



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC NO. 17 OF 2020

ALINOOR ABDI ELMI ALI.....1st PLAINTIFF/APPLICANT

ABDI YUSSUFF HASSAN.....2nd PLAINTIFF/APPLICANT

RASHID ADAN HUSSEIN.....3rd PLAINTIFF/APPLICANT

-VERSUS-

WILSON KIPYEGON CHELULE

ALFRED K CHELULE

LEONARD K CHELULE (Administrators of the

Estate of STANLEY TURGET.....DEFENDANTS/RESPONDENTS

RULING

1. Vide an Application by way of Notice of Motion dated 16th June 2020 brought under Order 40 Rule 1, 2, 3, and 4, Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 1, 1A, 3, and 3A of the Civil Procedure Act, and all other enabling provisions of the law, the Applicants herein sought for interim injunctive orders against the Respondents, their servants and/or agents from interfering howsoever with the Plaintiff's quiet enjoyment, use, possession and occupation of the suit property known as Bomet Municipality No. 8939/12 ('the suit property') situate in Bomet, pending referring of the suit for arbitration for its hearing and determination.

2. The application was supported by the grounds on its face as well as the supporting affidavit of Abdi Yussuff Hassan the 2nd Applicant sworn on the 16th June 2020.

3. The Application was opposed through the Respondents' Replying Affidavit of the 23rd June 2020 to the effect that their deceased father entered into a lease agreement with the Applicant's on the 23rd February 2004. That following his demise on the 20th September 2017, the lease lapsed on the 23rd February 2019 as stipulated in clause 7 of the same and was never renewed since the deceased's estate had not undergone the succession process.

4. The Respondents further file a Preliminary objection dated the 26th June 2020 to effect that they were not suited to the Applicant's claim as they had no locus standi having not taken out letters of Administration for the estate of the late Stanley Turgut.

5. Interim orders were granted wherein parties herein sought leave of the court to try and settle the matter out of court which leave was granted on the 26th October 2020. Parties failed to reach a resolution. On the 20th January 2021 parties took directions to have both the Application dated the 16th June 2020 and Preliminary objection dated 26th June 2020 disposed of way of written submissions.

Applicants' written submissions.

6. The Applicants, in support of their application dated 16th June 2020 framed their issues for determination as follows;

- i. Do the Plaintiffs have locus to sue the estate of Stanley Turgut

- ii. Does the court have locus to hear and issue the orders sought by the Plaintiffs
- iii. Do the Defendants/Respondents have locus to be sued as administrators of the estate of Stanley Turgut
- iv. Is there a lease between the Plaintiffs and the late Stanley Turgut
- v. If the answer is yes to issue iv above;
 - a. when did it start
 - b. when did it end
 - c. What are its terms
- vi. Is the lease still subsisting
 - a. If yes,
 - b. What rights does it accord the Plaintiffs/Applicants?
- 1) If no;
 - a. What happened to it when it lapsed?
 - b. Are the Plaintiffs clothed with any residual rights in such an event?
- vii. Whether the Respondents lack locus to be sued as Administrators

7. The Applicants submitted that there was no known disability that stopped them from bringing suit against the estate of the late Stanley Turgut. That the court was bound by the provisions of Section 1B of the Civil Procedure Act to handle all matters presented before it. That the lease agreement between the deceased Stanley Turgut and the Applicants provided for an arbitral clause which met (sic) the provisions of Sections 4 and 7(1) of the Arbitration Act.

8. The Applicants further submitted that since parties were bound by their pleadings, there was no dispute that the Respondents, as per at paragraph 1 of their replying affidavit, were the administrators of the estate of Stanley Turgut. That having deponed as such, the court should not allow them to blow hot and cold by raising a preliminary objection challenging their locus standi to be sued. Should the court find that they had no locus that the suit should not die but continue to exist subject to remedies in Order 1 Rule 9 and 10 of the Civil Procedure Rules.

9. It was the Applicants' submission and that the crux of the suit was an existing relationship between them and the Defendant/Respondents in a lease agreement made on 23rd February 2004 and which lease, pursuant to the provisions of clause 4 of the same, commenced on 23rd July 2004 for a period of 15 years ending on 23rd July 2019 as per the terms in clause 1, 2, 5, 7 and 8.

10. That pursuant to an agreement between the Applicants and the Respondents on the 29th June 2019 to renew the rent for a further 15 years, the lease between them was still subsisting. That further, according to the provisions of Section 57(1) of the Land Act, after the lease expired, the Applicants having been in possession of the demised premises with consent of the Respondents, the lease by law had been converted into a periodic lease on the same terms of the lapsed lease. They submitted further that in case the lease had expired, Clause 7 of the lease agreement provided for the lessor to give a 1 (one) year notice to lessee to vacate wherein the lessor was to pay the lessee such sums of money equivalent to the developments therein based on a value to be placed by a valuer to be mutually agreed upon by both parties. This position was further affirmed by a consent entered between the parties dated the 30th June 2020. The court noted that this consent was not adopted as an order of the court.

11. The Applicants' supplementary submissions to the Preliminary Objection was to the effect that although the Respondents' arguments was that they (Respondents) had no locus standi to be sued as they had not acquired letters of Administration to the deceased's estate, yet via a gazette notice of the 24th July 2020 herein annexed by the Respondents, the same was clear that they (Respondents) had now obtained the a grant. In buttressing their point, the Applicants relied on the decided cases in **Local Building Construction Ltd vs Institute of Blessed Virgin Mary [2019] eKLR**, **Zephir Holdings Ltd vs Mimosa Plantations Ltd, Jeremiah Matagaro & Ezekiel Misango Mutisya [2014] eKLR**, **William Kiprono Towett & 1597 Others vs Farmland Aviation Ltd & 2 Others [2016] eKLR** amongst a myriad of other authorities to submit that the misjoinder or non-joinder of parties to a suit was a mere technicality and by virtue of Article 159 of the Constitution, this procedural technicality should not defeat the suit.

Respondents' submissions.

12. In opposition to the Applicants' application dated 16th June 2020, the Respondents submitted that the same was based on the fact that the Applicants were lessees in the suit property under an expired lease agreement wherein the Respondents had issued them with a notice to vacate without following the terms of the lease. That further the dispute over the suit property ought to have been referred for arbitration.

13. The Respondents framed their issues for determination as follows;

- i. Whether or not the Respondents have locus to defend the suit and the Application.
- ii. Whether or not the Applicants are using the suit property illegally/intermeddling.
- iii. Are the Applicants entitled to the prayers sought in the application
- iv. Which party shall bear the costs of this Application.

14. The Respondents submitted that in response to the Applicants' application, they had filed their Preliminary objection dated 26th June 2020 raising the issue of them not having the locus standi to defend the suit and challenging the substratum of the suit as it was founded on a lease agreement that had lapsed.

15. The Respondents submitted that the suit property was registered to their deceased father Stanley Chelule Turgut who had executed the lease agreement on 23rd February 2004 with the Applicants. That their father had subsequently passed away on 20th September 2017 and the lease had lapsed on 23rd February 2019 with all its terms wherein it had never been renewed.

16. That the Respondents had petitioned for grant of Letters of Administration which had been published in the Kenya Gazette on 24th July 2020 and therefore by the time the Application/suit was filed, they had not been made administrators to the deceased's estate. That the law was explicit and unequivocal that for one to sue or defend on action against an estate of a deceased person he must have a grant.

17. Reference was made to the decided cases of **Virginia Edith Wamboi Otieno vs Joash Ochieng Ougo & Another [1987] eKLR** and **Patrick Kiseki Mutisya (suing as the personal representative to the estate of Nzomo Mutisya(deceased) vs K.B Shaghani & Sons Limited & Another [2012] eKLR** to submit that based on the above captioned authorities the entire suit and the application upon which it was founded fails.

18. It was their submission that the Applicants had breached clause 5 of the lease agreement by subleasing the property, as seen in the photographs annexed to their Replying affidavit, instead of using it for petroleum products only. That further, the Applicants' presence on the suit property after the lease expired, and their continuous deriving of benefits and income without paying rent amounted to intermeddling with the property of a deceased person under the terms of Section 45 of the Law of Succession Act which was therefore illegal. Reference was made to the case of the **Estate of Veronica Njoki Wakagoto [2013] eKLR**.

19. The Respondents' submission to the Applicants' application for the court to restrain them (Respondents) from evicting Applicants from the suit property pending the reference of the matter for arbitration for determination is that the application failed the threshold of a prima facie case as per the terms of **Giella vs. Cassman Brown & Company Limited** (sic). That the suit failed for want of locus standi on the part of the Respondents, secondly there was no prima facie case established by the Applicants with a probability of succeeding on merit, and third, that the Applicants were relying on an expired lease that had never been renewed thereby intermeddling with the property of a deceased person.

20. That in order for the Applicants to sue for equitable remedies, they ought to have come to court with clean hands by vacating from the suit property in which they were in occupation illegally. That pursuant to a valuation of the developments they had made on the suit land, if they had any issue or claim, they had recourse of suing the administrators, in the proper forum, once they were appointed.

21. The Respondents submitted that the entire suit having been incompetent, could not be adjudicated before an arbitrator and therefore was undeserving of the orders sought. That the same should be dismissed with costs and the interim orders issued therein vacated.

Determination.

22. Having considered the Application herein, the replying affidavit and the Preliminary objection herein, the submissions by both parties as well as having regard to the authorities and annexures filed herein, consequently I find that the pending issues for determination being ;

- i. Whether the Respondents have the locus Standi to be sued.
- ii. Whether this Court should grant the Applicant interim injunctive orders pending the hearing of the suit.

23. The Applicant's case is based on a lease agreement made on 23rd February 2004 between them and the proprietor of the suit property, the Defendant/Respondents' deceased father Stanley Chelule Turgut for the lease of the suit property for a period of 15 years from the 23rd July 2004, whose contents I have considered herein.

24. In seeking for interim orders of injunction against the Respondents, the Applicants' contention is therefore that after the expiry of the said lease and pursuant to an agreement between the Applicants and the Respondents on the 29th June 2019 to renew the rent for a further 15 years, the lease between them was still subsisting by virtue of the provisions of Section 57(1) of the Land Act. That further since the provisions of the lease agreement between the deceased Stanley Turgut and the Applicants provided for an arbitral clause the court should grant them interim orders pending the reference of the matter for arbitration, hearing and determination thereto.

25. The Respondents on the other hand have opposed the Applicants' application for reasons that it had failed the threshold of a prima facie case as established in the terms of the notorious **Giella vs. Cassman Brown (Supra)**. That the suit failed for want of locus standi on the part of the Respondents, secondly there was no prima facie case established by the Applicants with a probability of succeeding on merit, and third, that the Applicants were relying on an expired lease that had never been renewed thereby intermeddling on the property of a deceased

person.

26. It is not disputed that the suit property was registered to the deceased Stanley Chelule Turgut who had executed the lease agreement on 23rd February 2004 with the Applicants, to lease the suit land for 15 years with a grace period of 5 months delay period to cover for the clearing of any structures therein. It is also not disputed that Stanley Chelule Turgut subsequently passed away on 20th September 2017. It is further not disputed that the Respondents petitioned for grant of letters of administration which had been published in the Kenya Gazette on 24th July 2020 and lastly it is not disputed that the suit and application were filed in court on the 16th June 2020.

27. Applying the principles in **Mukisa Biscuit Manufacturing Co. Ltd. vs West End Distributors Ltd. (1969) EA 696** to wit that an objection must consist of a point of law which if argued as a preliminary objection is capable of disposing of the suit, the Respondents herein have argued that the Applicants cannot bring a suit against them because they have no locus standi. *Locus standi* is a primary point of law almost similar to that of jurisdiction and is therefore within the first principle in the **Mukisa Biscuit** case. It is a point of law capable of disposing the application.

28. In **The Owners of the Motor Vessel "Lilian S" –vs- Caltex (Kenya) Ltd [1989] KLR 1**, the Court stated as follows:-

"...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

29. Considering the terms of paragraph 4 of the Lease agreement, had the lease commenced on the 23rd February 2004, after 15 years it would have lapsed on the 23rd February 2019 and had it commenced on 23rd July 2004 for a period of 15 years, it would have lapsed on 23rd July 2019 either way, it is also clear that the Court has not been furnished with any evidence to prove that there had been issued any grant of representation to the estate of the original owner and lessor of the suit parcel of land known as Bomet Municipality No. 8939/12 ('the suit property') situate in Bomet, granting such Administrators the *locus standi* to defend and/or be sued on behalf of the estate of Stanley Chelule Turgut as at the time this suit was filed on the 16th June 2020.

30. The issue of locus standi was defined in the case of **Alfred Njau & 5 Others vs. City Council of Nairobi [1983] eKLR** to mean- "the right to appear in Court."

31. The Court of Appeal has 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 & Another v Jane Mbeyu & Another Civil Appeal No. 145 of 1990 to the effect that Locus standi** is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent. The lack of it therefore cannot be simply wished away as a mere technicality as the Applicant would seek of the court.

32. 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."

33. The Respondents have been sued as the legal representatives of the Estate of Stanley Chelule Turgut (deceased) where no grant of representation has been obtained. The Court of Appeal in the case of **Erick Makokha & 4 Others vs Lawrence Sayani & 2 Others [1994] eKLR**, held as follows:

"An application for injunction under Rule 5 (2) (b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "equity, like nature, will do nothing in vain". On the basis of the maxim, Courts have held again and again that it cannot satisfy itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it."

34. The issue of *locus standi* is a point of law which goes to the root of any suit and its absence renders a suit fatally defective.

35. The often cited case of **Giella –vs- Cassman Brown (Supra)** is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.

36. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicants, to issue temporary injunction against the Respondents. At this stage, the Court is only required to determine whether the Applicant is deserving of the Orders sought. The Court is not required to determine the merit of the case.

37. Having found that the Respondents herein had no locus Standi to sue or be sued as legal representatives of the Estate of Stanley Chelule Turgut (deceased), I find that the Applicants have not established a prima facie case for the grant of the interlocutory injunction so sought.

38. The Court of Appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

39. I therefore need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established.

40. The Respondents/Defendants have been sued as the legal representatives of the Estate of Stanley Chelule Turgut (deceased) where no grant of representation has been obtained. The issue of *locus standi* is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without *locus standi* in a civil suit lacks the right to institute and/or maintain that 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. The issue of *locus standi* becomes even more serious in a case like this on where the matter involves the estate of a deceased person.

41. In the end I find that since the issue of *locus standi* is a point of law which goes to the root of any suit and its absence renders a suit fatally defective, the Defendants/Respondents in this matter having lacked the requisite *locus standi* to be sued, a prima facie case has therefore not been established and the proceedings herein are a nullity as they lack the legal leg to stand on.

42. For that reason, I strike out the suit and proceed to dismiss the Applicants’ application dated the 16th June 2020 with costs to the Respondents.

43. The interim orders issued are therein vacated.

It is so ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF APRIL 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE