



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. 9 OF 2020 (OS)

JOHN KAMANDE NGUGI.....APPLICANT

VERSUS

PETER KARANJA MWANGI.....1<sup>ST</sup> RESPONDENT

JOSEPH KAMANDE MWANGI.....2<sup>ND</sup> RESPONDENT

**RULING**

1. The Applicant herein moved the Honorable Court vide the Originating Summons dated 12/05/2020 for adverse possession. He contends that he bought land from Njeri Karanja, the registered proprietor who is now deceased and the Respondents herein are the beneficiaries thereof. He alludes to a dispute that existed prior to the filing of the suit as between him and the Respondents which matter was resolved by the Maragua Land Dispute Tribunal in his favour and was subsequently adopted as an order of the Court.
2. In response, the Respondents filed a Replying Affidavit opposing the summons on the ground that the land is registered in the name of Njeri Karanja. That as a result, they do not have the locus to be sued as they are not the legal representatives of the late Njeri Karanja thereof.
3. Contemporaneously, the Respondents further filed a Notice of Preliminary Objection dated 18/9/2020 on grounds; -
  - a) That the Respondents being not the legal representatives and/ or Administrators of the Estate of Njeri Karanja (deceased) have no Locus Standi and/ or capacity to be sued.
  - b) No cause of action has been established by the Applicant against the Respondents in so far as land parcel No. Loc 7/ICHAGAKI/645 is concerned as they have no known registerable interest as the same is registered in the name of a deceased person.
  - c) The Originating Summons as filed is frivolous, vexatious and an abuse of the due process of the Court.
4. Directions were taken that the Preliminary Objection be determined first and the same be dispensed with by way of written submissions. The Respondents filed theirs dated 8/4/2021 whilst the Applicant filed his dated 19/4/2021.
5. It is the Respondents' submission that they are not the registered owners of the suit property instead the same is registered in the name of the late Njeri Karanja. The Respondents invited the Court to look at the annexures to the Replying Affidavit as well as the Further Affidavit which shows they are not the legal representatives of the Estate of Njeri Karanja and therefore they do not have the locus to be sued. It is further their submission that since the land is still registered in the name of the deceased, they do not have any registerable interest in the land thereby there is no cause of action that can be brought against them.
6. In support of their submissions on locus, the Respondents submitted that this Court be guided by the holding that locus standi is a primary point of law akin to jurisdiction and without it a suit is rendered incompetent as was held in **Troustik Union International & Another vs Jane Mbeyu & Another Civil Appeal No. 145 of 1990** and **Julius Andronicus Nyaga Karoge vs Ennedy Wawira Njagi & 6 Others {2014} eKLR**.
7. The Applicant in opposing the Preliminary Objection, maintained that the Respondents are beneficiaries of the suit property based on the certificate of confirmation of Grant. It was further his submission that the Preliminary Objection raises issues that need to be determined through production of evidence; thus raises no issue of pure point of law within the required legal standards. He urged the Court to dismiss the Preliminary Objection.

8. I have looked at the issues raised in the Preliminary Objection and the rival submission by Parties and it is my considered opinion that the main issue for determination by this Court would be Whether the Preliminary Objection can be entertained.
9. In the celebrated case of **Mukisa Biscuits Manufacturing Company v West End Distributors Limited [1969] EA 696** case a Preliminary Objection was defined as “consisting 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”. The Court opined that it must be a pure point of law which assumes that all facts pleaded are correct and need not be ascertained. Further that it should not call upon the Court to exercise its discretionary powers.
10. The intent of Preliminary Objection was enunciated by the Supreme Court in **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** the Court concluded that the purpose of preliminary objection was firstly, it serves as a shield for the *originator of the objection*—against profligate deployment of time and other resources. And secondly, it serves *the public cause*, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.
11. Relevantly, a Preliminary Objection must raise pure points of law that the Court need not invoke evidence to buttress the issue raised. Such point raised must be admitted by the other party and the issue raised be capable of disposing the suit at the preliminary stage.
12. It is the Respondents’ objection that they do not have the locus standi to be sued and the suit discloses no action against them. What then is the clear point of law raised by the Respondent? The Respondents have submitted they are not the registered owners of the suit property and cannot therefore be sued. To determine the owner of the property, this Court will have to peruse the documents provided by the Respondent to ascertain this.
13. The Court of Appeal in Nairobi Civ App No. 74 of 1982 **Alfred Njau & 5 others v City Council of Nairobi [1983] eKLR** stated “Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in Court or other proceedings; literally it means a place of standing - see **Jowett’s Dictionary of English Law (2nd Edn)**. To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the Court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.
14. It is thus my considered view that an issue of locus needs to be determined at the onset with a view of saving the Courts time. As rightly put by the Court of Appeal in Mombasa Civ Appeal No. 30 of 2013 **Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR** the issue of locus standi is critical just like jurisdiction and ought to be dealt with at the onset before delving into the substance of the case.
15. It is not in dispute that the land belonged to Njeri Karanja who is now deceased. This has been succinctly deduced from the pleadings. The law in regards to such instances is that a suit should be brought against the personal representative within the meaning of section 2 of the Civil Procedure Act. As to whether the Respondents are the personal representatives, it is an undisputed fact that they are not.
16. The Respondent has submitted that this Court be guided by the **Trouistik Union** case, the facts from the case emanates from an award of damages under the Law Reforms Act. The case relates to a cause of action resulting from a chose in action which I do not find to be of much relevance in the case save that a Personal Representative has the locus standi in Court to institute a case once he has taken out letters of administration. But based on the record, there is a Legal Representative Monica Njeri Mwangi.
17. However, a perusal of the pleadings alludes to a suit as between the Applicant and the defendants herein and to ascertain this, the Court will be required to go through the evidence. Further, this Court notes that the annexed copy of certificate of confirmation of Grant indicates that the property already has been vested in the beneficiaries. However, there is no glaring evidence to show that the grant has been registered for purposes of transmission of the property since 2019.
18. The Respondents submitted that the suit is frivolous, vexatious and an abuse of the process of the Court, the reason for this is because of an existing mis-joinder of the Respondents. I agree with Justice Munyao in **Eldoret ELC No. 712 of 2013 County Council of Nandi V Ezekiel Kibet Rutto & 6 Others [2013] eKLR** on the definition of what frivolous and vexatious suit is. The learned judge opined that a frivolous pleading lacks legal foundation and a vexatious one are pleadings meant to annoy the other party to the suit. As to whether the pleadings herein meets the threshold stated above, my answer will be in the negative, the pleadings in my considered opinion raises issues on the right to property that this Court ought to protect.
19. From the pleadings and based on the documents placed on record, it appears therefore that the Applicant has a claim over the suit land. Also the Respondents have a share out of the suit property among other beneficiaries. What this Court is not sure is who is in occupation of the portion claimed by the Applicant, this will require examination of the facts and evidence. If the Respondents are in occupation, it matters not who is the administrator as was settled in the Court of Appeal in **Mombasa Civ App No. 48 of 2018 Peter Kim Baker & 2 others v Sidi Katana Bongo & another [2019] eKLR** where the learned judges opined that the appellant did not need letters of administration to defend their right to occupation.
20. Dismissing the suit as the preliminary stage may result in a miscarriage of justice. The Court is guided by the provisions in Order 1 Rule 9 of the Civil Procedure Rules. It provides, “no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.
21. It is therefore my finding that the Preliminary Objection is not a pure point of law and to quote the wise words of the Hon Judge in the case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] Eklr**, it becomes clear that the Respondents have raised this objection **as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.**

22. The Preliminary Objection is found to be unmerited. It is dismissed

23. I order costs in favour of the Applicant.

24. **It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17<sup>TH</sup> DAY OF JUNE 2021**

**J.G. KEMEI**

**JUDGE**

**Delivered in the presence of:**

Ndungu HB for Mr. T M Njoroge for the Plaintiff/Applicant

Bore HB for Ndegwa for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants

Court Assistant: Alex