



**Surum & another v Cheruiyot (Environment & Land Case  
22 of 2019) [2023] KEELC 688 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 688 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 22 OF 2019**

**MC OUNDO, J**

**FEBRUARY 9, 2023**

**IN THE MATTER OF A CLAIM FOR TITLE TO LAND BY ADVERSE POSSESSION  
OVER THE PARCEL OF LAND KNOWN AS KERICHO/KIPTERE/565**

**BETWEEN**

**DAVID KIPYEGON SURUM ..... 1<sup>ST</sup> PLAINTIFF**

**GLADYS CHEPTOO BETT (SUING ON BEHALF OF THE ESTATE OF THE  
LATE ANDREW BETT - DECEASED) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOEL KIPKUPTONUL CHERUIYOT ..... DEFENDANT**

**RULING**

1. In this consolidated matter and vide Originating Summons both dated April 5, 2019, the plaintiffs herein moved the court seeking a determination that the 1<sup>st</sup> plaintiff and Estate of the late Andrew Bett (deceased) the 2<sup>nd</sup> plaintiff, herein be declared to have acquired title equivalent to 1.2 acres and 5.1 acres respectively, being part of the suit premises known as Kericho/Kiptere/565, by adverse possession and thereafter an injunction be issued restraining the defendant, his servants or agents from taking possession, occupying, alienating, trespassing/interfering, selling or disposing off or dealing in any way whatsoever with the said suit land.
2. The defendant then filed his Notice of Preliminary Objection dated November 6, 2019 which was premised on grounds that the suit as lodged by the plaintiffs was incompetent, misconceived and abuse of court process having been filed by the plaintiffs who lacked capacity to institute proceedings as they had not procured a Grant of Letters of Administration to the Estate of Cheruiyot Arap Matui who was the registered proprietor to land parcel no Kericho/Kiptere/565.
3. That further the sale agreement in issue was also null and void as the seller had no capacity to sell.



4. Directions were taken that the preliminary objection be disposed of in the first instance by way of written submissions wherein whereas there was neither a response to the preliminary objection or submissions filed by the plaintiffs, the defendant/applicant filed their submissions, and therefore I shall proceed to determine the merits of the application as unopposed.
5. The applicant's submission was to the effect that the 1<sup>st</sup> plaintiff's case was that April 16, 1996 he had bought land from the defendant who was the son of the late Cheruiyot M Arap wherein later on March 2. 2019 he had received threats of eviction from the defendant which threats were aimed at evicting him from the suit portion.
6. The defendant's preliminary objection was therefore premised on grounds that the suit as lodged by the plaintiff was incompetent, misconceived and abuse of court process for lack of capacity on the part of the plaintiff to sue, him not having procured Letters of Administration and further that the sale agreement wherein the plaintiff sought to bind the defendant, was null and void for lack of capacity.
7. The defendant framed his issues for determination as follows:
  - i. Whether the plaintiff has capacity to institute the instant proceeding when he had no Grant of Letters of Administration
  - ii. Whether the defendant had capacity to contract in respect to LR no Kericho/Kiptere/565
8. On the first issue for determination, the defendant submitted that the plaintiffs lacked capacity to institute these proceedings in respect to the estate of Cheruivot Arap Mutai who was for all purposes and intent, the registered owner of the land parcel, Kericho/Kipter1/565. That at the time of instituting the suit on behalf at the estate of Cheruivot Arap Mutai, he had not obtained and/or taken out grant of letters of administration for the land parcel, Kericho/Kiptere/565. The defendant contended that the land had never been registered in the name of the 1<sup>st</sup> plaintiff David Kipyegon Surum but rather, it had been registered in the name of Cheruivot Arap Mutai. Reliance was placed on the case of *Isaya Masira Momanyi v Daniel Omwoyo & another* (2017) eKLR to submit that the plaintiff thus lacked the capacity to bring this suit on behalf of the deceased's estate as he was not duly authorized to do so.
9. That in the case of *Benson Mutuma Muriungi vs C E O Kenya Police Sacco & Another* [2016] eKLR, the court in defining the ambit and wide purview of actions amounting to intermeddling, stated that it referred to any act or acts which were done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. That such acts would include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out the free property of the deceased in contravention with the *Law of Succession Act* and as such the court had been clothed with wide powers to deal and issue appropriate orders of protection of the estate against any person. That the deceased's estate ought to be protected from the plaintiff who intended to intermeddle with it.
10. On the second issue for determination as to whether the defendant had capacity to contract in respect to LR no Kericho/Kiptere/565, the defendant submitted that he did not have the capacity to enter into any sale agreement as there was currently a succession cause pending in court over the same suit parcel of land. Reliance was placed on the case in *Lucy Mirigo & 555 Others vs. Ministry of Lands* (2014) eKLR where the Court of Appeal had held that a contract for sale of land came into force only after its execution by both the vendor and the purchase.
11. That the relationship between the plaintiff and the defendant remained a promise to enter into a contract for sale and such promise was not enforceable in law. That the defendant could only contract



when he had received his share of the estate once the suit proceedings had ended. That the alleged sale agreement was therefore null and void ab-initio as the seller did not have capacity to execute the said sale agreement

12. That even if he had capacity, it was law that a contract did not vest any interest to anyone save that it was merely executorial with interest passing only when parties had signed the transfer forms after applying for consent to transfer from the respective Land Control Board subject to fulfilling the conditions as set out in section 37, (1) and (2) of the [Land Registration Act](#). That in [Scott vs Brown](#) (1982)2 QB 724, it had been held that no court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of an illegal transaction, if the illegality is duly brought to the notice of the court.
13. That section 43(2) of the [Land Registration Act](#) clearly stated that no instrument effecting any disposition of private land shall operate to sell until it had been registered in accordance with the laws relating to registration affecting the land in respect of which the disposition has been made. Further that section 6(1) of the [Land Control Act](#) stipulated that transactions touching on the sale of agricultural land was void for all purposes unless the Land Control Board for the land control area in which the land was situated had given its consent in respect of that transaction. That the plaintiff had not tendered any such consent in court. That the plaintiffs had thus failed to prove the legal possession and occupation of the suit property and instead continued with their acts of trespass depriving the bonafide owners from exercising their right to property.
14. The defendant relied on the words of Lord Denning in [Mcfoy vs United Africa Company Limited](#) (1961) 3 All ER 1169 to submit that if an act was void, then it was in law a nullity. That one could not put something on nothing and expect it to stay there. It would collapse.

#### **Determination.**

15. I have considered the defendant's application on a point of preliminary objection to the effect that plaintiffs herein lacked the *locus standi* to institute suit. It is also clear from the pleadings filed herein that plaintiffs' claim in their respective Originating Summons is that of adverse possessors to an equivalent of 1.2 acres and 5.1 acres respectively, being part of the suit land known as Kericho/Kiptere/565, for reasons that they had bought the same from the defendant on April 16 1996 and in July 1999 respectively.
16. The defendant in his Notice of Preliminary Objection dated November 6, 2019 submitted that the suit as lodged by the plaintiffs was incompetent, misconceived and an abuse of court process having been filed by the plaintiffs who lacked capacity to institute proceedings as they had not procured a Grant of Letters of Administration to the Estate of Cheruiyot Arap Matui who was the registered proprietor to land parcel no Kericho/Kiptere/565.
17. Secondly that at the time of the sale agreement, the defendant had no capacity to enter into the sale agreements because he had no title to pass, since the suit property was registered to one Cheruiyot Arap Matui and there had been no letters of Administration obtained.
18. There was neither a response to the preliminary objection or submissions filed by the plaintiffs.
19. I have anxiously considered the preliminary objection raised herein and I wish to point out that unlike ordinary suits wherein a plaintiff or plaintiffs as the case may be, cannot move any court to propound a deceased's estate if they do not have the requisite Letters of Administration, (do not possess the *locus standi*) in the present matter where the plaintiffs seek to be declared to have acquired title equivalent to 1.2 acres and 5.1 acres respectively, by adverse possession, to land parcel no Kericho/Kiptere/565



which is still registered to the deceased Cheruiyot Arap Matui, I believe the attention as to whether Letters of Administration had been procured would not be on the plaintiffs but would now shift to the defendant to establish if he had the locus to be sued on behalf of the deceased's estate and/or defend the deceased's estate. I say this for reason that section 38 of the [Limitation of Actions Act](#) provides as follows;

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.” (Emphasis mine)

20. In terms of section 38 of the [Limitation of Actions Act](#) therefore, where a person claims to have become entitled by adverse possession to land, (s)he must apply to the High Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The registered owner of land parcel no Kericho/Kiptere/565 in this matter is the deceased Cheruiyot Arap Matui and therefore for the plaintiffs to file any suit against his estate seeking adverse possession, it was incumbent upon them to sue the administrator of his estate. They had sued the defendant herein wherein there is no evidence provided in the pleadings that he (defendant) was one such administrator.
21. Pursuant to the provisions of section 1B and 3A of the [Civil Procedure Act](#), therefore I would find the matters arising for my determination as being;
  - i. Whether the defendant herein has the *locus standi* to be sued.
  - ii. Whether Preliminary Objection raised is sustainable.
22. The principles in *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd*(1969) EA 696 are clear that for a preliminary objection to be sustained, it must consist of a point(s) of law which if argued is capable of disposing of the suit.
23. In [Alfred Njau & Others v City Council of Nairobi](#) [1982-88] 1 KAR 229 the Court of Appeal gave meaning to the term *locus-standi* by stating:

“.....to say he has no *locus standi* means he cannot be heard, even on whether or not he has a case worth listening to.”
24. I have considered the Originating summons herein as well as the preliminary objection. I have also considered the fact that the suit land herein is still registered to the deceased one Cheruiyot Arap Matui as per para 7 and 12 respectively of the plaintiffs' Supporting affidavit to their Originating Summons. I have further considered that there were no succession proceedings conducted in reference to the deceased Cheruiyot Arap Matui's estate and therefore no Letters of Administration had been issued to his (deceased's) representatives. Reference is made again to the above mentioned paragraphs.
25. In effect therefore, the defendant herein was not a personal representative to the deceased's estate in terms of section 3 of the [Law of Succession Act](#), which defines a personal representative to include the “executor” or “administrator”, as the case may be, of a deceased person.



26. The Court of Appeal delivered itself on the issue of *locus standi* in case of *Trouistik Union International & Another v Jane Mbeyu & Another* (2008) IKLR (G&F) 730 where it held that;
- “ To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the *law of succession Act*. That section confers that power on personal representatives and on them alone”
27. The issue on *locus standi* is a primary point of law almost similar to that of jurisdiction and since the defendant was not an administrator to the deceased’s estate herein, he lacked the capacity to be sued on behalf of the deceased’s estate which renders the suit incompetent.
28. Indeed the Court of Appeal authoritatively delivered itself on the issue of *locus standi* in *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another* (1982-99) 1 KAR, *Morjaria v Abdalla* [1984] KLR 490 and in *Trouistik Union International (supra)* to the effect that *locus standi* was a primary point of law almost similar to that of jurisdiction and the lack of capacity to sue or be sued rendered a suit incompetent.
29. The defendant has been sued by the plaintiffs who seek to be declared as adverse possessors to 1.2 acres and 5.1 acres respectively, being part of the suit premises known as Kericho/Kiptere/565 which was registered to the deceased Cheruiyot Arap Matui’s whose estate has not undergone succession. They have therefore sued the defendant herein where no grant of representation was applied for and/or obtained. The issue of *locus standi* is so cardinal in a civil matter since it runs through the heart of the case. Simply put, a party without *locus standi* in a civil suit lacks the right to institute, maintain or in this case, defend the suit even where a valid cause of action subsists. 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 and lack of it cannot be termed as a mere technicality. The issue of *locus standi* becomes even more serious in a case like this one where the matter involves the estate of a deceased person, since in most cases the estate involves several other beneficiaries or interested parties.
30. In the end I find that the defendant in this matter lacked the requisite *locus standi* to be sued and therefore the proceedings herein are a nullity as they lack the legal leg to stand on. Having found that the issue of *locus standi* is a point of law which goes to the root of any suit and where its absence renders a suit fatally defective, I herein proceed to allow the preliminary objection and strike out the plaintiffs’ suits with costs to the defendant.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023**

**M C OUNDO**

**ENVIRONMENT & LAND – JUDGE**

