



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. E015 OF 2021

ESTHER MUTHONI MWANGI.....PLAINTIFF

VERSUS

SAMUEL MAINA NJARIA.....DEFENDANT

RULING

1. On the 25/6/2021 the Defendant filed a notice of Preliminary Objection on the grounds that;
 - a. The Plaintiff has no locus standi to institute the present suit in her capacity as the administratrix of the estate of the late Arthur Ikua Gioche without the authority of her co-administrator, one John Gathaiya Gioche.
 - b. The present suit is misconceived, bad in law and fatally defective.
2. On the 28/6/2021 the parties elected to canvass the objection through written submissions which I have read and considered.
3. Relying on Section 2 of the Civil Procedure Act, Section 82(a) of the Succession Act the Plaintiff submitted that the Plaintiff having been issued with grant of letters of administration vide Nairobi HCCC No 1713 of 2006 was vested with power under section 83 of the Succession Act to safeguard and protect the interests of the estate of the deceased. That the Defendant's actions of felling and wasting the trees amounted to intermeddling with the estate of the deceased and should be stopped. That holding that the Plaintiff cannot institute the case without the authority of the co-administrator is wrong and unfair.
4. Lastly that the Plaintiff is sufficiently clothed with standing to institute the suit as she did against the Defendant for the loss occasioned as a result of his injurious actions on the deceased land.
5. The Defendant in his submissions reiterated that the Plaintiff and one John Gathaiya Gioche were jointly appointed as administrators of the estate of Arthur Ikua Gioche vide Murang'a Succession Cause No. 736 of 2013. The Defendant submitted that Plaintiff's move to solely file the suit to the exclusion of her co-administrator annuls her locus standi before this Court. That no attempt was made to consult or procure her co-administrator's authority to file suit. In urging the Court to uphold the Preliminary Objection, reliance was placed on the case of Hassan Iddi Malambu suing as the **of the estate of Amina Naanyu Malambu vs. Bestel Agencies Company Ltd & Anor. [2015] eKLR** among others.
6. The key issue for determination is whether the Preliminary Objection is merited.
7. What then is a Preliminary Objection? As to whether the Preliminary Objection as raised is a pure point of law, the Court in the case of **Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, 91969) EA 696**, defined a Preliminary Objection as follows;

“.....a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”
8. In the case of *Oraro vs. Mbaja* (2005) I KLR 141 Ojwang, J (as he then was) held as follows:-

“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary pointAnything that purports to be a Preliminary Objection must not deal with disputed facts, and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence

9. Further in the case of **Nitia Properties Limited – v- Jagjit Singh Kalsi & Another, C.A. No. 132 of 1937**, it must be borne in mind that for a preliminary point to succeed, the facts as alleged in the plaint are deemed to be correct. In the instant case, the facts as alleged in the plaint and defence are disputed and prima facie the claim in this suit cannot be deemed to be incontestably hopeless and be summarily dismissed by way of Preliminary Objection.

10. In this case the Plaintiff filed suit against the Defendant on the 3/6/2021 seeking orders inter alia a permanent injunction restraining the Defendant from interfering and whatsoever intermeddling with LOC 19/GACGARAGEINI/2994 (suit land) together with damages.

11. Under para 3 of the said Plaint the Plaintiff describes herself as the administrator of the estate of ARTHUR IKUA GIOCHE, the registered owner of the suit land who died on the 12/1/2001.

12. I have perused the ruling in the in HCCC 172 of 2011 (OS) between the Plaintiff and John R Gathaiya Macharia alias John Gathaiya Gioche where an order by way of consent was recorded inter alia as thus;

”The 3.7045 hectares of land out of the share held by John R Gathaiya Macharia alias John Gathaiya Gioche in land reference no LOC19/GACHARAGEINI/2994 is held in trust. for the benefit of Arthur Mwangi Gioche deceased”.

13. A copy of the green card on record shows that the suit land measuring 12.555 ha is held by John R Gathaiya Macharia 6.12 Ha whereas Esther Muthoni Mwangi and John R Gathaiya Gioche holds 6.13 ha as administrators of the estate of Arthur Ikuu Gioche deceased.

14. According to the said green card it is clear that the suit land is held jointly by the Plaintiff and one John Gathaiya Gioche as administrators of the estate of Arthur Ikuu Gioche and on the other hand ½ of the suit land is owned by John Gathaiya in his own name. This is captured in the official search dated the 19/5/2021.

15. According to the grant of letters of administration intestate issued on the 16/10/2006 the administrators of the estate of Arthur Ikuu Gioche are the Plaintiff and one John Gathaiya Gioche.

16. **Black’s law dictionary** defines locus standi as the right to bring an action or to be heard in a given forum. The forum includes a Court of law. In **Rajesh Pranjivan Chudasama vs. Sailesh Pranjivan Chudasama [2014] eKLR** the Court of Appeal held that;

“.....a litigant is clothed with locus standi upon obtaining a limited or full letters of administration in cases of intestate succession.....”

17. Section 82 (a) of the Succession Act provides that the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.

18. Section 83 of the said Act provides that 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 his personal representative;

19. From the above sections of the law, the administrator of an estate of a deceased has power to take action in the protection and administration of the estate including filing suit. In this case and according to the grant on record the Plaintiff is one of the administrators of the estate of the deceased alongside one John Gathaiya. It is also clear that John Gathaiya holds ½ of the land on his own right and the other half is held jointly with the Plaintiff as administrators of the estate of Gioche. To the extent that the Plaintiff is advertent a claim in the protection of the estate, in my considered view, gives her sufficient locus to mount the case. The issue of the certainty of the land in dispute calls for further inquiries. It is admitted that the said co administrator sold his portion of the suit land measuring 15 acres to the Defendant. This taken against the consent order set out in para 12, shows that there is a variance on the land owned by the co-administrator vis a vis the estate of Gioche.

20. In the end I hold the Preliminary objection is not merited. It is dismissed.

21. The Plaintiff shall have the costs of the application.

22. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 29TH DAY OF JULY 2021

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Ms Waititu Advocate for Respondent/Plaintiff

Gitonga Advocate for Defendant/Applicant

Kuiyaki/Alex, Court Assistants