



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC APPEAL NO. 39 OF 2019**

**LUCY MUMBI THUO.....APPELLANT**

**VERSUS**

**GEORGE NDUNGU WANGIE.....RESPONDENT**

**AND**

**SAMUEL WAINAINA CHEGE.....1<sup>ST</sup> INTERESTED PARTY**

**PATRICK NJOROGE CHEGE.....2<sup>ND</sup> INTERESTED PARTY**

*(Being an Appeal from the Judgment and/ or Ruling of the Hon. C.A Otieno Omondi (SPM)*

*delivered on 14<sup>th</sup> May 2019 in the Senior Principal Magistrate’s Court*

*Civil Suit No. 1 of 2019 at RUIRU)*

**BETWEEN**

**REPUBLIC OF KENYA**

**IN THE SENIOR PRINCIPAL MAGISTRATES COURT**

**AT RUIRU**

**MCL&E NO. 1 OF 2019**

**GEORGE NDUNGU WANGIE.....PLAINTIFF**

**VERSUS**

**SAMUEL WAINAINA CHEGE.....1<sup>ST</sup> DEFENDANT**

**PATRICK NJOROGE CHEGE.....2<sup>ND</sup> DEFENDANT**

**LUCY MUMBI THUO.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The Appellant herein Lucy **Mumbi Thuo**, was the 3<sup>rd</sup> Defendant , the Interested Parties were the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, while the Respondent **George Ndungu Wangie**, was the Plaintiff in **Ruiru MCL & E NO. 1 OF 2019**. The Respondent( Plaintiff) filed the suit vide a **Plaint** dated **2<sup>nd</sup> April 2019**, seeking various orders amongst them a Declaration that the transfer of the suit property to the 3<sup>rd</sup> Defendant was illegal, an order of injunction restraining the Defendants from interfering with the property and General Damages. He also

filed an Application under Certificate of Urgency seeking orders of injunction.

In opposing the Application, the Appellant (3<sup>rd</sup> Defendant) filed a Notice of Preliminary Objection dated 11<sup>th</sup> April 2019, on the grounds that;

1. *That the entire suit is incompetent frivolous, vexatious and an abuse of the Court process.*
2. *That the Plaintiff lacks the locus standi to have filed this suit and should be dismissed.*
3. *That the Court lacks the requisite jurisdiction to have entertained this suit and the same cannot be heard*

The Preliminary objection was canvassed by way of oral submissions in Court on 23<sup>rd</sup> April 2019, and on 14<sup>th</sup> May 2019, the trial Court delivered its Ruling and stated that;

*“I have considered the pleading, the Application and submissions of the respective Counsels and note that the Plaintiff has not brought the suit in his capacity as a beneficiary or Administrator of the Estate, but in his capacity as the purchaser of Ruiru/ Ruiru East Block 2/2924, which he bought from the 1<sup>st</sup> & 2<sup>nd</sup> Defendants . The matter for determination in the Application dated 1<sup>st</sup> April 2019, and the suit is in my view is whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had sold the suit property to the Plaintiff as claimed and if so, whether they had the capacity to resell/ transfer the same parcel of land to the 3<sup>rd</sup> Defendant. The issue can therefore not be said to be a succession issue*

The Appellant was dissatisfied with the decision of the trial Court and through her Memorandums of Appeal dated 27<sup>th</sup> May 2019, has sought for orders that the finding of the trial Court of dismissing the Notice of Preliminary Objection dated 11<sup>th</sup> April 2019, be struck out. The grounds upon which the Appellant has based her appeal are;

1. *That the Learned Magistrate erred in Law and in fact in not finding that the entire suit is incompetent, frivolous, vexatious and an abuse of the Court process.*
2. *That the Honourable Magistrate erred in Law and in fact in not finding that the Respondents herein lacks the locus standi to file this suit.*
3. *That the Honourable Magistrate erred in Law and in not finding that the Court lacks jurisdiction to have entertained the suit.*
4. *That the Honourable Magistrate erred in Law and in fact as having clearly understood the gist of the Preliminary Objection that succession in the estate of the deceased Nyambura Chege had not been done as the Plaintiff/ Applicant was neither an Administrator nor a beneficiary of the Estate of the deceased and as such lacked locus stand to bring the suit and the Application dated 1<sup>st</sup> April 2019 failed to appreciate that the suit was a non starter.*
5. *That the Honourable Magistrate erred in Law and in fact by failing to appreciate that the subject matter of the ill advised suit was property belonging to the deceased Nyambura Chege and hence succession proceedings were a conditional precedent.*
6. *That the Honourable Magistrate erred in fact and Law by failing to appreciate that all that property of land known as Ruiru/ Ruiru/ Block 2/2924, could not be sold or bought without first conducting the process of succession.*
7. *That the Honourable Magistrate erred in Law and in fact in not appreciating that the 1<sup>st</sup> & 2<sup>nd</sup> Defendant have had no capacity to sell all that property to land known as Ruiru/ Ruiru/ Block 2/2924 to the Respondent.*
8. *That the Honourable magistrate erred in Law and in fact and indeed misled herself thus” and note that the Plaintiff has not brought the suit in his capacity as a beneficiary or Administrator of the Estate but in his capacity as the purchaser Ruiru/ Ruiru/ Block 2/2924 which he bought from 1<sup>st</sup> & 2<sup>nd</sup> Defendant.*
9. *That the Honourable Magistrate erred in Law and fact in making a finding that the Plaintiff/ Respondent bought Ruiru/ Ruiru/ Block 2/2924.*
10. *That the Honourable Magistrate erred in Law and fact and indeed further misled herself thus “The matter for determination in the Application dated 1<sup>st</sup> April 2019 , and the suit is in my view whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had sold the suit property to the Plaintiff as claimed and is so whether they had the capacity to re sell/ transfer the same parcel of land to the 3<sup>rd</sup> Defendant.”*
11. *That the Honourable Magistrate erred in Law and in Fact when she failed to determine whether the 1<sup>st</sup> and 2<sup>nd</sup> Responden6 had capacity to sell the suit property Ruiru/ Ruiru/ Block 2/2924 to the Plaintiff , which really is the substratum of the suit if at all.*
12. *That the Honourable Magistrate erred in Law and in Fact when she misdirected herself that “ the issue cannot therefore*

*be said to be succession issue” when indeed she had observed that the property in issue belonged to the Estate of the Deceased Nyambura Chege.*

**13. That the Honorable Magistrate erred in Law and in fact in not appreciating the holding in Trouistik Union International & Another ... Vs... Mbeyu & Another (2008) 1KLR.**

**14. Other grounds and reasons to be adduced at the hearing thereof.**

The Appeal is opposed and the Respondent **George Ndungu Wangie** swore a Replying Affidavit on **16<sup>th</sup> October 2019**, and averred that the Memorandum of Appeal is frivolous and unmeritorious and the same ought to be dismissed. He averred that the trial Court carefully went through all the facts and arrived at the right decision. That the trial Court applied the Law correctly, when it found that the Appellant's **Notice of Preliminary Objection** lacked in merit and proceeded to dismiss it. That the Appellant is bent on frustrating him after acquiring the title deed fraudulently.

On **20<sup>th</sup> July 2020**, the Court directed that the Appeal be canvassed by way of written submissions and in compliance with the said directive, the Respondent through the Law Firm of **Muturi Njoroge & Company Advocates**, filed his written submissions dated **9<sup>th</sup> November 2020**, and submitted that the subject matter as captured by the trial Court is whether the agreement entered into by the 1<sup>st</sup> & 2<sup>nd</sup> Interested parties with the Respondent on **1<sup>st</sup> April 2005**, was legally binding and if so they had the capacity to resell and or transfer the same to the Appellant. That what is on trial is the legitimacy of the land transferring process. That the Respondent in his capacity as a purchaser is entitled to a recourse / remedy and thus has **locus standi** to file the suit.

The Appellant through the **Law Firm of Prof Kiama Wangai & Company Advocates**, filed her written submissions on **9<sup>th</sup> November 2020**, and submitted that at the hearing of the case, it was clear that the case was a Succession Matter. That the Respondent is neither an Administrator nor a beneficiary of the said Estate. That no Succession proceedings have ever been instituted by any of the beneficiaries of the **estate of Nyambura Chege**, and there cannot be any sale of the Deceased estate other than by the Administrator. The Court was therefore urged to vacate the orders dismissing the Preliminary Objection

The Court has carefully considered the findings of the trial Court, the written submissions by the respective advocates and finds as follows;-

As this is a first Appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. See the case of **Selle v Associated Motor Boat Co. [1968] EA 123 where the Court held that;**

*“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (**Abdul Hameed Saif vs. Ali Mohamed Sholan**(1955), 22 E. A. C. A. 270).*

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of **Mbogo vs Shah (1968) EA at Page 93** where the Court held that:-

*“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”*

It is not in doubt that the Appeal is against the dismissal of a Preliminary Objection. In order to determine whether or not the same is merited, the Court will first have to determine whether the objection raised by the Appellant qualifies to be a **Preliminary Objection** as described in the case of **Mukisa Biscuit Manufacturing Co. Ltd ...Vs... West End Distributors Ltd (1969) EA 696**, where Law J A stated that;

*“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 the pleadings and which objection point may dispose the suit”.*

Further the Court stated;

*“A preliminary objection raises a pure point to law which is argued 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”.*

In her Notice of Preliminary Objection, the Appellant based it on two major grounds;- one that the Respondent had no **Locus Standi** or capacity to institute the suit and secondly that the Court had no jurisdiction. In the case of **Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000**, the Court held that; -

***“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.***

Further in the case of Alfred Njau and Others ..Vs.. City Council of Nairobi ( 1982) KAR 229, the Court also held that:-

***“The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.***

Therefore, it is evident that **locus standi** is the right to appear and be heard in Court or other proceedings and literally, it means ‘**a place of standing**’. If a party is found to have no **locus standi**, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no **locus standi**, then the Applicant cannot be heard and that point alone may dispose of the suit. In the case of Quick Enterprises Ltd ...Vs... Kenya Railways Corporation, Kisumu High Court Civil Case No. 22 of 1999, the Court held that:-

***“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone”.***

**Further it, is also not in doubt that jurisdiction is everything and without Jurisdiction a Court of law has no option but to down its tools. Therefore, it follows that if a Court has no jurisdiction, then the suit would be dismissed summarily. See the case of Owners of Motor Vessel ‘Lilian S’...Vs...Caltex Oil (Kenya) LTD (1989) 1 KLR, where the Court held that: -**

***“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no Jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction”.***

Having now considered the objections raised by the Appellant, the Court finds that lack of **locus standi** and **jurisdiction** by a Court can dispose of the matter preliminarily without having to resort to ascertaining of facts. The **Preliminary Objection** raised by the Appellant fits the description of **Preliminary Objection** as stated in the Mukisa Biscuit case ( Supra).

While the Court has already held and found that the issue of **locus standi** and **jurisdiction** are **Preliminary Objections properly** raised, it must further determine whether the same are merited.

The Appellant through her Advocates submitted that the Court did not have jurisdiction as the suit was a Succession matter. This Court acknowledges that the trial Court;- Senior Principal Magistrate Court that has jurisdiction to deal with all Criminal and Civil matters including Succession causes. However, the Court further notes that the suit was filed as a **MCLE**, and therefore filed as a land matter.

In deciding whether or not the suit is a Succession Cause or a Land matter, the Court has carefully gone through the Complaint dated **2<sup>nd</sup> April 2019**, the Application even dated and the prayers sought. It is not in doubt that the prayers sought are injunction orders that revolve around the transfer of the suit property by the **1<sup>st</sup> & 2<sup>nd</sup> Interested Parties** to the Appellant and the Sale Agreement entered into between the Interested parties and the Respondent. The pleadings by the Respondent have not sought orders dealing with the **Estate of the late Nyambura Chege**. Given that the orders sought are in relation to a Sale Agreement regarding the use and or occupation of land, the Court finds and holds that the same was a land matter and a Magistrate’s Court gazetted to deal with land matter was seized with the proper jurisdiction. The trial Court therefore had jurisdiction to deal with the matter.

On whether the Respondent has the requisite locus standi to bring the suit, In the case of Law Society of Kenya ...Vs... Commissioner of Lands & Others, (supra), the Court held that; -

***“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law..”***

**Did the Respondent therefore have interest in the land. The Respondent alleges that he entered into a sale agreement with the 1<sup>st</sup> & 2<sup>nd</sup> Interested Parties over the sale of the suit property. Whether or not the said Interested parties had capacity to enter into the said Sale agreement is an issue to be determined at the main hearing. This Court concurs with the trial Court that the Respondent did not file the suit on behalf of the Estate of Nyambura Chege, nor has he filed claiming as a beneficiary but as a purchaser who bought the same from the 1<sup>st</sup> & 2<sup>nd</sup> Interested Parties and therefore the Court finds and holds that the Respondent has sufficient Interest and the right to be heard and hence possess the requisite locus standi to bring the suit. Therefore, this Court finds and holds that the two grounds upon which the Preliminary Objection was based are not merited and there is no merit in the said Preliminary Objection.**

Having now carefully re-evaluated and re-assessed the available evidence before the trial Court, and the Memorandum of Appeal together with the written submissions, the Court finds that the trial Magistrate arrived at a proper determination and this Court finds no reason to upset the said determination.

Consequently, the Court finds the Appellant’s Appeal is **not merited** and thus the said Appeal is dismissed entirely and the Ruling and Order of the trial Court is upheld.

On the issue of costs, the Court finds that costs usually follow the event unless special circumstances are presented. In this instant, the Court

finds no special circumstance has been presented and therefore finds that the Respondent being the successfully party, then the Appellant should bear the costs of the Appeal. This Appeal is thus dismissed entirely with costs to the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021**

**L. GACHERU**

**JUDGE**

**Court Assistant –Lucy**