



**Mwenda v Butt & another (Environment & Land Case
2 of 2022) [2023] KEELC 18519 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18519 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND CASE 2 OF 2022
PM NJOROGE, J
JULY 3, 2023**

BETWEEN

LUCY MWENDA PLAINTIFF

AND

FAROOQ ASIF BUTT 1ST DEFENDANT

ISIOLO COUNTY GOVERNMENT 2ND DEFENDANT

RULING

1. The preliminary objection which is the subject of this ruling takes the following format.

"Notice of preliminary objection

Take notice

1. The plaintiff/applicant cannot initiate a suit on behalf of the estate of a deceased person without first taking out letters of administration in respect of the said deceased person, hence has no *locus standi*/capacity to do so.
 2. The suit herein filed on the June 20, 2022 was drawn, signed and filed by an unqualified person (namely Kenneth Muthomi Kirimi) within the meaning and application of section 9 of the [Advocates Act](#) chapter 16 of the law of Kenya.
 3. The plaintiff/applicant's suit be dismissed as the same is *res judicata* having been decided by a court of competent jurisdiction in Isiolo CMCC ELC No 31 of 2020 the parties being Farooq Asif Butt vs Ismael Hassan and Lucy Mwenda."
2. The 2nd defendant in this case whether by default, carelessness, design or even indolence failed to respond to the preliminary objection although this court accorded it several opportunities. In such



circumstances, a court of law has no choice but to proceed with hearing the matter before it the participation of an unwilling litigant notwithstanding.

3. In his submissions, the advocate for the 1st defendant has submitted authorities to support ground 1 in the preliminary objection that a litigant who has not obtained letters of administration cannot purport to come to court to prosecute a matter involving the estate of a deceased person. He cited the cases of *Shanko versus Mibamed Uta Shanko* [2010] eKLR and *Trouistic Union International & another versus Mrs Jane Mbegu & Alice Mbegu*, Nairobi Court of Appeal, Civil Appeal No 145 of 1990. I do find that the 2 authorities are relevant to the facts of this case. They constitute good law that will bind this court where the facts are appropriate.
4. Regarding ground 2, the 1st defendant's advocate submitted authorities to buttress the legal position that an advocate who has not taken out a practicing certificate cannot properly file a suit on behalf of a litigant. He says that one Kenneth Muthomi Kirimi, Advocate, who filed a notice of motion application and the apposite originating summons had not taken a practicing certificate for two (2) years at the time he filed those documents. To buttress his argument that an unqualified person was not allowed to act as an advocate, he proffered the cases of *Peter Karuiru Gachira versus Leonard Wanjohi Murage & another* [2016] eKLR, *Belgo Holdings Limited versus Esmael* eKLR [2017] eKLR, *Kenya Power & Lighting Co Ltd Versus Chris Mahinda t/a Nyeri Trade Centre*, Nyeri, CA 148 of 2004, *Standard Chartered Bank Versus Mechanical Engineering Plant & others*, [2009] EA 404, CA and *Ibrahim M Njibia Versus IEBC & 2 others*, [2009] eKLR.

The ratio in all these cases is that an unqualified person cannot file pleadings on behalf of a litigant.

5. The 1st defendant's advocate proffered that this suit was res judicata Isiolo CMCC ELC No 31 of 2020. Regarding res judicata he proffered the cases of *Independent Electoral & Boundaries Commission Versus Maina Kiai & others* [2017] eKLR and *Nicholas Njeru Versus the Attorney General & 8 others*, Civil Appeal No 110 of 2011 CA [2013] ECLR.
6. Regarding ground 1 of the preliminary objection, the applicant's advocate says that she has for a long period of time been in possession of the suit property. He says that as a result of alleged illegal and inconsiderate action, the 1st and 2nd defendants colluded to cause Judgement in Isiolo ELC Case No 31 of 2020. With due respect, this is an issue that the applicant should have raised in an appeal. I do note that the applicant's advocate does not dispute the allegation that she had not obtained Letters of Administration concerning the estate of the deceased person.
7. Regarding ground 2, the applicant's advocate categorically states that the advocate who filed the impugned documents was properly qualified. Although no evidence was proffered, I also note that the applicant's advocate had also not provided evidence to prove that the concerned advocate did not have a practicing certificate when he filed this suit.
8. Regarding the issue of *res judicata* the applicant's advocate says that the cause of action brought in this suit is different from that one in Isiolo CMCC No 31 of 2020 as this case concerns adverse possession whereas Isiolo CMCC No 31 of 2020 concerned a different claim.

The applicant's advocate says that the applicant has made extensive and substantial developments in the suit land.

9. I have carefully considered the pleadings, the submissions and the authorities proffered in this matter. I do find that ground 2 in the preliminary objection invites arguments regarding if or if not advocate Kenneth Muthomi Kirimi had a practicing certificate at the time he filed this suit on behalf of the applicant. I therefore find that ground 2 does not raise a pure point of law as it invites arguments. This ground is dismissed.



10. Regarding grounds 1 and 3, I find that they raise pure points of law. On a balance of probability, I find that the 1st defendant has proved these grounds. As a consequence, I find that it is merited for this court to dismiss both the notice of motion application dated June 20, 2022 and this suit in its entirety.
11. The following orders are issued;
 - a. The application dated June 20, 2022 is dismissed except for ground 2.
 - b. This suit is dismissed.
 - c. Costs are awarded to the 1st defendant.

DELIVERED IN OPEN COURT AT ISIOLO THIS 3RD DAY OF JULY, 2023 IN THE PRESENCE OF;

Court assistant: Balози/Rahma

John Andati for the 1st Defendant/Respondent

Other parties absent.

HON. JUSTICE P.M NJOROGЕ

JUDGE

