



REPUBLIC OF KENYA



KENYA LAW
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**Kimahu v Kimahu & 9 others (Environment & Land Case
E012 of 2022) [2023] KEELC 15956 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15956 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE E012 OF 2022**

YM ANGIMA, J

MARCH 2, 2023

BETWEEN

WANGUI JOHN KIMAHU PLAINTIFF

AND

GEORGE KOIMBURI KIMAHU & 9 OTHERS DEFENDANT

RULING

A. Introduction

1. By a plaint dated and filed on June 27, 2022 the plaintiff sought the following reliefs against the defendants:
 - a. Orders of permanent injunction restraining the defendants by themselves, their servants and or agents from entering, developing or in any way dealing with land parcel No Nyandarua/Njabini/9185, Nyandarua/Njabini/9193, Nyandarua/Njabini/9197 Nyandarua/Njabini/9169, Nyandarua/Njabini/9184, Nyandarua/Njabini/9170, Nyandarua/Njabini/9178, Nyandarua/Njabini/9155, Nyandarua/Njabini/9188, Nyandarua/Njabini/9189, Nyandarua/Njabini/9192 and Nyandarua/Njabini/9194.
 - b. The hon court do specifically restrain the 7th defendant from trespassing or in any way developing plot. Nyandarua/Njabini/9188.
 - c. The land registrar Nyandarua county be ordered to cancel title Nos Nyandrua/Njabini/9185, Nyandarua/Njabini/9193, Nyandarua/Njabini/9197 Nyandarua/Njabini/9169, Nyandarua/Njabini/9184, Nyandarua/Njabini/9170, Nyandarua/Njabini/9178, Nyandarua/Njabini/9155, Nyandarua/Njabini/9188, Nyandarua/Njabini/9189, Nyandarua/Njabini/9192 and Nyandarua/Njabini/9194.



- d. That the land registrar Nyandarua do amend the register to reflect parcel Nos Nyandarua/Njabini/9185, Nyandarua/Njabini/9193, Nyandarua/Njabini/9197, Nyandarua/Njabini/9169, Nyandarua/Njabini/9184, Nyandarua/Njabini/9170, Nyandarua/Njabini/9178, Nyandarua/Njabini/9155, Nyandarua/Njabini/9188, Nyandarua/Njabini/9189, Nyandarua/Njabini/9192 and Nyandarua/Njabini/9194 as belonging to the deceased John Kagai Gachenga alias John Kimuhu Kagai and in his demise the same be distributed between his three houses.
 - e. Any other relief the court deems fit to grant.
2. The plaintiff pleaded that she was the 2nd wife of the late John Kagai Gachenja (the deceased) who was the previous owner of the suit properties. It was also pleaded that vide a consent recorded in Nakuru HCCC No 232 of 2012 (OS.) (the Nakuru case) the suit properties were to be registered in the name of the deceased and upon his demise they were to be shared equally amongst the 3 households of the deceased.
 3. It was further pleaded that in violation of the terms of the said consent the various suit properties were fraudulently registered in the name of the various defendants as particularized in the body of the plaint.

B. The Plaintiff's Instant Application

4. Simultaneously with the plaint the plaintiff filed a notice of motion dated June 27, 2022 seeking the following orders against the defendants:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That pending the hearing and determination of this suit there be orders of injunction restraining the 7th defendant by himself, his servants or agents from entering, constructing any building on parcel number Nyandarua/Njabini/9188 formerly plot no 59.
 - e. That pending the hearing and determination of this suit inter parties there be orders of injunction restraining the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th defendants from interfering with the parcel no 49 which currently is registered as Nyandarua/Njabini/9178, parcel number 26 which currently is registered as Nyandarua/Njabini/9155, parcel number 68 which currently is registered as Nyandarua/Njabini/9194 parcel number 64 which currently is registered as Nyandarua/Njabini/9193, parcel number 59 which currently is registered as Nyandarua/Njabini/9188, parcel 55 which currently is registered as Nyandarua/Njabini/9184, parcel number 41 which currently is registered as Nyandarua/Njabini/9170, parcel number 40 which currently is registered as Nyandarua/Njabini/9169 and parcel number 63 currently registered as Nyandarua/Njabini/9192 registered against each of them.
 - f. That the OCS Haraka police station to enforce the orders herein.
5. The application was based upon the grounds set out in the body of the motion and the contents of the supporting affidavit sworn by the plaintiff on June 27, 2022 and the exhibits thereto. The plaintiff contended that by the terms of the consent recorded in the Nakuru case the suit properties were to be shared equally amongst the 3 households of the deceased but the same were fraudulently registered in the names of the defendants thereby leaving out the 2nd household. It was further contended that



the 7th defendant was undertaking construction on parcel 9188 hence he ought to be restrained from doing so.

C. The Defendants' Response

6. The 1st – 6th and 8th – 10th defendants filed a notice of preliminary objection dated August 25, 2022 objecting to the suit and application on the following grounds:
 - a. That the suit is incompetent, bad in law and an abuse of the court process as the plaintiff has no locus standi to seek the reliefs set out in the plaint.
 - b. That the suit is founded on transfers effected by John Kimuhu Kagai (deceased) and the plaintiff does not hold letters of administration of the deceased's estate.
 - c. That the suit is a non-starter and ought to be struck out with costs.
7. They also filed a replying affidavit sworn on their behalf by the 1st defendant, George Koimbori Kimuhu on August 29, 2022 in opposition to the application. The defendants gave a detailed history of the land dispute between the plaintiff and the deceased which culminated in the consent recorded in the Nakuru case on April 23, 2015.
8. It was contended that pursuant to the said consent all the concerned parties were called upon to attend a meeting of the Land Control Board (LCB) on May 21, 2015 together with copies of their supporting documents such as national identity cards, pin certificates, and passport size photos to facilitate implementation of the terms of the consent. The defendants contended that all the concerned parties obliged except the plaintiff and her family members who were not keen on implementation of the terms of the consent.
9. The plaintiffs further stated that upon the consent of the LCB being issued the suit properties were transferred to them by the deceased and they were issued with title deeds to their respective plots on June 22, 2015 during the lifetime of the deceased. The defendants further stated that before the demise of the deceased, he had transferred to them the 14 plots as gifts and that even though the plaintiff had filed an application dated November 9, 2015 in the Nakuru case challenging the transfers the said application was never prosecuted.
10. The defendants further stated that the consent order of March 18, 2015 did not restrain the deceased from dealing with the 14 plots he was to retain but merely provided for equal sharing of the plots which may be in his name at the time of his demise. The defendants also contended that plaintiff had no *locus standi* to file the instant suit since she had not been appointed the legal representative of the estate of the deceased at the time of filing suit.
11. It was further the defendants' contention that the plaintiff and her sons had forcibly and with threats of violence prevented them from the use and occupation of the suit properties even though they (the defendants) were the registered proprietors thereof. They cited various incidences when the plaintiff and her sons are said to have forcibly prevented them from utilizing the suit properties and the various reports made to Haraka police station.
12. The defendants also asserted that the plaintiff and her children had been collecting rent from plot nos 60, 26 and T 49 Mwangaza by harassing and threatening the tenants whereas the said plots initially belonged to the deceased and that they had collected such rent for over 10 years without accounting for the same. It was, therefore, contended that the instant suit was intended to sanitize and legalize the wrongful status quo to the detriment of the defendants. The defendants consequently contended that



the plaintiff was underserving of the orders sought hence the application and suit should be dismissed with costs.

13. The 7th defendant filed a notice of preliminary objection dated September 23, 2022 objecting to the suit and application on the following grounds:
 - a. This suit is bad in law and an abuse of due process of law.
 - b. That the application as filed is unprocedural, misconceived, incompetent and fatally defective.
 - c. That no letters of administration have been issued for the estate of the late John Kagai Gachenga alias John Kimuhu Kagai therefore the plaintiff has no locus standi to file the suit on behalf of the estate.
 - d. That this court has no jurisdiction to so entertain matters of succession which is in the province of the probate/family court.
 - e. This suit is void ab initio for want of compliance with the law on the sought prayers.
14. The 7th defendant also filed a replying affidavit sworn on September 23, 2022 in opposition to the application. He stated that he was the registered proprietor of parcel 9188 having bought it from the previous owner known as Benson Kuria Magu who had in turn bought it from the deceased. He denied having acquired parcel 9188 through fraudulent means. He stated that he obtained his title on October 15, 2015 during the lifetime of the deceased.
15. The 7th defendant further contended that the plaintiff was not the duly appointed legal representative of the estate of the deceased at the time of filing suit hence the suit was incompetent *ab initio*. He further contended that the consent recorded in the Nakuru case did not bar the deceased from selling any of the properties he was entitled to under the consent hence he was at liberty to deal with parcel 9188 as he wished. He consequently prayed for dismissal of the plaintiff's suit and application.

D. The Plaintiff's Further Affidavit

16. The plaintiff filed a further affidavit sworn on September 16, 2022 in reply to the replying affidavit by the 1st – 6th and 8th – 10th defendants. She stated that she had obtained a limited grant ad litem dated July 18, 2022 to enable her file the instant suit. She denied that the deceased had sub-divided his land during his lifetime to facilitate issuance of titles to the defendants. It was contended that the deceased was in a bad mental state at the material time and subject to manipulation by the 1st defendant. It was further contended that no surveyor had ever surveyed or sub-divided the deceased's property and that there were no beacons on the entire land.
17. The plaintiff denied that the deceased had gifted any of the defendants the suit properties or that he had sold parcel 9188 to Benson Kuria Magu who later sold it to the 7th defendant. It was, therefore, contended that the titles held by the defendants were suspect, illegal, null and void. The plaintiff further contended that the consent recorded in the Nakuru case did not allow the deceased to dispose of any of the plots in his name. She consequently prayed that the application for interim orders be allowed.

E. The Defendants' Further Replying Affidavit

18. The 1st defendant filed a further replying affidavit sworn on September 28, 2022 on behalf of the 1st – 6th and 8th – 10th defendants in response to the Plaintiff's further affidavit. The defendants essentially disputed the allegations contained in the plaintiff's further affidavit and reiterated the contents of their replying affidavit. They stated that the limited grant was obtained by the plaintiff after the filing of the instant suit and without involving members of the other 2 households of the deceased. It was



further stated that there was a succession cause pending before the senior principal magistrate's court at engineer where the plaintiff had issued a citation.

19. The defendants further reiterated that the terms of the consent in the Nakuru case simply provided for equal sharing of the plots in the name of the deceased upon his demise. It was contended that at the time of his demise only plot no T 49 was in his name hence the plaintiff had no legitimate claim against the rest of the properties which were transferred by the deceased during his lifetime.
20. The defendants disputed that the deceased was in a bad mental state at the material time and asserted that the plaintiff had sued him in the Nakuru case without a next friend hence the plaintiff could not blow hot and cold at the same time.

F. Directions on Submissions

21. When the matter was listed for directions it was directed that the preliminary objection and the application dated June 27, 2022 shall be canvassed together through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the plaintiff's submissions were filed on October 21, 2022 whereas the defendants' submissions were filed on October 31, 2022. However, the 7th defendant's submissions were not on record by the time of preparation of the ruling.

G. The Issues for Determination

22. The court has perused the plaintiff's notice of motion dated June 27, 2022, the replying affidavits in opposition thereto, the plaintiff's further affidavit, the defendants' further replying affidavit as well as the defendants' preliminary objections to the suit and application. The court is of the opinion that the following issues arise for determination:
 - a. Whether the plaintiff's suit is incompetent and bad in law for want of *locus standi*.
 - b. Whether the plaintiff has satisfied the legal requirements for the grant of the interim injunctions sought.
 - c. Who shall bear costs of the application and the preliminary objections.

H. Analysis and Determination

Whether the Plaintiff's suit is incompetent and bad in law for want of locus standi

23. The court has perused the 7th defendant's notice of preliminary objection dated September 23, 2022 and the rest of the defendants' notice of preliminary objection dated August 25, 2022. The only issue raised therein which can form the subject of a preliminary objection is the issue of the plaintiff's *locus standi*, that is, whether the plaintiff had the legal capacity to file the instant suit on behalf of the estate of the deceased.
24. The court has considered the submissions and material on record on this issue. The defendants submitted that whereas the plaintiff's suit was filed on June 27, 2022 the limited grant which was exhibited in the plaintiff's further affidavit was issued on July 18, 2022 long after the filing of the suit. The plaintiff, on the other hand, submitted that she had a limited grant ad litem after all and did not specifically address the issue of the date on which it was made. None of the parties cited any authority on this issue.
25. Although the plaintiff did not describe herself as the personal representative of the deceased in the plaint and although she did not specifically plead that she was suing on behalf of the deceased, it is



evident from the prayers sought in the plaint that she wanted recovery of the suit properties which were assigned to the deceased in the consent filed in the Nakuru case so that they could be distributed equally among the 3 houses of the deceased as part of his estate. It is further evident from the plaintiff's further affidavit sworn on September 16, 2022 that she obtained a limited grant for the estate of the deceased from the chief magistrate's court at Nyahururu on July 18, 2022 hence she contended that she had the legal capacity to file the instant suit.

26. In the case of *Trouistik Union International & another v Jane Mbeyu & another* [1993] eKLR, it was held by the Court of Appeal, inter alia, that a claim for damages for the benefit of the estate of a deceased person under the *Law Reform Act* (cap 26) by a beneficiary who had not taken out letters of administration was incompetent from inception. The court held, inter alia, that:

“...To determine who may agitate any cause of action vested in him at the time of death, one must turn to section 82(a) of the *Law of Succession Act*. That section confers that power on the personal representatives and on them alone. As to who are personal representatives within the contemplation of the act, section 3, the interpretative section provides an all inclusive answer. It says “personal representative means executor or administrator of the estate of the deceased...”

27. Similarly, in the case of *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR the Court of Appeal reaffirmed that a beneficiary of the estate of a deceased person had no right to institute legal proceedings for the benefit of the estate without first obtaining letters of administration or a grant of probate. The court held, *inter alia*, that:

“We shall first deal with the issue of whether the respondent had *locus standi* to institute the summons application dated May 3, 2011 and filed in court on May 4, 2011. It is common ground that at the time of institution of the said summons, the Respondent was not in possession of a grant of letters of administration. As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased's estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In *Otieno v Ougo* (supra) this court differently constituted rendered itself thus:

“...an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is competent as of the date of inception.”

28. The material on record shows that whereas the plaintiff's suit was filed on June 27, 2022, the limited grant was obtained on July 18, 2022. The court is thus of the opinion that the plaintiff's suit was incompetent at the date of filing. If it was dead on arrival on June 27, 2022 it cannot possibly be resurrected afterwards by the plaintiff obtaining a limited grant on July 18, 2022. The court, therefore, agrees with the defendants' preliminary objection that the plaintiff's suit was incompetent and bad in law from the date of filing.

Whether the Plaintiff has satisfied the legal requirements for the grant of the interim injunctions sought

29. The court has already found and held that the plaintiff's suit was incompetent *ab initio*. It would, therefore, follow that the accompanying application was equally incompetent. In the premises, there is no need of considering the merits of the application. The same is for striking out.



Who shall bear costs of the suit

30. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court finds no good reason why the successful litigants should be deprived of the costs of the suit and application. Accordingly, the defendants shall be awarded costs of the proceedings.

I. Conclusion and Disposal Orders

31. The upshot of the foregoing is that the court finds merit in the defendants' preliminary objection on the capacity of the plaintiff to institute the proceedings. Consequently, the court makes the following orders for disposal of the suit, the preliminary objection and the application:
- a. The defendants' preliminary objections on the plaintiff's lack of capacity to file suit in the first instance is hereby upheld.
 - b. The plaintiff's suit is hereby struck out with costs to the defendants.
 - c. The plaintiff's notice of motion dated June 27, 2022 is hereby struck out with costs to the defendants.
 - d. The defendants are hereby awarded costs of the preliminary objections.
 - e. For the avoidance of doubt, any interim orders in place are hereby vacated.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU THIS 2ND DAY OF MARCH, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Kairu holding brief for Ms. Njoroge for the Plaintiff

Mr. Cheruiyot for the 7th Defendant

C/A - Carol

Y. M. ANGIMA

JUDGE

