REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 185 OF 2014 (O.S)

IN THE MATTER OF LAND REFERENCE NO. KARATINA TOWNSHIP BLOCK 1/235

BETWEEN

JOSEPH MAINA GATUGI.....APPLICANT

-VERSUS-

NJUKI WAMBUGU.....1ST RESPONDENT

NJATHEINI MBIGO.....2ND RESPONDENT

RULING

1. The plaintiff herein took up the originating summons dated **27th August, 2014** for determination of the questions listed therein, which include a determination of the question as to whether the property known as Karatina Township Block1/235 owned by himself, Arthur Mbigo (deceased) and Wilson Wambugu (deceased) may be sold by public auction and the proceeds shared between himself and the personal representatives of the deceased persons herein.

2. The application is supported by the affidavit (supporting) of the plaintiff sworn on **27th August, 2014** in which the plaintiff has *inter alia* deposed that the respondents herein are sons of the deceased persons herein and that the deceased persons were his partners (the deceased persons and him are the owners of the suit property). The plaintiff has further deposed that there was an agreement between him and his deceased partners for disposal of his interest in the suit property which never materiarized.

3. Explaining that the respondents have refused to take out letters of administration for the estates of the deceased partners and that the respondents are the ones who have been collecting rent from the suit property, the plaintiff prays for an account of the proceeds from the suit property from the respondents.

4. The suit/application is opposed through the replying affidavits of Patrick Maina Wilson (not a party to the suit but suspects himself to be the person sued as the 1st respondent) and Njatheini Mbigo the second respondent herein through which it is contended that the applicant's suit against them is misconceived, incompetent and an abuse of the process of the court. It is also deposed that the subject matter of this suit is subject of other proceedings pending before court.

5. Based on the averments contained in the affidavits sworn in opposition to the application to the effect that the application is fatally defective for having being brought against persons who are not the legal representatives of the estate of the deceased persons herein, the respondents raised a preliminary objection to the suit/application.

6. Pursuant to the directions issued on 24th October, 2017 the preliminary objection was heard by way of written submissions.

Submissions by the respondents

7. In the submissions filed in support of the preliminary objection, it is pointed out that it is not in dispute that the suit property is owned by the applicant and the deceased persons herein; that there are other suits pending in court over the suit property and that the respondents are not the representatives of the estates of the deceased persons herein.

8. Faulting the applicant for suing them when they had no capacity to sue or be sued in respect of the estate of their deceased parents, the respondents submitted that the applicant had no reason for suing them. According to the respondents, the applicant ought to have cited them to take grant of letters of dministration in respect of the estate of their parents as opposed to suing them when they had no legal capacity to be

sued in respect of the estate of their deceased parents.

9. Maintaining that the suit is incompetent for having been brought against persons who have no legal capacity to defend the estates of the deceased persons herein, the respondents urges the court to strike out the suit with costs to them.

Applicant's submissions

10. In the submissions filed on behalf of the applicant, the issues arising from the preliminary objection herein to wit whether the respondents are wrongly sued or enjoined in the suit and whether there are other suits in respect of the suit property are said to be not the proper province of a preliminary objection. In that regard, reference is made to the case of **Mukisa Biscuit Co. Ltd v. West End Distributors Ltd** (1969)E.A 696 and the case of **William Kiprono Towett & 1597 others v. Farm Land Aviation Ltd (2016)e KLR** where it was *inter alia* observed:-

> **"...Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit..."**

11. According to the applicant, the question as to whether or not the respondents had taken out letters of administration in respect of the estates of their deceased parents is a question of fact that requires the tendering of evidence. It is also contended that the respondents have been sued in their capacity as the persons collecting rent from the suit premises, which fact the respondents are said not to have disputed.

12. Terming the suit against the respondents an issue of misjoinder, which cannot entitle the respondents the orders sought, the applicant urges the court to dismiss the preliminary objection with costs to him.

13. On whether there are other pending proceedings concerning the subject matter of the suit, the applicant acknowledges that there have been previous proceedings concerning the suit property but contends that the respondents have not tendered any evidence capable of showing that the current suit is *res judicata* the former.

Analysis and determination

14. As can be discerned from the applicant's own pleadings, the suit property is owned by the deceased persons and himself. Through prayer (1) of the originating summons, the applicant seeks determination as to whether the suit property should be sold by public auction and the proceeds of sale shared between himself and the personal representatives of the deceased persons. The question which arises from the foregoing is whether the question of sale of the suit property and distribution of the proceeds of sale of the suit property can be addressed in the absence of the legal representatives of the estate of the deceased persons.

15. Whilst the applicant is of the view that the said issue can be addressed based on the fact that the respondents are the one in control of the suit property, the law and in particular **Sections 3** and **45** as read with **Section 82** of the Law of Succession Act, (LSA) Cap 160 Laws of Kenya do not support such a position. In that regard see the said sections of the law which provide as follows:-

> **" 3(1). 'Administrator' means a person to whom a grant of letters of administration has been made under this Act.**
>
> **'Estate' means the free property of a deceased person.**
>
> **45(1) Except as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, intermeddle with, any free property of a deceased person.**
>
> **(2) Any person who contravenes the provisions of this section shall-**
>
> > **(a) be guilty of an offence and liable to a fine not exceeding ten thousand shilling or to a term of imprisonment not exceeding one year or both such fine and imprisonment; and**
> >
> > **(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in due course of administration.**
>
> **82. personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-**
>
> > **(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for for his personal representative;**
> >
> > **(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they best think:**
>
> **Provided that ...**
>
> > **(c) to accent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof.**

(d) To appropriate, at any time after confirmation of grant, any of the assets vested in them....”

16. It is clear from the foregoing provisions of the law that before the respondents can lawfully undertake any dealings in respect of the estate of the deceased fathers, they are required to have obtained letters of administration in respect of the estate.

17. Through his own pleadings, to wit, the affidavit sworn in support of the suit, the applicant acknowledges that the respondents have not taken letters in respect of the estate of their fathers. That being the case, they cannot lawfully be sued in respect of the estate of their fathers. In this regard see the case of **Troustik Union International & Another v. Mbeyu & Another (2008)1 KLR (GF) 730** where the Court of Appeal *inter alia* obseved:-

> **“to determine who may agitate by suit any cause of action vested in the deceased at the time of death, one must turn to section 82 of the Law of Succession Act. That section confers that power on personal representatives and on them alone.**
>
> **Section 3 of the Law of Succession Act provides that an administrator is a person to whom a grant of letters of administration has been made...”.**

18. Also see the case of **Rajesh Pravinjivan Chudasama v. Sailesh Pranjivan Chudasama (2014)eKLR** where the same court differently constituted stated:-

> **“...he (referring to the plaintiff/applicant in that suit) moved to court by virtue of being a beneficiary for preserving the deceased’s estate. That may be well 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 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 incompetent as of the date of inception.”**

19. Whilst the applicant contends that on account of the fact that the respondents are the ones in control of the suit property, they can answer to the issues raised in the suit, that position is not supported by law, as any dealing with the suit property by the respondents without letters of administration as by law required is an offence under **Section 45** of the LSA. This court cannot be called upon to sanction an illegality.

20. It is clear from the foregoing, that the plaintiff’s suit is bad in law as it has been brought against persons without the capacity to answer to the issues raised in the suit.

21. Concerning the contention by the applicant that the suit raises an issue of joinder or misjoinder of parties which does not vitiate the suit, that is not the case as striking out the suit against the respondents for want of capacity to defend the claim will leave the suit without a defendant.

22. The upshot of the foregoing is that the respondents have made up a case for striking out the suit. Consequently, I strike it out with costs to the respondents.

23. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 2nd day of July, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the applicant

Ms Macharia h/b for Kebuka Wachira for the respondents

Court assistant - Esther