



REPUBLIC OF KENYA



**Gitee v Wanjiru & 19 others (Environment & Land Case 4 of 2019)
[2022] KEELC 14524 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14524 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 4 OF 2019**

JG KEMEI, J

NOVEMBER 3, 2022

BETWEEN

FLORA WANJIKU GITEE PLAINTIFF

AND

HELLEN JACKLINE WANJIRU 1ST DEFENDANT

ANN PATRA WANGUI 2ND DEFENDANT

**HENRY KARANJA NGUGI, MARGARET WANJIRU NDEHI & FLORENCE
ELIZABETH WANJIRU NGANGA AS TRUSTEES OF SUPER MICRO
VENTURES SHG 3RD DEFENDANT**

NJERI KIMANI MNUTHIA 4TH DEFENDANT

NANCY NJERI KUNGU 5TH DEFENDANT

HILDAH MARY MUTHONI 6TH DEFENDANT

KENNEDY WAFULA WALIALA 7TH DEFENDANT

KEN MWENDA KAUMBUTHU 8TH DEFENDANT

RUTH WAIRIMU KABUTHIA 9TH DEFENDANT

NJORA HUNGI NJORA 10TH DEFENDANT

FLORENCE WANGARI HUNGI 11TH DEFENDANT

SCOLASTICA WANJA KAMAU 12TH DEFENDANT

VERONICA WAITHAKA KAMAU 13TH DEFENDANT

ROSEMARY WAIRIMU KINYANJUI 14TH DEFENDANT

TREZZA WAITHERA KINYANJUI 15TH DEFENDANT

ANTHONY MUTHIGA KINYANJUI 16TH DEFENDANT



VALERIE WAMBUI KINYANJUI	17 TH DEFENDANT
TREZA WAITHERA KINYANJUI	18 TH DEFENDANT
THIKA LAND REGISTRAR	19 TH DEFENDANT
ATTORNEY GENERAL	20 TH DEFENDANT

RULING

1. The 1st, 2nd and 3rd defendants filed a Notice of Preliminary Objection dated October 22, 2021 on ground that;
 - a. That the suit as brought by the plaintiff is incompetent, incurably defective and unsustainable on grounds that the plaintiff has neither obtained the appropriate Letters of Administration nor sued in the capacity of a Legal Representative for the Estate of Gitee Mutahi (deceased) in violation of sections 2 and 82(a) of Law of Succession Act as read with section 2 Civil Procedure Act and for that reason, the Plaintiff lacks the legal capacity to bring the present suit.
2. The Plaintiff opposed the Preliminary Objection vide her Replying Affidavit sworn on 8/12/2021. She averred that she is the wife of the late Gitee Mwahi who was a shareholder to Githunguri Constituency Ranching Co. Ltd, a company governed by the Company's Act with an incorporation certificate annexed as FWG1. That provisions of the Law of Succession Act (LOSA) do not apply to the Company which in any event has its Memorandum and Article of Association to govern its affairs. That as per the company policy, upon demise of a shareholder, his/her shares are transferred to the next of kin determined by the beneficiaries in absence of any objection. That all the Company requires is Chief's letter who such shares should be transferred to and not Letters of Administration.
3. That it is against that background that the late Gitee Mwahi's shares in the company as denoted by Share Certificate No. 4292 and Ballot No. 1736 annexed as FWG 2a & b respectively were transferred to the plaintiff as per the correspondence marked FWG3. Consequently, those shares were transferred to the plaintiff and she was issued with her Share Certificate no. 2862 dated 8/6/2018; FWG4. She deponed that she was further cleared to get a title deed for which she paid requisite fees and given a clearance certificate as shown by FWG5 a & b. to that end the plaintiff maintained that when she applied for the title deed, she did so in her own personal capacity and not on behalf of her deceased husband. She disputed the Preliminary Objection for not raising a pure point of law and urged the Court to dismiss it with costs.
4. The Preliminary Objection was canvassed by way of written submissions.
5. Supporting the Preliminary Objection, the 1st, 2nd and 3rd Defendants filed their submissions dated 22/1/2022 through the firm of H. Kago & Co. Advocates. They submitted that the Plaintiff's claim as can be gleaned from para. 13 of the plaint is for the property that belonged to her late husband Gitee. That Section 2 and 82(a) of LOSA as read with section 2 Civil Procedure Act require her to take out Letters of administration and without them, she cannot institute or defend a suit on behalf of Gitee, as his personal representative. The Court of Appeal case of Fredrick Wachira Ndegwa (Substituting Ndegwa Wachira (Deceased) v Richard Wanjiku Ndanjeru & anor [1997] eKLR was cited in support of that proposition. The Court was urged to uphold the Preliminary Objection and award the Defendants costs in line with section 27 Civil Procedure Act.



6. On the other hand, the firm of Kanyi Kiruchi & Co Advocates filed submissions dated 3/6/2022 on behalf of the plaintiff. The plaintiff rehearsed the averments in her replying affidavit and highlighted section 30 of the 1st Schedule, Table A as adopted by the company pursuant to section 9 of the Companies Act that;

“Any person becoming entitled to a share in consequence of the death or bankruptcy of a member may, upon such evidence being produced as may from time to time properly be required by the directors and subject as herein provided, elect either to be registered himself as holder of the share or to have some person nominated by him registered as the transferee thereof, but the directors shall in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by that member before his death or bankruptcy, as the case may be.”

7. That accordingly the late Gitee’s shares were transferred to the Plaintiff and her claim is solely for own benefit and not for the estate of her late husband. That the Plaintiff thus has the requisite locus standi and to ascertain the same, the Court has to analyze the evidence tendered and therefore the Preliminary Objection fails the fundamental test of being a pure point of law.

8. The main issue for determination is whether the Preliminary Objection is merited.

9. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

10. At page 701 Sir Charles Newbold, P added:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

11. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.

12. The Preliminary Objection assails the plaintiff’s capacity to in the instant case without obtaining letters of administration for her deceased husband Gitee Mwahi. The plaintiff contends that the suit is in her own capacity and not as beneficiary of the estate of the late Gitee. A cursory look at paras. 12 & 13 of the plaint dated 10/1/2019 reveals that the plaintiff was the transferor of the late Gitee’s shares vide a Share Certificate No. B2802 and ballot No. 1736 emanating from Gitee’s Share Certificate No. B 4292 and ballot No. 1736 for and parcel known as Ruiru Kiu Block 2(Githunguri) 3063, the suit land.



That this was done in line with the memorandum of Githunguri Constituency Ranching Co. Ltd (the company). That the instant suit was prompted upon the plaintiff's attempt to obtain the title deed for the suit land when she discovered third parties laying claim to the suit land hence the suit in her own name. The Applicant is emphatic that the company is not governed by the Law of Succession Act but by the Company's Act.

13. The 1st, 2nd and 3rd defendants refute that position and without prejudice, insist that the suit land belongs to the estate of the late Gitee hence the need to take out Letters of Administration in accordance with Law of Succession Act and section 2 of the Civil Procedure Act. In relying on the case of Fredrick Wachira Ndegwa supra the appellate Court set aside the trial Court Judgment in favour of the respondents who instituted a claim for damages under Land Registration Act and Fatal Accident Act following a fatal road traffic accident without obtaining Letters of Administration for the deceased's estate. That case is distinguished with the facts here in that the Plaintiff asserts the suit is in her own name upon transfer of her husband's shares to her and subsequent issuing of Share Certificate and ballot number.
14. For this Court to ascertain the transfer of the said shares and the attendant laws, it must analyze evidence of the Company's Articles of Association that allows such transfer of shares as pleaded.
15. To that end the test for a Preliminary Objection being a pure point of law that need not be ascertained by way of examination of evidence is ousted.
16. The Preliminary Objection is unmerited and it is for dismissal with no orders as to costs.
17. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 3RD DAY OF NOVEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Wachira HB Kanyi for Plaintiff

1st – 6th Defendants – Absent

Karanja for 7th – 9th Defendants

10th & 11th Defendants – Absent

Karanja for 12th Defendants

13th -14th Defendants - Absent

Court Assistants – Phyllis Mwangi / Oliver

