



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 51 OF 2019

MICHAEL MUSEMBI MBOLE.....PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....DEFENDANT

RULING

1. On the 20th January, 2021 this court directed the parties to address it on the issue of whether the Plaintiff herein has the legal capacity to file this suit on behalf of the estate of a deceased person. The parties were further directed to file and exchange brief submissions.

2. On the 3rd February, 2021 the Plaintiff filed a further affidavit to the application dated 29th July, 2019. The same having been sworn at Makueni on 2nd February, 2021. He did not file any submissions. the Defendant on the other hand filed what it termed as supplementary submissions on the 8th March, 2021.

3. In his plaint dated 29th July, 2019 and filed in court on 31st July, 2019, the Plaintiff averred in paragraph 3 that he is the administrator of the estate of the late Moses Musembi Mbole who is the registered proprietor of plot no. 8 within Kivani market, Makueni County and was duly issued with title deed in respect of the suit plot and is thus entitled to all the rights of an absolute proprietor conferred under the Constitution, the Land Act and the Land Registration Act. He sought the following prayers against the Defendant: -

a) That this application be certified urgent and be heard exparte in the first instance.

b) That the Defendant, the Defendant's agents and/or servants be restrained by way of injunction from effecting any construction work in violation of the Plaintiff's proprietary rights unless the Defendant makes prompt payment of due and just compensation in accordance with the law.

c) Damages on account of the Defendant's violation of the Plaintiff's constitutional rights to peaceful enjoyment of his proprietary rights.

d) Any further or other order that this honourable court deems fit to grant in the circumstances.

4. Contemporaneously with the plaint, the Plaintiff filed the Notice of Motion application dated 29th July, 2019. The same was duly canvassed by way of written submissions and the court rendered its ruling on 5th November, 2020.

5. The Defendant however did not file its defence to the Plaintiff's suit.

6. For the purpose of this ruling, I will assume that the Plaintiff's further affidavit filed in court on 3rd February, 2021 was filed pursuant to the directions issued by this court on 20th January, 2021 and cannot be in respect of an application which has since then be determined.

7. In paragraph 6 of his further affidavit, the Plaintiff stated that;

“.....he verily believes that he has locus standi to institute the present suit and that it is anchored in law for the following reasons;

(a) The demolition notice was issued by the Respondent which is the subject matter of the suit to him personally, an acknowledgement that he is in occupation and the person affected by the imminent demolition of the suit property.

(b) The registered owner property, Moses Musembi Mbole left a valid will which bequeathed the suit property to the Plaintiff.”

8. The counsel for the Defendants submitted that it is not in contention that the registered owner of the suit property is one Mr. Moses Musembi Mbole who is now deceased. The counsel pointed out that the Plaintiff refers to himself as the administrator of the estate of Moses Musembi Mbole in paragraph 2 of his Complaint but has failed to exhibit any document to support such an appointment.

9. The counsel went on to submit that it is trite law that the power to sue on behalf of a dead person is only done through obtaining letters of administration for the estate of the deceased. The counsel pointed out that in the absence of such letters of administration, the person purporting to represent the estate acts as a stranger. The counsel urged that having failed to provide evidence of any grant of letters of administration, this suit must collapse.

10. In support of his submissions, the counsel cited Section 82 of the Law of Succession Act, Chapter 160 of the Laws of Kenya which provides as follows;

“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 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 think best;

(i) Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) No immovable property shall be sold before confirmation of the grant;

(c) To assent, at any time after confirmation of the grant to the vesting of a specific legacy in the legatee thereof;

(d)

80(2) A grant of letters of administration, with or without the will annexed shall take effect only as from the date of such grant.”

11. It was further submitted that the letters of administration cannot even be subsequently obtained to support an already filed suit. The counsel relied on the case of **Isaya Masira Momanyi –Vs- Daniel Omwoyo & Anor [2017] eKLR** where it was held thus;

“In his filed submissions the Plaintiff has unprocedurally annexed as “Ex.4” a copy of letters of administration to the estate of Marisa Onsase dated 20th July, 2016 issued to Isaya Masira Mumanyi in CMC Succ. Cause No. 219 of 2016. The letters of administration are to the Plaintiff in the present suit meaning that as at 8th June 2016 when he filed the suit he never had any letters of administration to the deceased estate. He definitely did not have any capacity and/or locus standi to file the suit on behalf of the deceased estate. The suit is incompetent and filed in abuse of the process of the court. The suit was null and void ab initio and cannot be sustained.”

12. Needless to say, the same situation in the aforementioned authority obtains in the matter before this court. The Plaintiff contends that he is an administrator of the estate of Moses Musembi Mbole by virtue of a document dated 9th August, 2009 and marked ‘MBM2’ to the Plaintiffs further affidavit filed in court on 3rd February, 2003. That document is said to be a will. Whether or not it is a will is not for this court to decide save to say that there is nothing on record to show that the Plaintiff has obtained letters of administration in order to enable him to file this suit. Instead the Plaintiff purports to insinuate that he has the *locus standi* by virtue of the notice of demolition that was served upon him by the Defendant. The notice in itself does not confer locus on him in the absence of letters of administration.

13. Having been served with the said demolition notice by the Defendant, it behoved the Plaintiff to obtain the necessary letters of administration ad litem to enable him file this suit on behalf of the estate of the late Moses Musembi Mbole. Short of the appropriate letters of administration, I am minded to agree with J. M. Mutungi, J in the authority that was cited to me by the Defendant’s counsel where his lordship stated thus;

“He definitely did not have any capacity and/or locus standi to file the suit on behalf of the deceased estate. The suit is incompetent and filed in abuse of the process of the court.”

14. In hold a similar position in this matter and in the circumstances, I hereby proceed to strike out the Plaintiff’s suit with costs to the Defendant. Since the facts in this case are similar to the ones in ELC number 52 of 2019, this ruling shall apply to the said ruling as well.

SIGNED AND DELIVERED AT MAKUENI VIA EMAIL THIS 2ND DAY OF SEPTEMBER, 2021.

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HON. C. G. MBOGO

JUDGE

Court assistant: Mr. Kwemboi