



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 586 OF 2017**

SUSAN NJOKI KIRIGU.....PLAINTIFF

VERSUS

RUTH NYONGAI MUKARA.....1<sup>ST</sup> DEFENDANT

MARY WANJIRU MBURU.....2<sup>ND</sup> DEFENDANT

PHILLIS NYOKABI KOMO.....3<sup>RD</sup> DEFENDANT

SUSAN MUGURE CHEGE.....4<sup>TH</sup> DEFENDANT

ISAAC MWANGI.....5<sup>TH</sup> DEFENDANT

**RULING**

1. The Preliminary Objection dated 30<sup>th</sup> August 2019 is pursuant to order 51 rule 14 (1) (a) of the Civil Procedure Rules, 2010 and Section 82(a) of the Law of Succession Act Cap 160, Laws of Kenya.

2. The grounds are:-

***1. That the plaintiff's suit is fatally defective in law and substance.***

***2. That the plaintiff herein does not have the requisite locus standi to institute this suit for and on behalf of the Estate of the Late Francis Muriu Kabui as she is not the legal representative to the said estate and the same should be struck out with costs.***

3. On the 27<sup>th</sup> February 2020 the court with the consent of parties directed that the preliminary objection be canvassed by way of written submissions. The parties were directed to file submissions within thirty (30) days and a mention to confirm was fixed on 29<sup>th</sup> July 2020. On the 29<sup>th</sup> July 2020 Mr. Maina for the defendant appeared but the plaintiff's counsel did not. Mr. Maina sought and was granted more time to file their submissions. The matter was then fixed for mention on 17<sup>th</sup> September 2020.

4. On the 17<sup>th</sup> September 2020 the plaintiff's counsel again did not appear. Mr. Sichangi holding brief for Mr. Maina for the defendant sought more time to put in submissions. By 23<sup>rd</sup> March 2021 only the defendants' counsel had filed their submissions.

5. It is the defendant's submissions that the plaintiff lacks the *locus standi* to bring this suit. That without *locus standi* the party bringing the suit or claim is a busy body and the court cannot waste its precious judicial time entertaining the party on the matter.

6. The plaintiff brings the suit claiming under her father in law who is deceased. Her father in law died intestate and therefore his Estate is governed under the Law of Succession Act (Cap 160) Laws of Kenya. The plaintiff's further in law having passed on, it is incumbent upon the plaintiff to demonstrate that she has legal capacity to institute a suit on behalf of her father in law claiming his interest in the property in question.

7. The plaintiff purports to claim under a sale agreement which she is not a party, an agreement which is clearly unenforceable in view of the Limitation of Actions Act. The defendants' pray that the plaint be struck out as the plaintiff is a mere busybody.

8. I have considered the preliminary objection herein, the grounds, the written submissions filed on behalf of the defendant and the authorities cited. The issue for determination is whether the preliminary objection is merited.

9. As to whether this is a preliminary objection. I am guided by the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** where the Court of Appeal stated thus as per Sir Charles Newbold P:-

*“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all 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 exercise of judicial discretion”.*

*Lord J A proceeded to state thus:*

*“.....so far as I am aware 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 objection 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”.*

I am satisfied that the issues raised herein are pure point of law.

10. **Section 45 (1)** of the Law of Succession Act (Cap 160 Laws of Kenya) provides that:-

*“ Except so far 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, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”*

**Section 82 (a)** 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;”*

11. From the plaint dated 18<sup>th</sup> September 2017 **paragraph 4** states:-.

*“The plaintiff states that her husband’s father one Francis Muriu (father in law) now deceased, legally bought the land pursuant to sale agreement dated 3<sup>rd</sup> October 1964 from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants’ mother one Frasia Wagochi Chege now deceased, who was the widow of the original owner Mr. John Chege Kuria who died in the year 1957”*

**Paragraph 8** states:-

*“The plaintiff further avers that she is entitled to the land by virtue of the sale agreement between her father in law and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants’ mother and the fact that she has lived there for almost her life time”.*

It is clear from the foregoing paragraphs that the plaintiff’s father in law is deceased and that he died intestate.

12. The plaintiff has not demonstrated that she has the legal capacity to institute this suit on behalf of her father in law claiming his interest in the property in question.

13. I agree with the defendants’ submissions that the plaintiff ought to have done the following:-

*(i) Probating the will if one exists.*

*(ii) Taking out Ad Collegenda Bona in the event of a real danger of the property being wasted.*

*(iii) Applying for full grant.*

*(iv) Citing the reluctant person entitled to a grant based on the line of survivorship.*

The plaintiff has done none of the above. She was not a party to the sale agreement between her father in law and the defendants’ mother.

14. I find that she has failed to demonstrate that she has *locus standi* to institute this suit.

15. The upshot of the matter is that I find merit in this preliminary objection and the same is upheld. Consequently, the plaintiff’s suit is hereby struck out with no orders as to costs.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 22<sup>nd</sup> day of July 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the Plaintiff

Ms Mumbi for Mr. Maina for the Defendants

Phillis - Court Assistant