prayer (a) of the plaint. The court reasoned that to grant it will be banishing the appellants from the land and deny them a chance to pursue their interest in the estate or the land. The court also thought that it would elevate the respondent to the status of a small god who would lord over the lives of the others who may have a valid interest in the land. The court however allowed prayer (b) of the plaint on the basis that the deceased was not married to Abel Mbera pursuant to the holding in the Nairobi case. He held that to allow her burial on the land would not be lawful since she is a stranger to the family as she was not legally married to Abel.
8. Aggrieved, the appellants have preferred this appeal. The appellants raise issue that the trial court was wrong in holding that the respondent had locus standi to sue in respect of the suit land. They fault the trial court in holding that the respondent had locus to sue because she displayed a consent to subdivide the land. They also aver that the trial court failed to give sufficient weight to the evidence given that Marucha was married to Abel Mbera and that the court misdirected itself in relying on the judgment in the previous suit. The appellants contend that the trial court erred in issuing an injunction stopping the appellants from burying their mother on the suit land and erred by shifting the burden of proof regarding title to the land to the appellants. They seek orders that the primary suit be struck out as it was filed by the plaintiff without locus standi together with costs.
9. I directed that the appeal be argued through written submissions and I have seen the submissions of Mr. K.A Nyachoti, learned counsel for the appellants, and Mr. Wachira learned counsel for the respondent.
10. I will start by appreciating that there is no cross-appeal filed by the respondents on the refusal of the trial court in allowing prayer (a) of the plaint. What it means is that the respondent was not acknowledged to have the right to administer the land parcel Bassi/Bogetaorio II/1035, or the right to make decisions over it which would bind all other persons, on the basis that she is the first born child of the late Abel Mbera. It follows that the court acknowledged that the mere fact that one is the first born child, by itself, does not give capacity to make decisions over property of a deceased person. Having found as



such, then it behoved the court to find on what basis or capacity the respondent was coming to court to sue over the land parcel Bassi/Bogetaorio II/1035.

11. In his submissions, Mr. Nyachoti argued that the plaintiff had no locus standi to sue as she was not the legal representative of the estate of Bironga w/o Orwoba under whose name the title to the suit land is registered. He submitted that there was never any proof that Abel was ever appointed as administrator of the estate of his mother Bironga. He pointed out that the respondent neither had a limited grant nor a full grant of letters of administration. He added that the suit land neither belonged to the plaintiff nor to her father Abel.
12. On his part, Mr. Wachira submitted that the respondent ‘brought the claim as a daughter and, to a large extent, one of the beneficiaries of her late father’s estate, rather than as an administrator of her late grandmother’s estate.’ On the contention that she had no legal standing for want of letters of administration, he submitted that before his death, the respondents father attempted and/or was in the process of transferring the suit piece of property from himself to two of his children including the respondent herein together with his brother. He submitted that this is ‘enough evidence that succession of the estate of the respondent’s grandmother was carried out long ago.’ He referred to the letter written by Abel and the consent issued by the Land Control Board. In addition, he urged, without giving any authority, ‘that equity will intervene to restrict legal processes where it is determined that one party wants an unfair advantage over the other, resulting in an injustice.’ He submitted that the Appellant’s deceased mother should not be buried in a property that she had no interest whether legal and or beneficial save to her being a squatter. He referred me to the case of *Re Estate of Benson Maingi Mulwa (deceased) (2021) eKLR* and the dictum therein of Odunga J (as he then was) where he stated as follows :

“In my view since intermeddling can be committed even by administrators, any person interested in the state of a deceased person as a beneficiary or otherwise is properly entitled to move the court and seek orders intended to preserve the estate. It is therefore not mandatory that such an application be made by the administrators or with consent or authority of the other beneficiaries since a beneficiary is properly entitled to protect his or her interest in the estate.”

13. He submitted that the action of burying the deceased on the land will constitute interference with the Respondent’s deceased father’s estate or, at the very least, the Respondent’s property in this case.
14. I am not persuaded by the above submissions of Mr. Wachira. It is trite that one requires locus standi in order to file a private suit over private property. If that was not the case then the courts would be inundated by all manner of suits over private issues that do not concern the litigants. Busy bodies will have a field day in court. When it comes to land, the person with locus standi is the land owner. That is the person vested with rights over the land as enunciated by Section 24 of the *Land Registration Act* which provides as follows :

24. Interest conferred by registration

Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together



with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

15. It will be seen from the foregoing that in respect of registered private land, it is the person who is the registered proprietor who is vested with the rights and privileges appurtenant to the land. It is therefore of critical importance that when a plaintiff sues so as to protect private land he needs to demonstrate that he is the one who is vested with rights over that land. There is no question that if he is the registered proprietor then he can sue. If the registered proprietor is dead, then the person who has locus to sue is the legal representative of the registered proprietor. That is what comes out of a reading of Section 79, of the [Law of Succession Act](#), Chapter 160, Laws of Kenya, which provides as follows :
 79. Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.
16. In addition to the above Section 82 of the [Law of Succession Act](#), provides for the powers of the personal representative of the deceased. Among those powers is :
 - a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate.
17. The above provisions are plain and clear. Where land is owned by a person who is deceased, the capacity to sue over that land vests in the legal representative of the estate of the deceased and nobody else. To hold otherwise will be to negate the entire purpose of having an orderly way of administering estates of a deceased, and all and sundry, including busy bodies, will be at liberty to take charge of the estate of the deceased and file suits purporting to be for the interest of the estate of the deceased. For order to prevail, it is the legal representative who is given capacity by law to administer the estate of the deceased, and among the powers given to such legal representative is the power to institute suits for the preservation of the land or other property left by the deceased. One does not even need a full grant to file suit in respect of the estate of a deceased person. He/she can quickly apply for a limited grant ad litem for purposes of filing suit.
18. Another thing : when you come court, you must make clear in what capacity you come to court. You cannot come to court with ambivalence and leave the court to guess your capacity. If it is land in issue, you need to be clear whether you have come to court as the land owner, beneficial owner, legal representative or other capacity. It is not for the court to imagine your capacity. In our case, the respondent first needed to be clear on who owns the suit land. She then needed to be clear regarding her capacity to sue over the land. She was the one who came to court and she was the one who bore the burden of proof, not the appellants.
19. In our instance, the plaint of the respondent seems to suggest that she had capacity to file suit because she was the first born of Abel Mbera and that Abel was the sole administrator of the suit land. Now, that pleading alone would mean that the land was registered in the name of somebody else of whom Abel was administrator. The plaintiff did not disclose who this somebody else was. Neither did she display any letters of administration issued to Abel Mbera. Most significantly, she did not display that she holds any grant of letters of administration in respect of the person who was the registered proprietor of the land. When she testified, the plaintiff appeared to change her pleadings and allege that she now has title to the suit land. If that was the position then she needed to provide proof that indeed she holds title



- to the suit land. She did not produce anything. She produced no title deed and produced no search to indicate that she is the registered proprietor of the land or any subdivision of it or indeed who the registered proprietor of the land was.
20. There was insinuation in the judgment of the court that the land parcel file went missing at the lands registry. I wonder where the trial court got that because I have not seen it in the evidence. But even assuming that this is the position the respondent needed to call somebody from the Lands Registry to testify on that point and provide any documents of title that could shed light as to the ownership of the suit land. From the title deed that was annexed by the respondent when she filed the application for injunction, it would appear that the property is still in the name of Bironga. If so, the plaintiff needed to have a grant of letters of administration for the estate of Bironga in order to file suit to stop the burial.
 21. The argument of Mr. Wachira, that because there was displayed consent by the Land Control Board to Abel Mbera to subdivide the land then succession must have been done does not wash. The issue of capacity was raised by the appellants in their defence. It was a central issue in the case. The respondent needed to table evidence that Abel Mbera and/or herself represented the estate of the registered proprietor. It cannot be said that because one has got a Land Control Board consent in his name then he must be the owner of the land. A person can proceed to find a way to get consent when he ought not to. It was also urged that the respondent could file suit as beneficial owner or under equity but I am not persuaded. Equity does not override the law and can only come in aid when the law does not address a particular point. In our case the *Law of Succession Act* adequately addresses who can represent a person who is deceased and it was not shown that the respondent could not move court to quickly obtain a limited grant in order to file suit. The issue of beneficial ownership does not arise and even if it were, I observe that this land under the name of Bironga, was to be inherited by many other persons not just Abel Mbera and his children. The other beneficial owners do not appear to have any problem with the presence of Machunga Onyancha on the land or her burial on it. In fact, Isaac Orwoba, brother to Abel and who may very well be a beneficial owner of the land had testified in the Nairobi case that Machunga was wife to Abel. Given that position the plaintiff needed to demonstrate proper capacity to sue over the suit land that would give her preference over the other beneficial owners. She did not.
 22. I am thus persuaded that she had no locus standi to sue the appellants over the suit land. Having no locus standi she could not maintain the suit and the case was one for striking out for want of locus standi. It did not even deserve to proceed on merits.
 23. It is on the basis of the foregoing that I allow this appeal. I set aside the judgment of the trial court. I substitute that judgment with an order that the case of the respondent before the trial court is dismissed for want of locus standi and capacity to sue over the land parcel Bassi/Bogetaorio II/1035. There having been no proper suit there is no basis upon which this court can interrogate whether or not the body of Machunga ought to be interred in the suit land and I make no orders on that. That issue could not and cannot be determined in the context of this case as the person who filed suit had no locus to do so. The appellants will have the costs of the suit before the trial court and the costs of this appeal against the respondent.
 24. Judgment accordingly.

DATED AND DELIVERED THIS 2 DAY OF MAY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in presence of:

Mr. K.A Nyachoti for the appellants



Mr. Omuyoma and Mr. Wachira Gachoka for the respondents
Court Assistant – David Ochieng’

