



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LANDS COURT AT MILIMANI

ELC CASE NO. E343 OF 2021

PETER KIMANI BORO.....PLAINTIFF/APPLICANT

-VERSUS-

MARK & JEDY PROPERTY MANAGEMENT.....1ST DEFENDANT/RESPONDENT

NAIROBI METROPOLITAN SERVICES.....2ND DEFENDANT/RESPONDENT

CHIEF LAND REGISTRAR, NAIROBI.....3RD DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. The Plaintiff/Applicant herein has filed the Application dated 28th September 2021, in respect of which same seeks the following Reliefs;

i.(spent)

ii. *Pending the hearing and determination of this Application, the Honorable Court be pleased to issue Interlocutory orders restraining the Defendants herein by themselves and any other person acting on their behalf from trespassing, encroaching, disposing of and/or dealing with any part of the subject matter herein.*

iii. *Pending the hearing and determination of this suit, the Honorable Court be pleased to issue Interlocutory orders restraining the Defendants herein, by themselves and any other person acting on their behalf from trespassing, encroaching, disposing of and/or dealing with any part of the subject matter herein.*

iv. *Costs of this Application be borne by the Defendants.*

2. The subject Application is premised on the various grounds contained and enumerated at the foot of the Application and same is further supported by the Affidavit sworn by the Plaintiff/Applicant on the 28th of September 2021, to which the Plaintiff/Applicant has annexed 10 exhibits, details whereof have been synchronized in the Affidavit.

3. The subject Application came up under a Certificate of Urgency and same was dealt with by this Honourable Court on the 30th of September 2021. For clarity, the Honorable Court directed that the Application be served and be heard on the 19th of October 2021.

4. On the 19th of October 2021, when the Application was called out for hearing, Counsel for the Plaintiff/Applicant indicated that same was ready to proceed and on the basis of the intimation by the Counsel, the Honorable Court directed that the Application be canvassed orally.

DEPOSITION BY THE PARTIES

5. The Plaintiff/Applicant herein averred in the Supporting Affidavit that the subject suit touches on and/or concerns L.R. NO. Dagoretti/Riruta/T22, herein after referred to as the suit property, and proceeded to state that the suit property belongs to and was registered in the name of one, Moses Kimani Boro, now deceased.

6. It was the Plaintiff/Applicant's further averment that during the lifetime of the deceased, same had erected various structures on the suit property, which structures have been attracting and continue to attract monthly rents.

7. The Plaintiff/Applicant further avers that in the year 2012, his sister, namely Virginia Gakuhi Boro, filed Succession Cause, namely **Nairobi HCC Succession 1240 of 2012**. However, upon the filing of the succession, a dispute arose and the Succession Cause is still pending determination to date.

8. Nevertheless, the Plaintiff/Applicant further avers that to date, no grant of Letters of Administration have been issued, over and in respect of the estate of the deceased.

9. It was the Plaintiff/Applicant's further averment that notwithstanding the foregoing, the Defendants/Respondents herein, and in particular the 1st and 2nd Defendants, have since entered the suit property and have commenced the process of demolishing the structures thereon.

10. On the other hand, the Plaintiff/Applicant has also averred that the ownership of the suit property, was on the verge of being interfered with and as a result of same, he proceeded to and lodged a Caution, which remains in place to date.

11. Owing to the foregoing, the Plaintiff/Applicant sought for orders in terms of the Notice of Motion Application.

1st Defendant/Respondent's Case

12. Upon being served, the 1st Defendant/Respondent proceeded to and entered appearance. However, the 1st Defendant/Respondent had not filed any responses to the subject Application.

2nd and 3rd Defendants/Respondents Case

13. Similarly, upon being served with the Court process pertaining to the subject matter, the 2nd and 3rd Defendants/Respondents also entered appearance, but had not filed any responses to the subject Application.

SUBMISSIONS

14. The subject Application was canvassed by way of Oral submissions and the Plaintiff/Applicant herein reiterated the contents of the Supporting Affidavit. In particular, the Plaintiff/Applicant contended that even though no Grant of Letters of Administration have been issued in respect of the estate of the deceased, the Applicant herein is still seized of the capacity to maintain the suit and the subject Application.

15. On the other hand, the Plaintiff/Applicant also contended that as a result of the likelihood of the alienation of the suit property and change of ownership, same proceeded to and lodged a Caution to protect the Registration of the suit property.

16. As pertains to the provisions of **Section 82 of the Law of Succession Act, Chapter 160, Laws of Kenya**, the Plaintiff/Applicant contended that same did not apply to the subject matter.

17. In a nutshell, the Plaintiff/Applicant contended that the grant of Letters of Administration over and in respect of the estate, is irrelevant to the subject suit and that the Court should proceed and grant the Orders sought.

18. On her part, the 1st Defendant/Respondent contended that the suit was a nullity and therefore same cannot anchor the subject Application for Injunction.

19. The sentiments by the 1st Defendants/Respondent, were shared by Counsel for the 2nd and 3rd Defendants/Respondents, who were represented by Learned Counsel Mr. Allan Kamau. For clarity, the 2nd and 3rd Defendants/Respondents stated that the subject Application does not disclose any reasonable cause of action.

ISSUES FOR DETERMINATION

20. Upon examining the Plaint, the Notice of Motion Application and the Supporting Affidavit attached thereto, and upon re evaluating the submissions by the Plaintiff/Applicant, as well as submissions by the Defendants/Respondents, the following issues arise for determination;

- i. *Whether the Plaintiff/Applicant is the legal administrator of the estate of the deceased, and if not, whether same can commence any civil proceedings on behalf of the estate of the deceased.*
- ii. *Whether the subject Suit has established and/or disclosed a Prima facie case with overwhelming chances of success.*
- iii. *Whether the Plaintiff/Applicant is disposed to suffer any irreparable loss.*

ANALYSIS AND DETERMINATION

Issue Number One

21. From the pleadings and Affidavit on record, it is common ground that the suit property belongs to and was registered in the name of one,

Moses Kimani Boro, who is stated to have passed on the 28th of April 2012.

22. It is also apparent from the Supporting Affidavit of the Plaintiff/Applicant, that upon the death of the deceased herein, Succession proceedings were commenced by one, Virginia Gakuhi Boro, but that no grant of Letters of Administration have since been issued.

23. In any event, during the hearing of the Application, Counsel for the Plaintiff/Applicant conceded that the Plaintiff/Applicant herein has not been issued with any Grant of Letters of Administration, over and in respect of the estate of the deceased.

24. In view of the foregoing, what becomes apparent is whether or not the Plaintiff/Applicant has the requisite *locus standi* to file and/or maintain not only the subject Application, but also the instant suit.

25. Before endeavoring to answer the question on the issue of *locus standi*, it is important to take cognizance of the provisions of **Section 82 of the Law of Succession Act**, which stipulate as hereunder;

“82. Powers of personal representatives

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:

Provided that—

(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; CAP. 160 [Rev. 2012] Law of Succession.

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

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Provided that except so far as otherwise expressly provided by any will—

(i) no appropriation shall be made so as to affect adversely any specific legacy;

(ii) (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.”

26. My reading of the foregoing provision of the law, leads me to the conclusion that only a person who has been issued with a Grant of Letters of Administration on behalf of the estate of a deceased person, can file and/or maintain a suit, in respect of the estate of the deceased.

27. In respect of the instant matter, the Plaintiff/Applicant concedes that same has not been issued with any Letters of Administration and thus, same is not the legal administrator of the estate of the deceased.

28. In my humble view, the Plaintiff/Applicant herein is not seized of the requisite *locus standi* to commence and/or maintain the subject suit. In this regard, the subject Application as well as the suit upon which same is grounded, are fatally deficient and defective.

29. In support of the foregoing observation, I refer to the decision in the case of **Virginia Edith Wamboi Otieno vs Joash Ouko & Another [1986] eKLR whereby the Court stated as hereunder:**

“But the difficulty remains that the general rule in relation to administration is that a party entitled to administration can do nothing as administrator before letters of administration are granted. Section 80(2) of the Law of Succession Act provides that a grant of letters of administration, with or without the will annexed, shall only take effect as from the date of the grant. In contrast section 80(1) provides that a grant of probate shall establish the will as from the date of death, and shall render valid all

intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such. This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of a fresh action, because he derives title from the will and the property of the deceased vest in him from the moment of the intestate's death (see 1 Williams on Executors and Administrators (14th edn) paras 84 et seq and 230 et seq). But an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception. The doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death, cannot be invoked so as to render the action competent (see Ingall v Moran [1944] 1 KB, and the case which follow namely Burns v Campbell [1952] KB 15). This doctrine is as old as Wankford v Wankford [1702] where Powys J said:

'but an administrator cannot act before letters of administration granted to him.'

30. If further emphasis was necessary, I would invoke the decision in the case of **Trouistik International Ltd vs Jane Mbeyu & Another** where the Honorable Court stated as hereunder;

"The administrator is not entitled to bring an action as administrator before he has taken letters of administration. If he does, the action is incompetent at the date of its inception."

31. In my humble view, the Plaintiff/Applicant does not have the requisite legal capacity to commence and/or maintain the subject suit. In this regard, the subject Application, which is anchored on the suit, is a nullity.

Issue Number Two

Whether the subject Application has established and/or disclosed a Prima facie case with overwhelming chances of success

32. As pertains to the issue of Disclosure or existence of a *prima facie* case, it is worthy and appropriate to take cognizance of the decision in the case of **Mrao Ltd vs First American Bank Ltd[2003] Eklr**, where the Honorable Court defined a prima facie case as hereunder;

"So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

*"Prima facie" is a Latin phrase for "at first sight", whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like "a serious question to be tried", "a question which is not vexatious or frivolous", "an arguable case" have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the **American Cyanamid Co. Ethicon Ltd** [1975] AC 396 is a case in point. The meaning of "prima facie case", in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in **Ramanlal Trambaklal Hatt V. Republic** [1957] E.A. 332.*

33. In view of the definition provided, can a person who does not have the requisite Locus standi generate a case capable of meeting the prescribed threshold?

34. In my humble view, a *prima facie case* strictly construed, cannot arise in the circumstances espoused and/ or captured in the subject matter.

35. In view of the foregoing, I am compelled to return a verdict that no prima facie case has been established and/or disclosed, to warrant the grant of the Orders sought. For clarity, I have reached the said conclusion, despite the submissions by Counsel for the Plaintiff/ Applicant that the Plaintiff, was seized of capacity.

Issue Number Three

Whether the Plaintiff/Applicant is disposed to suffer any irreparable loss.

36. It is common ground that a person who seeks to procure and/or obtain an Order of Temporary Injunction, must not only establish the existence of a prima facie case, but must also show that there is a likelihood of suffering Irreparable loss, if the orders sought are not granted.

37. As pertains to what amounts to Irreparable loss, I can do no better than refer to the Decision in the case of **Nguruman Ltd vs Jan Bonde Nielsen & Another [2013] Eklr** where the Court observed as hereunder;

"On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

38. In my humble view, having found and held that the suit property belongs to and is registered in the name of the deceased, and that the Plaintiff/Applicant has not taken out Grant of Letters of Administration, it is therefore my finding that the Plaintiff/Applicant herein has no lawful and/or legitimate rights over the suit property that can be protected by this Honorable Court.

39. I must say, that even though the Plaintiff/Applicant, may very well be a Son of the Deceased and thus be entitled to beneficial Rights thereto, however, such Rights are Inchoate and can only accrue and/ or materialize for enforcement upon the Grant of Letters of Administration, over and in respect of the Estate of the Deceased and not otherwise.

40. I further find and hold that by virtue of not being the registered owner of the suit property, and in the absence of Grant of Letters of Administration, the Plaintiff/Applicant herein shall not suffer any loss known to law.

41. In a nutshell, I am afraid that the Plaintiff/Applicant, despite the persuasion, has failed to surmount the legal hurdles, that lay ahead of him and therefore the Honorable Court, is incapacitated from granting the Reliefs sought.

FINAL DISPOSITION

42. I have found and held that the Plaintiff/Applicant is not seized of and/or invested with the requisite *Locus standi* and the lack of such legal standing would have invalidated the entire suit and/or proceedings herein.

43. However, the subject suit was not scheduled for hearing today and in this regard, I am not obliged to make a determination affecting the suit, even though, it looks evident, that the suit is a nullity.

44. Be that as it may, I must confine myself to what was before me and this is the Notice of Motion Application dated the 28th of September 2021.

45. In the premises, the said Notice of Motion Application, which I have elsewhere herein found to be Incompetent, is hereby Dismissed with costs to the Defendants/Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

IN THE PRESENCE OF;

JUNE NAFULA COURT ASSISTANT