Nyala & another v National Bank of Kenya & 2 others (Civil Suit E003 of 2022) [2023] KEHC 999 (KLR) (14 February 2023) (Ruling)

Neutral citation: [2023] KEHC 999 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL SUIT E003 OF 2022

RPV WENDOH, J

FEBRUARY 14, 2023

BETWEEN

JANE ANURO NYALA ..... 1ST PLAINTIFF

PRISCAR ATIENO NYALA ..... 2ND PLAINTIFF

AND

NATIONAL BANK OF KENYA ..... 1ST DEFENDANT

IBRAHIM OWINO ..... 2ND DEFENDANT

KEYSIAN AUCTIONEERS ..... 3RD DEFENDANT

RULING

1. By a Notice of Motion dated 18/8/2022 and filed in court on 19/8/2022, the applicants seek the following orders:-

   a. Spent.

   b. That an order of injunction be granted by this court restraining either the 1st and 3rd respondents either by themselves or their authorized agents from offering for sale either by public auction or private treaty the parcel of land described as L.R. No. South Sakwa/ Alego/305 belonging to the Estate of the Late Basil Nyala pending the hearing and determination of this application.

   c. That pending the hearing and determination of the main suit, this court be pleased to issue orders restraining the 1st and 3rd respondents by itself, its servants, agents, officers, employees or assigns from auctioning or any way dealing with L.R. No. South Sakwa/Alego/305 belonging to the Estate of the late Basil Nyala.

d. That the court does issue an order directing the 1st respondent to distress for the loan amounts from the 2nd respondent and his estate. The 2nd respondent and his estate own properties that can be attached to offset his defaulted loan.

e. The respondents do bear the costs of this application.

2. The application is supported by the applicants' affidavits both dated 18/8/2022 and a further affidavit of Jane Anuro dated 30/11/2022 together with the annextures thereto. The contents of the affidavits were similar Jane Anuro Nyala the 1st applicant. deposed that she is a widow of the late Basil Nyala (the deceased) herein who died on 23/4/2016 and was laid to rest on L.R. No. South Sakwa/Alego/305 (suit land); that together with her co-wife, the 2nd applicant, they have been in occupation of the suit land; that until the death of her husband, she was not aware that the deceased had guaranteed any loan on behalf of the 2nd respondent which was taken from the 1st respondent; that she only came to learn of the loan when the 1st respondent purported to auction the suit land.

3. It was further deposed that when the loan facility was taken, there was no spousal consent as it is required in all matters relating to matrimonial properties; that the deceased did not benefit from the proceeds of the loan as he only guaranteed the debtor who should be pursued to repay loan; that the deceased was also not notified that there was a default in repayment of the loan; that it beats logic their matrimonial property is being targated while the defaulter has realizable assets; that together with her children they have an overriding interest in the suit land. The 1st applicant asked this court to intervene and issue the orders as prayed or the 1st respondent will unfairly dispose of the matrimonial property, disinherit and leave the dependants of the Estate of the Late Basil Nyala destitute.

4. The application was opposed. Edwin Mbugua the Remedial and Recovery Analyst of the 1st Respondent swore a replying affidavit on behalf of the 1st respondent. To the effect that 1st respondent advanced a loan of Kshs. 550,000/= to the 2nd respondent on 7/6/1991; that the suit land was then offered as security for the advancement of the loan facility; that on 12/6/1991, the deceased (basil) executed a legal charge on the suit land guaranteeing the loan amount for Kshs. 600,000/=; that the 2nd defendant defaulted on the repayment of the loan which now stands at Kshs. 10,442,757. The 1st respondent stated that on 22/3/1993 and 19/11/1993, it wrote demand letters to the 2nd respondent asking him to settle the outstanding loan amounts; that in the absence of a response, it wrote to the deceased vide a letter dated 15/6/1998 demanding repayment of the loan; that after issuing a notification of sale to the deceased, he wrote to the 1st respondent and through a letter dated 16/12/1998, he made a request to liquidate the loan with effect from 31/1/1999.

5. Further, the 1st respondent deposed that in the year 1999, the deceased instituted a suit being Kisumu HCCC 36 of 1999 which resulted into a consent judgement in favour of the 1st respondent and the deceased was to pay the principal sum of Kshs. 600,000/= and the balance in equal monthly instalments; that as of 4/10/2011, the deceased wrote to the 1st respondent proposing to pay a sum of Kshs. 480,000/= per month towards off setting the loan. The 1st respondent sated that they issued several statutory notices towards sale of the suit land resting with the notice issued on 5/5/2022 and the sale was reserved for 20/7/2022; that on 7/6/2022 the applicants through their family representatives promised to pay a sum of Kshs. 2,000,000/= over 24 months and the 1st respondent held off the intended auction slated for 20/7/2022.

6. The 1st respondent deposed that the applicants are being economical with the truth by stating that they came to know of the sale when it was advertised for sale; that the deceased who was the guarantor, was made aware of the defaulted loan as early as 15/6/1998; that the guarantor is the one who bears the burden of repayment of the loan amount; that the legal charge binds the administrators, heirs and

executors of the deceased and that his debts and liabilities survive him and are recoverable from his estate such as the loan amount. The 1st respondent ask this court to dismiss the application and allow it to sell the suit property in realization of the debt owed to it by the deceased's estate.

7. The 1st respondent also filed grounds of opposition to the application dated 18/8/2022 on the following grounds:-

   a. That the applicants do not have locus standi to institute the suit on behalf of the Estate of the Deceased, Mr. Basil Nyala.

   b. That the application is an abuse of the court's process, incurably defective and yearning for dismissal on grounds that the prayers sought are out of touch with the applicable law as relates to charges and guarantors and ultimately incapable of being granted by the court.

8. The applicants filed a further affidavit dated 30/11/2022 in response to the grounds of opposition and the relying affidavit of the 1st respondent. The 2nd applicant deposed that she brought this suit as the substantive bearer of equitable rights of the deceased and not his estate as they are yet to do succession; that the institution of the suit was predicated on the fact that the 1st respondent through the deceased, charged the suit property without consent of his family; that the 2nd respondent is a well to do man and therefore the bank should not go after their matrimonial property; that the purported agreement of 6/6/2022 was not made by either of the applicants but their sons due to duress; that the question before this court is not one of repayment of the loan but protection of their equitable interest in the property; that the grounds of opposition are misconceived and it is in the interest of justice that the application be allowed.

9 The application was canvassed by way of written submissions. The applicants filed their submissions dated 13/10/2022 and further submissions dated 30/11/2022. On whether they have a prima facie case, the applicants submitted that before issuing temporary injunction, the court must consider three principles: whether the applicanst has demonstrated that they have a prima facie case with a probability of success, whether the applicant is likely to suffer irreparable harm if an order of injunction is not granted and where the balance of convenience tilts if the court is in doubt. On what constitutes a prima facie case, the applicants relied on the case of *Mrao Ltd vs First American Bank Kenya Ltd* (2005) eKLR.

10. The applicants further submitted that the material before this court arises a prima facie case with high chances of success since among others, consent was not obtained from the applicants despite the fact that the deceased held the property in trust for their family; that no statutory notices were issued on the estate of the deceased; that the 1st respondent has not demonstrated efforts to realize the loan from the 2nd respondent and the loan having accumulated to Kshs. 10,000,000/= is in violation of the duplum rule.

11. Whether the applicants stand to suffer irreparable harm, it was submitted that there is no amount of value that can be commensurate to their attachment to the suit land. On the issue of their locus standi, the applicants submitted that they bring this suit as persons who have enjoyed possessory rights and had no choice in the charge. It was also submitted that the preliminary objection is not properly before the court and it should be dismissed.

12. The 1st respondent filed its submissions dated 25/10/2022 in court on 31/10/2022. On the locus standi of the applicants, the 1st respondent submitted that the applicants have premised their case on the sole reason that the suit land was a matrimonial and ancestral property and the deceased held it in trust for them; that the applicants have no locus standi to bring this suit because they have not taken out letters of administration of these estate. The 1st respondent submitted that locus standi signifies the right to

appear before the court of law. In support thereof, the 1st respondent referred to the case of *Law Society of Kenya vs Commissioner of Lands & others* Nakuru Civil Case No. 464 of 2000, Alfred Njau & others vs City Council of Nairobi (1982) KLR. On the question of trust, the 1st respondent submitted that there is nothing presented before this court to prove the existence of a trust.

13. On whether the applicants have met the threshold for grant of an order of injunction, the Respondents reiterated the principles set out in *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358. The 1st respondent also referred to the case of Mrao Limited (supra) on what constitutes a prima facie case. It was submitted that the applicants have not disputed the existence of a loan that was guaranteed by the deceased and they have conceded that the loan amount fell into arrears; that they have not advanced any proposal as to the repayment and it is only plausible to conclude that there is an admission of a loan and default in repayment of the same.

14. On the liability of the guarantor, the 1st respondent referred to the case of *Ecobank Kenya Limited vs Solution Wizards Limited & 2 Others* (2017) eKLR where the court held that the guarantor becomes liable upon default of the principal debtor. The 1st respondent submitted that the import of Section 90 of the *Land Act*, 2012 is that the remedy a chargor has is upon default which the applicants have admitted to; that the assertations that it is the only property the applicants have cannot stand since it was given as security to recover the loan upon default as it was held in the cases of *Andrew M. Wanjohi vs Equity Building Society & 7 Others (2006) eKLR and Jim Kennedy Kiriro Njeru vs Equity Bank (K)* (2019) eKLR,

15. Further to the foregoing, the 1st respondent submitted that the fact that the property is all that the estate of the deceased relies on, is not sufficient reason to grant an injunction as was observed in *Jimmy Wafula Simiyu vs Fidelity Bank Ltd* (2014) eKLR. It was submitted that the applicants have not demonstrated what harm would be suffered by the estate of the deceased if the 1st respondent is stopped from invoking statutory remedies.

16. On whether the court can compel the 2nd respondent and his estate from repaying the outstanding loan amount, the 1st respondent reiterated that the law provides that the primary liability is on the guarantor as was held in *Ebony Development Ltd vs Standard Chartered Bank Ltd* (2008) eKLR and R*ose Chepkirui Mibei vs Jared Mokua Nyariki & Others* (2015) eKLR. The 1st respondent also submitted that they should be awarded costs of this application.

17. I have carefully considered the application, the grounds contained thereon, the rival affidavits in support and opposition to the application, the grounds of opposition, the rival submissions of the parties together with the case law cited. The following issues are for determination:-

    a. Whether the applicants have locus standi to commence these proceedings.

    b. Whether this court has jurisdiction.

    c. Whether the applicants have made a case for grant of injunctive orders.

18. The applicants contend that they have brought these proceedings as persons with equitable interest in the suit property. The applicants also contended that the preliminary objection failed to meet the legal requirements. The locus classica on what constitutes a preliminary objection is the case of Mukisa Biscuits Manufacturing Company Ltd -vs- West End Distributors Ltd (1969) EA 696 where the Court held that:

> " ...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 point may dispose

of the suit...It raises a pure point of 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 had to be ascertained or if what is sought is the exercise of discretion."

19. A preliminary objection should meet the following criteria: it consists of a point of law; it arises by clear implication out of pleadings; it must be a matter which is capable of disposing off the suit; the facts arising therefrom should not be for calling evidence or discretion of the court.

20. In Melchizedek Shem Kamau v Beatrice Waithera Maina & 2 others (2020) eKLR the court held:-

> " The Court must proceed from the premise that an objection must be raised on a pure point of law, the effect of which if successful would dispose of the entire suit without allowing parties to go through the trial process. Arguably, the rationale of a Preliminary Objection is to interject the trial process. Given the draconian ramifications of Preliminary Objections, the Respondent must be seen to have proceeded in breach of a mandatory legal provision."

21. The undisputed fact is that there was a loan advanced to the 2nd respondent by the 1st respondent and it was guaranteed by Basil Nyala, the applicants / plaintiffs husband who is now deceased. It is also not disputed that the applicants have brought these proceedings as the wives of the deceased. The Court of Appeal in Alfred Njau & Others (supra) defined locus standi as:-

> " ...Locus standi" literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."

22. At the inception of any court proceedings, what qualifies the proceedings to be heard to its finality, is the locus a person has before institution of the suit. In the absence of locus, a court cannot be said to have jurisdiction to entertain the suit before it. The emphasis that a litigant must have locus before bringing proceedings to court is to weed out vexatious litigants who do not have a direct claim in the dispute and to also uphold the sanctity of court proceedings. In certain circumstances such as the one before this court, a person who intends to commence proceedings on behalf of deceased persons, is required to fulfil certain conditions.

23. The title to the suit property in dispute shows that it was registered in the name of the deceased. It therefore follows that any issue concerning the title should have been commenced ab initio, by the deceased himself but since he is incapable of doing that, his personal representatives can institute proceedings but they must show that they have locus. Apart from the averments by the applicants that they are wives of the deceased, there is nothing else on record like a marriage certificate, an affidavit of marriage sworn by the deceased acknowledging the applicants as his wives or a letter from the chief to ascertain that they are wives of the deceased. The only option the applicants had in order to bring these proceedings was to take out letters of administration ad litem.

24. The rationale for requiring parties to take out letters of administration ad litem is for the succession court which is seized with the jurisdiction to handle probate matters, to investigate the veracity of persons who purport to represent estate of deceased persons. Unless the applicants take out letters of administration ad litem to bring an action on behalf of the deceased concerning the suit title, their capacity to commence these proceedings remains doubtful.

25. In the case of Julian Adoyo Ongunga -vs- Francis Kiberenge Abano Migori (2016) eKLR Mrima J had this to say on the issue of a party filing a suit without having obtained a limited grant.

> " Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties."

26. The Court of Appeal in Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another (1987) eKLR stated: -

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

27. The applicants have circumvented the argument that they do not need to take out letters of administration by stating that they have an equitable interest in the suit property which the deceased held in their trust. When a party raises issues of trust, it is trite law that evidence must be led to establish the existence of trust. In Peter Moturi Ogutu v Elmelda Basweti Matonda & 3 Others (2013) eKLR the court stated: -

> " Where a claim of trust has been raised, the Plaintiff had to establish the existence of a trust on which his case could be hinged or mounted."

28. All questions relating to trust are to be determined substantively by the Environment and Land Court courtesy of Article 165 (5) of *the Constitution* and Section 13 of the Environment and *Land Act*. Hence, this court cannot issue any orders in favour of the applicants in relation to the suit land since the issue of trust ownership is in dispute and evidence has not been led to establish the existence of a trust.

29. The other aspect of jurisdiction is the pecuniary nature of this suit. According to the 1st respondent's affidavit, the outstanding amount is Kshs. 10, 442, 757. Section 11 of the *Civil Procedure Act* provides that every suit should be instituted in court of the lowest grade competent to heart it. The import is that depending on the subject matter, geographical and pecuniary limits of jurisdiction, a suit should be filed in a Magistrate's Court. Section 7 of the Magistrate's Court Act provides for the different pecuniary limits of the different ranks in the Magistrate courts.

30. The pecuniary jurisdiction of the subject matter in question, falls well within the rank of a Senior Principal Magistrate Court which has a pecuniary limit of Kshs. 15,000,000/=. Pursuant to the powers given to the High Court in accordance with Article 165 of *the Constitution*, this suit is hereby transferred to the Migori Chief Magistrate Court for hearing and determination.

31. On the first issue for determination, this court finds that the applicants have no locus standi to bring this suit. This court also finds that it lacks jurisdiction to entertain this application and the suit on the basis of the locus standi of the applicants, the arising issue of trust and the pecuniary jurisdiction which is granted to the Magistrate's Court in the first instance.

32. The applicants contend that the 1st respondent did not endeavour to seek spousal consent prior to charging the suit land. The loan was taken in the year 1991. At the time when the legal charge was created over the suit land, the *Land Act* 2012 which makes it a mandatory requirement for spousal consent was not yet enacted. The Court of Appeal sitting in Kisumu upheld the decision of the High Court in Stella Mokeira Matara v Thaddues Mose Mangenya & another (2016) eKLR and observed that:-

> " But even if the appellant had shown that their matrimonial home was situated in the suit properties, the appellant still had to prove that her consent to charge the properties was by law required and was not obtained, considering that the charge in issue was drawn and executed before the *Land Act*, 2012 and the *Land Registration Act*, 2012 that espouse spousal consent were enacted."

33. In E N W v P W M & 3 others (2013) eKLR the court made a finding that:-

> " Charges taken before the enactment of the *Land registration Act* 2012 cannot be invalidated on the basis that spousal consent had not been obtained. It was not a requirement prior to the enactment of the new *Land Registration Act* and therefore the plaintiff in the present case cannot have refuge under the new *Land Act*."

34. Guided by the above decisions, the applicants cannot have refuge in the *Land Act* 2012 on issue of special consent.

35. It was the applicant's further contention that the deceased only got one letter that served both as a notice of default and auction. From the 1st respondent's affidavits, the deceased was first served with a letter dated 15/6/1998 demanding payment for the defaulted loan. The deceased instructed the firm of Oduk & Co. Advocates and by a letter dated 11/9/1998, he denied that his liability as a guarantor had arisen. On 8/12/1998, the 1st respondent sent a notification of sale to the deceased which he acknowledged having received albeit l via his Counsel Oduk & Co. Advocates in a letter dated 16/12/1998. In the said letter, the deceased undertook to liquidate the outstanding balance of Kshs. 600,000/= within 36 months. In addition, the deceased wrote to the 1st respondent advising them to attach the 2nd respondent's property via a letter dated 17/12/1998.

36. The deceased also proceeded to file a suit against the 1st respondent being Kisumu HCCC No. 36 of 1999 and a consent was recorded. The said letter forwarding the consent terms at page 40 is not visible but the existence of the suit is not denied. The deceased failed to honour the terms of the consent and instead threatened to sue the 1st respondent when it sought to execute the terms of the consent judgement. Once again, the deceased wrote to the 1st respondent vide a letter dated 4/10/2011 proposing to make payments in instalments of Kshs. 480,000/= per month. The 1st respondent issued fresh statutory notice on 5/8/2016 under Section 90 of the *Land Act* 2012. The culmination of these letters was one dated 7/6/2022 addressed to the bank by the sons of the deceased wherein they undertook to repay the outstanding loan amount.

37. The principles set out in the case of Giella vs Cassman Brown (supra) are not for grant of an order of injunction: whether the applicant has shown prima facie case with a probability of success; whether the applicant will suffer irreparable injury which cannot be compensated by damages; and if the court is in doubt, then it can decide the application on a balance of convenience. In the case of Mrao Limited (supra) a prima facie case was described as one which on the material placed before the court, there exists a right which has been infringed by the opposite party.

38. From the history of the matter before this court, the applicants have not established that they have a prima facie case. First, the applicants have no locus standi to bring this action before this court. Second, the applicants have not established existence of a suit and this court has no jurisdiction to determine issues arising from trust. Third, there was no requirement of spousal consent at the time when the legal charge over the suit property was made. The applicants cannot therefore make claims over the suit land on the basis there was no spousal consent. Fourth, there is evidence on record that the deceased was notified of the default payments severally and even on his own volition he agreed to make payments on behalf of the 2nd respondent.

39. This court makes another observation on the validity of the statutory notices sent to the deceased. A statutory notice of sale was issued to the deceased and the 2nd respondent on 5/8/2016. The death certificate shows that the deceased died on 23/4/2016. The letter to the 1st respondent dated 7/6/2022 by the sons of the deceased also shows that the 2nd respondent is also deceased but it is not disclosed when he died. From the foregoing, the statutory notice of sale was sent to the deceased person. The statutory notice would only be said to have been valid if it was addressed to the estate of the deceased persons. The service of the statutory notice upon deceased persons was invalid. The Chargee cannot exercise its statutory power of sale based on the notices and therefore the sale cannot crystallize upon such service.

40. The 1st respondent has the right under Section 66 of the *Law of Succession Act* to apply to the court for letters of administration to enable it carry out its statutory power of sale. The Court of Appeal in Marteve Guest House Limited v Njenga & 3 others (2022) held:-

> "As Chargee, the bank had the option under section 66 of LSA to apply for letters of administration for the estate of the deceased to enable it to exercise its statutory power of sale. Nevertheless, in light of the bank's interest in the suit property, and the rights of the deceased's beneficiaries, the bank could only exercise that option by applying to have a person or persons entitled to a grant of letters of administration for the estate of the deceased chargor appointed as such by the court. That would have enabled the bank to serve the estate of the deceased with the necessary notices through the appointed administrators, to give an opportunity for the estate to pay the debt failing which the bank would be able to pursue its statutory right of sale, the administrators stepping into the shoes of the deceased chargor. The bank did not follow that avenue and the estate of the deceased was not given an opportunity to redeem the suit property before the sale. To that extent the bank's statutory power of sale had not accrued."

41. As I come to the end of this ruling, as observed hereinbefore, the 2nd respondent is deceased. The applicants cannot purport to sue a deceased person. An action against the 2nd respondent can only subsist through the personal representatives of his estate. This court also notes that from the affidavit of service, there seems to be no effort to serve the estate of the 2nd respondent or relatives of the 2nd respondent (deceased) if at all there are no personal representatives. This court is certain that the family of the 2nd respondent is not a stranger to the applicants. They should have attempted to serve the estate of the 2nd respondent or persons related to the 2nd respondent in order for them to sustain this suit. The applicants have at their disposal the provisions of the *Law of Succession Act* to come to their aid if at all the personal representatives of the deceased 2nd respondent are unwilling to act.

42. The foregone conclusion is that the following orders do issue:-

    i. The application dated 18/8/2022 is hereby dismissed.

ii. The 1st Respondent is at liberty to proceed and realize its security upon complying with the law and serving all the requisite notices on the parties as required by the law.

iii. The Plaintiffs' suit is hereby struck out.

iv. Upon compliance with the directive of taking out letters of administration ad litem, the suit may be filed in the Migori Magistrates Court.

v. The applicants to bear the costs of the application.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 14TH DAY OF FEBRUARY, 2023

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

Mr. Chesoli for the Applicants/Plaintiffs.

Mr. Kangogo for the 1st Defendant / Respondent.

No appearance for the 2nd Defendant / Respondent.

No appearance for the 3rd Defendant/ Respondent.

Nyauke Court Assistant.