



REPUBLIC OF KENYA



KENYA LAW
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**Aengwo v Chesaina (Environment and Land Appeal E002 of 2023)
[2024] KEELC 5110 (KLR) (3 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5110 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E002 OF 2023**

L WAITHAKA, J

JULY 3, 2024

BETWEEN

THOMAS AENGWO APPELLANT

AND

FRANCIS ARGUT CHESAINA RESPONDENT

*(Being an Appeal from the Ruling of Hon. P. Kosgey – (SPM)
delivered on 13th June 2023 in Kabarnet ELC Case No. E007 of 2023)*

JUDGMENT

Introduction

1. By a plaint dated 11th April, 2023 the plaintiff (now respondent) instituted a suit in the lower court to wit Kabarnet ELC Case No E007 of 2023 seeking judgment against the defendant (now appellant) for a permanent injunction restraining the defendant by himself, his servants, representatives and/or agents or otherwise howsoever from entering and/or trespassing upon, constructing on and/or in any other manner dealing with that plot of land known as plot No 70 Kabartonjo town (hereinafter referred to as the suit property); an order of eviction and costs of the suit. In alternative, the plaintiff seeks a declaration that he is the lawful purchaser and/or owner of the suit property.
2. The plaintiff's suit is premised on the grounds that at all times material to the suit, he was the beneficial owner of the suit property having purchased it from the late Aengwo Chepchieng on 14th July 2015; that the defendant has encroached and/or trespassed into the suit property and forcefully erected structures therein.
3. Terming the actions of the defendant complained of unlawful and incompatible with his right of quiet, peaceful possession, occupation, use and control of the suit property, the plaintiff avers that he has suffered loss and prejudice in that he is unable to develop the suit property.



4. Upon being served with summons to enter appearance, the defendant did not file a statement of defence but filed a notice of preliminary objection dated 22nd May, 2023 seeking to dismiss the plaintiff's suit in limine on the grounds that it is premature, incompetent, frivolous, vexatious and an abuse of the court process; that the defendant is improperly sued as he is not the administrator of his father's estate comprised in the suit property; that there is no evidence that the plaintiff has taken out citation against the estate of the defendant's deceased father; that the orders sought cannot issue against the defendant without legal representation of the estate of his deceased father and that the court lacked jurisdiction to entertain the matter. The defendant further contended that the suit is fatally defective and incapable of being salvaged.
5. The preliminary objection was disposed of by way of written submissions.
6. Upon considering the preliminary objection the learned trial magistrate observed/held:-

“I have considered the grounds in support and in opposition to the preliminary objection together with the submissions on record.

The main issue for determination is whether the preliminary objection has merit...

Before delving into the merits of the preliminary objection it is imperative for the court to state that when an issue concerning locus standi is raised, it is about the rights of the parties to bring an action or be heard in a given forum and has entirely nothing to do with jurisdiction of the court. The only end result is that a suit may be rendered a non-starter but not that the court has no jurisdiction. That said, I find that the issue raised on whether the court has jurisdiction to handle the matter is neither here nor there in the context of this preliminary objection and I will not delve into it.

The main issue that arises in the preliminary objection is whether the defendant has locus standi to be sued in the matter. Locus standi is defined in Black's Law Dictionary, 9th Edition (Page 1026) as “the right to bring action or to be heard in a given forum”.

It has been submitted that the Plaintiff is not the administrator of the estate of Aengwo Chechieng and has therefore been improperly sued.

A precursory look at the plaint at paragraph 4 shows that the cause of action concerns the Defendant's encroachment and/or trespass on the suit land and erecting structures therein. At paragraph 7 of the plaint, the plaintiff seeks to have the Defendant restrained from entering, constructing, trespassing and/or dealing with the suit land, Plot 70 Kabartonjo. One of the prayers sought against the Defendant is an eviction order.

The complaint of trespass is specific to the actions done by the Defendant not the estate of the deceased. Therefore, as the person accused of trespass, the Defendant has been sued in his personal capacity as a trespasser in spite of the fact that the claim arises from alleged sale agreement between the Plaintiff and the Defendant's father. This is the same position that was held in the case of *Joseph Owiso Ogombo v Sebastian Ben Adviori* (2022) eKLR.

In the case of *Oraro v Mbaja* (2005) eKLR it was held that anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be test by rules of evidence.

I find that the preliminary objection is premised on facts that includes whether or not the Defendant has trespassed on the suit land in his personal capacity...



Whether or not the Defendant trespassed on the suit land is a triable issue that will be determined after hearing the parties. Consequently, I do find that the preliminary objection lacks merit and is hereby dismissed with costs to the Plaintiff.”

The Appeal

7. Dissatisfied with decision of the trial court, the defendant appealed to this court on the grounds that the learned trial magistrate erred by:-
 1. Misapprehending the principles governing what constitutes a preliminary objection;
 2. Failing to determine that the subject matter is a property registered in the name of a deceased person;
 3. Holding that the court had jurisdiction to hear and entertain the matter;
 4. Considering issues of trespass and encroachment that were never raised in the preliminary objection;
 5. Failing to consider his submissions;
 6. Failing to conclusively decide on the issue of locus standi; and
 7. Dismissing his preliminary objection.
 8. Pursuant to directions given on 12th March, 2024 the appeal was disposed of by way of written submissions.

Submissions

Appellant's Submissions

9. In his submissions filed on 21st May, 2024 the appellant has identified three issues for the court's determination. These are:-
 - a. Whether the suit property is in the name of a deceased person;
 - b. Whether the defendant had locus standi; and
 - c. Whether the court had jurisdiction to hear and determine the suit.
10. On whether the suit property is in the name of a deceased person, it is submitted that it not in issue that the suit property is in the name of the defendant's father. That fact is said to be borne out by paragraph 3 of the plaint and paragraph 11 of the affidavit sworn in support of the plaintiff's interlocutory application.
11. Arguing that the plaintiff ought to have identified the beneficiaries of his father's estate and compelled the defendant to institute succession or take out letters of representation, the defendant/appellant, submits that the plaintiff did not prove that he is the registered owner of the suit property.
12. As to whether the defendant had locus standi to be sued, it is submitted that the defendant/appellant being a son of his deceased father and being merely a beneficiary of his father's estate just as other beneficiaries of his deceased father's estate, was improperly sued as he is not a personal representative of his father's estate. Reference is made to the case of *Alfred Njau & 2 others v City Council of Nairobi* (1982-1988)1 KAR 229 and the case *Trouistik Union International & another v Jane Mbeyu & another* (2008)1 KLR (G & F) 730.



13. Since he is not the legal representative of the estate of his deceased father's estate, the defendant/appellant asserts that he lacks the legal capacity to represent the estate of his late father.
14. On whether the court had jurisdiction to hear and determine the suit, based on the fact that the defendant /appellant lacks capacity to be sued on behalf of the estate of his deceased father, the defendant/appellant submits that the proceedings before the court are null and void ab initio and that the court lacks jurisdiction to hear and determine proceedings that were null and void.

Respondent's Submissions

15. In the respondent's submissions filed on 21st May 2024, reference is made to the test of a preliminary objection set out in the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) E.A 696 and the case of *Daykio Plantations Ltd v National Bank of Kenya Ltd & 2 others* (2019) eKLR and submitted that a perusal of the preliminary objection shows that the grounds of objection raised are premised on mixed issues of law and facts hence not a true preliminary objection.
16. Further reference is made to the case of *Biosystems Consultants v Nyali Links Arcade* (Civil Appeal E185 of 2023 (2023) KEHC 21068 (KLR) (31 July 2023) (Ruling) and the case of *Oraro v Mbaja supra* and reiterated that the preliminary objection hereto is not a true preliminary objection.
17. The grounds of appeal taken up are said to be misguided as they demonstrate that the preliminary objection was premised on mixed points of law and facts.
18. For the foregoing reasons, the plaintiff/respondent urges this court to uphold the decision of the lower court and dismiss the appeal with costs to him.

Analysis and Determination

19. As pointed out herein above, the plaintiff/respondent had not sued the defendant/appellant as a legal representative of his deceased father's estate, but as a person said to be in trespass of the suit property. The plaintiff had not pleaded that the suit property belongs to the estate of the defendant's deceased father, but rather that he had bought it from the defendant's deceased father.
20. The authorities relied on by the defendant/appellant are distinguishable in that, those suits related to estates of deceased persons. In the instant suit, the defendant is sued in his personal capacity to answer into alleged trespass into the suit property which property the plaintiff's claims to have a beneficial interest in.
21. The question as to whether the plaintiff has a beneficial interest to the suit property and whether the defendant is entitled to use and occupation of the suit property on account of being a beneficiary of the estate of his father comprised in the suit property are questions of law to be determined during hearing of the suit.
22. No material has been placed before this court to warrant interference with the decision of the trial magistrate. The defendant/appellant pleaded his own case and premised his preliminary objection on it.
23. The upshot of the foregoing is that the appeal is ill-advised and lacking in merits. Consequently, I dismiss it with costs to the plaintiff/respondent.

JUDGMENT DATED, SIGNED AND DELIVERED AT KABARNET THIS 3RD DAY OF JULY, 2024.

L. N. WAITHAKA



JUDGE

Judgment delivered electronically in the presence of:-

Mr. Kiptoo for the appellant

Mr. M. Chebii for the respondent

Court Assistant: Ian

