



Mwai (Suing as the the administrator and legal representative of the Estate of the Late Murugi Mwai Kariuki (Deceased) v Kimani & 3 others (Environment & Land Case E41 of 2023) [2023] KEELC 19825 (KLR) (19 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19825 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E41 OF 2023
FM NJOROGE, J
SEPTEMBER 19, 2023**

BETWEEN

**JAMEA NGIGI MWAI (SUING AS THE THE ADMINISTRATOR AND
LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE MURUGI MWAI
KARIUKI (DECEASED) PLAINTIFF**

AND

**RACHAEL WANJIRU KIMANI 1ST DEFENDANT
KIAMBU NYAKINYUA FARMERS CO LTD 2ND DEFENDANT
LANDS REGISTRAR, NAIVASHA 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT**

RULING

1. This ruling is in respect of the plaintiff's notice of motion application dated May 12, 2023 which is expressed to be brought under order 40 rule 1 and 2 of the [Civil Procedure Rules](#), Section 1A, 1B and 3A of the [Civil Procedure Act](#) and which sought the following orders:
 - a. Spent
 - b. Spent
 - c. Pending the hearing and determination of this suit, a temporary injunction do issue restraining the 1st respondent by herself, her employees/servants and/or agents from entering, remaining, trespassing onto, engaging in any acts of possession, transferring or in any manner dealing or interfering with the plaintiff/applicant's peaceful possession of the suit property title No. Longonot/Kijabe Block 6/781;



- d. The Officer Commanding station (OCS) Utheri wa Lari Police Station be ordered to ensure enforcement of and compliance with the orders of this honorable court.
 - e. The costs of this application be provided for.
2. The application is supported by the affidavit of James Ngigi Mwai. The grounds on the face of the application and the supporting affidavit are that the plaintiff is the administrator of the estate of the late Murugi Mwai Kariuki who was his mother; that his mother was member No 388 of the 2nd Defendant; that the 2nd defendant is a land buying company; that his late mother as a shareholder was entitled to ballot for three parcels of land and she was therefore allocated plot numbers 781, 1572 and 1116; that his late mother immediately took possession of all the parcels of land and set up her family home on plot No 781 which is now known as Longonot/Kijabe Block 6/781; that upon the demise his mother, he followed up on the issuance of the title deeds for all the parcels of land; that they were able to acquire titles for plot No 1572 and 1116 but the 2nd defendant refused to process the title for the suit property; that the share certificate of plot No 781 was not available as it had been burnt during an arson attack; that they reported the matter to the police and were issued with a police abstract; that when they took the police abstract to the 2nd defendant, they were informed that they would process the title deed upon issuance of the Grant of Letters of Administration of the estate of his late mother; that upon getting the said grant, they were required to pay land rates and title deed transfer fees of Kshs 125,000/= which they did; that they followed up in vain and in 2021 they reported the matter to the DCI- Naivasha; that on May 11, 2023, the 1st defendant and her agents unlawfully trespassed onto the suit property and started cutting down trees that were planted thereon; that the said agents claimed that the 1st defendant was the owner of the suit property and that it is fair that the status quo be maintained and they remain in possession of the suit property.
 3. In response to the application, the 2nd defendant filed a replying affidavit on May 24, 2023 sworn by George Kagunya Muiru on the same date. He deposed that the 1st defendant is the proprietor of land parcel No Longonot/Kijabe Block 6/781; that before issuance of title deeds, the 2nd respondent's members were issued with share certificates that demonstrated their rights to property owned by the 2nd defendant; that the 2nd defendant was directed by the court in Naivasha Judicial Review No 6 of 2015 to put a notice in the daily newspapers notifying its members that it was in the process of finalizing allocation of plots; that the members were informed to clear their allotment fees within 90 days failure to which they would be deemed to have forfeited their shares; that at the end of the 90 days there were shares that were deemed forfeited for non-compliance and so they were disposed of to new members; that the 1st defendant was among the new members; that she bought shares vide the sale agreement dated October 8, 2012; that upon purchase of the said shares, she was entitled to 14.25 acres of land from the 2nd defendant; that the 1st defendant made the necessary payments and after balloting she was issued with plot number 781; that she was later issued with the title deed to the suit property; that the late Murugi Mwai Kariuki was a member of the 2nd defendant but was not allotted any land; that the purported ballot annexed to the plaintiff's application is not recognized by the 2nd defendant as it alleges that she was issued with the ballot in the year 1982 but at the said time balloting had not been done as the land was yet to be subdivided; that the plaintiff annexed payment receipts dated September 17, 2014 and yet the 1st defendant was issued with a title deed in June 2013; that the 1st defendant acquired the suit property procedurally; that the suit property has no structures on it and so the plaintiff is misleading the court by alleging that the late Murugi Kariuki had set up a home on the said property; that the plaintiff did not provide any certificate of confirmation of grant that shows that the suit property is listed as part of the deceased's estate and that he did not produce any ownership documents to substantiate his claim over the suit property.



4. The 1st defendant filed a replying affidavit on May 25, 2023 sworn on May 24, 2023. She deposed that the plaintiff does not have the locus standi to file the present suit; that the purported grant of letters of administration issued on August 29, 2014 was revoked by the court on September 3, 2018; that there is another suit, ELC E36 of 2023 on the same subject matter; that when the pleadings and order in ELC E36 of 2023 were served upon John Mwai the defendant in the said suit, he caused his elder brother James Ngigi Mwai, to file the present suit; that the 1st defendant is the registered owner of land parcel No Longonot/Kijabe Block 6/781 and she has been in possession of the suit property since October 2012 and that she had personally planted trees on the suit property which are now grown; that the plaintiff alleges that there is a family home on the suit property which is not true; that it was the plaintiff's brother who trespassed on the suit property by placing building materials on it and that it is only fair and just that the plaintiff's application be dismissed with costs.
5. The 1st defendant also filed a Notice of Preliminary Objection dated May 24, 2023 on May 25, 2023. The preliminary objection is on the ground that the plaintiff lacks capacity or locus standi to institute the suit.
6. The plaintiff filed a further affidavit sworn on June 13, 2023 on June 19, 2023. He deposed that he was issued with the grant of letters of administration to the estate of Murugi Mwai Kariuki on August 29, 2014; that he had been collecting and identifying his late mother's properties for purposes of administration; that he was shocked learn from the 1st defendant's replying affidavit that his grant had been revoked under Section 73 of the *Law of Succession Act*; that he has regularized his position and the grant has been re-instated in Succession Cause No 104 of 2014; that the court should disregard the legal technicality raised in the preliminary objection and determine the issues in dispute; that in ELC E36 of 2023, his brother has not claimed ownership of the suit property; that the 1st defendant acquired the title deed to the suit property through fraud because his late mother was allotted the suit property in the year 1982 and has been in occupation since then; that the 1st defendant has never been in occupation of the suit property; that George Kagunya Muiru who swore the affidavit filed by the 2nd defendant did not attach anything to show that he is the chairman of the 2nd defendant; that notwithstanding, the 2nd defendant has confirmed that his mother was one of the shareholders; that the 2nd defendant did not attach the said notice that allegedly notified its members that they were in the process of finalizing allocation of plots; that the 2nd defendant did not produce any evidence in the form of Annual General Meeting notice, minutes and/or resolution to show how the 1st defendant became a shareholder; that no valuation report was produced to indicate that the value of 10.25 acres was Kshs 700,000/=; that the 2nd defendant alleged that the 1st defendant was entitled to 14.25 acres of land and yet from the said agreement, the 1st defendant had purchased 10.25 acres; that the 2nd defendant did not produce any evidence of the payment of allotment fees and the balloting exercise; that the 1st and 2nd defendants brought up the proceedings in Naivasha Judicial Review No 6 of 2015 to sanitize the process by which she acquired the suit property and that the 2nd defendant hatched an illegal and fraudulent scheme to deny his late mother and other people who were bona fide members of Kiambu Nyakinyua Farmers Company Limited their share of their properties.

Submissions

7. The plaintiff filed his submissions on June 19, 2023 while the 1st defendant filed her submissions on May 25, 2023.
8. The plaintiff in his submissions addressed the 1st defendant's preliminary objection dated May 24, 2023. He reiterated the contents of his further affidavit and submitted that he was not aware that his grant had been revoked. He also submitted that the said revocation was a procedural technicality and



would only serve to inhibit a just hearing, determination and conclusion of the issues in dispute. He relied on the case of *Gitau v Kenya Methodist University* [2021] in support of his arguments.

9. The plaintiff then submitted on his application where he reiterated that the suit property belonged to his late mother and that the 2nd defendant had failed to issue him with the title deed and had instead issued it to the 1st defendant. He also reiterated that on May 11, 2023 the 1st defendant trespassed onto the suit property. The plaintiff relied on order 40 of the *Civil Procedure Rules*, the case of *Stek Cosmetics Limited vs Family Bank Limited & another* [2020] eKLR and submitted that he had a *prima facie* case because he has demonstrated that the suit property belonged to his late mother. The plaintiff further submitted that even though the 1st defendant acquired the title deed to the suit property, the same was acquired illegally and unprocedurally. This was because she was not a member of the 2nd defendant at the time she allegedly bought the suit property and that George Kagunya Muiru who swore the replying affidavit on behalf of the 2nd defendant did not attach any documents to show that he was the 2nd defendant's chairperson and neither did he attach the minutes and/or resolution that indicated that they had agreed to dispose of shares to new members. The plaintiff relied on Section 26 of the *Land Registration Act* and reiterated that the 1st defendant acquired the suit property fraudulently. The plaintiff indicated that there are other cases pending in court that were filed against the 2nd defendant and that given the said history of litigation, he has established a *prima facie* case.
10. The plaintiff relied on the case of *Banis Africa Ventures Limited vs National Land Commission* [2021] and submitted that if the 1st defendant is allowed to continue alienating the suit property then he will suffer irreparable harm. The plaintiff concluded his submissions by stating that the balance of convenience tilts in his favour.
11. The 1st defendant in her submissions submitted on whether the plaintiff has the capacity and/or locus standi to institute the present suit. The 1st defendant relied on the cases of *Daniel Njuguna Mbugua v Peter Kiarie Njuguna & 2 others* [2021] eKLR, *Isaya Masira Momanyi v Daniel Omwoyo & another* [2017] eKLR and submitted that since the grant issued to the plaintiff on August 29, 2014 was revoked on September 3, 2018, the plaintiff had no locus to file the present suit and so it should be struck out.

Analysis and Determination

12. I will first address the 1st defendant's preliminary objection dated May 24, 2023 before addressing the plaintiff's application dated May 12, 2023, for it is capable of disposing of the present application and the entire suit.
13. The 1st defendant is alleging that the plaintiff did not have the locus standi to institute the present suit on behalf of the estate of Murugi Mwai Kariuki because the grant he was issued with on August 29, 2014 was revoked on September 3, 2018. The plaintiff on the other hand argues that he was not aware that the grant he was issued with was revoked and that it was a procedural technicality and that he has since regularized the said issue as the orders revoking his grant have been set aside.
14. The court in the case of *Isaya Masira Momanyi v Daniel Omwoyo & another* [2017] eKLR held as follows:
 - “9. In the instant matter, the issue is whether or not at the time the plaintiff filed the instant suit he had obtained the requisite letters of administration to the estate of the deceased to clothe him with capacity or locus standi to represent the estate of the deceased. The plaintiff did not file any affidavit to respond to the 1st defendant's assertions that he had not obtained grant of letters of administration to enable him to bring the instant suit. The plaintiff instead



filed grounds of opposition set out earlier in this ruling through which he appears to view failure to obtain a grant of letters of administration before filing suit as a mere procedural technicality which the court can overlook. With respect I do not agree that failure to obtain a grant of letters of administration to a deceased estate to enable one to acquire capacity to file a suit on behalf of the deceased estate would be a mere procedural technicality. The law is express that a deceased's estate can only be represented by a person who is duly authorized to do so."

15. In the present matter, it is not disputed that the plaintiff was issued with a grant of letters of administration of the estate of the late Murugi Mwai Kariuki on August 29, 2014. It is also not disputed that the said grant was revoked on September 3, 2018. From the documents annexed by the plaintiff, the said grant was reinstated on June 14, 2023. The present suit was filed on May 12, 2023 and therefore at the time the plaintiff was filing this suit, he did not have the capacity to do so. In the *Isaya Masira* case (*Supra*) the court further stated as follows:

" 10. In his filed submissions the plaintiff has unprocedurally annexed as "Ex.4" a copy of letters of administration to the estate of Marisa Onsase dated July 20, 2016 issued to Isaya Masira Momanyi in CMC Succ Cause No 219 of 2016. The letters of administration are to the plaintiff in the present suit meaning that as at June 8, 2016 when he filed the suit he never had any letters of administration to the deceased estate. He definitely did not have any capacity and/or locus standi to file the suit on behalf of the deceased estate. The suit is incompetent and filed in abuse of the process of the court. The suit was null and void abinitio and cannot be sustained.

11. I accordingly order the suit by the plaintiff initiated vide a plaint dated June 8, 2016 struck out in its entirety."

16. I agree with the position held in *Isaya Masira Momanyi v Daniel Omwoyo & another (supra)* cited above that the lack of a grant of letters of administration to a deceased estate is not a mere procedural technicality.

17. Given the said finding, I will not address the merits of the plaintiff's application dated May 12, 2023 and I hereby strike it out. The plaintiff's suit filed on May 12, 2023 is hereby also struck out. However, given the nature of the present dispute and the fact that there is another suit relating to the same property that is pending, I order each party to bear its own costs of the present suit.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 19TH DAY OF SEPTEMBER 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

