REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC MISC. APPLICATION NO. E002 OF 2020

DORCAS NJOKI MUGO.....APPLICANT

VERSUS

CRISPIN KIENYU KANG'ETHE.....1ST RESPONDENT

THE LAND REGISTRAR, EMBU.....2ND RESPONDENT

RULING

1. The focus of this determination is a preliminary objection dated 10.5.2021 and filed on 12.5.2021. The objection targets the application dated 16/11/2020 as filed and is premised on three (3) points as follows:-

a) **THAT** the applicant lacks capacity to bring the present application as she is not the legal representative of the estate of the deceased registered owner.

b) **THAT** the application and the entire suit is incompetent and an abuse of the court process.

c) **THAT** the application is fatally defective and a non-starter as it is purported to have been drawn and filed by a law firm that does not exist.

2. The parties in the application, which is a Notice of Motion, are shown to be Dorcas Njiru Mugo, as the applicant, while Chrispin Kienyu Kange'the and The Land Registrar, Embu, are the respondents. This matter is filed by way of miscellaneous application. The applicant sought the lifting of cautions and or restrictions placed on land parcel no. Kaagari/Weru/1168 on grounds that the court had heard and determined all issues relating to the suit land. The applicant averred that an appeal, which had been preferred in the matter had been dismissed and there was therefore need to have the caution lifted as she stands to suffer irreparably having purchased the said parcel of land. In essence, this is a suit initiated by way of a Notice of Motion.

3. The 1st respondent had opposed the application and averred that he had bought the land from Ephantus Njiru Gideon Murangai and despite the judgment dismissing his suit, he had filed for citation at the Runyenje's court against the beneficiaries of the deceased estate to enable him pursue his claim over the suit land. The respondent challenged the legal capacity of the applicant to bring the application since, according to him, the applicant was neither a legal owner of the land nor a legal representative to the estate. The applicant was also challenged for not stating her interest in the suit land.

4. The applicant in a further affidavit averred that she had an identifiable stake in the suit as a purchaser. Further she annexed letters of administration which according to her gave her capacity to prosecute the suit as she was an administrator to the estate of Ephantus Njiru Gideon, the registered proprietor of the land.

5. The applicant protested that the 1st respondent had unreasonably encumbered the suit land which made it difficult for her registration as the proprietor to be effected.

6. The preliminary objection was canvassed by way of written submissions. The 1st respondent opted to argue first ground 2 of the objection. He relied on Section 19 of the civil procedure act and Order 3 rule 1 of the Civil Procedure Rules to emphasize that a suit should be instituted in such a manner as prescribed by the rules. He went further to state that orders for removal of a caution and /or eviction are civil actions which must be commenced in the manner prescribed in the Civil Procedure Rules. He reiterated that as a general rule a suit can only be commenced by a plaint, petition or originating summons and a notice of motion can only be filed within a properly instituted suit.

7. The 1st respondent was of the view that such orders could not be sought through a miscellaneous application as the court would need to consider and determine the matter after the full hearing of the suit and this could only be achieved through a plaint. To emphasize this, the 1st respondent relied on the cases of **Misc Application No. 13 of 2020 ELC Eldoret; Rajab Kosgey Magut Versus Nuru Jepteting Choge** and **Misc Application No. 15 of 2020 ELC Mombasa Tatecoh Housing and Co-op Society Versus Qwetu Sacco,** where it was held that suits for orders of eviction and removal of cautions can only be commenced by way of a plaint.

8. On ground 3 of the objection the 1st respondent was of the view that the application was expressed to have been drawn by the firm of P. N. Mugo and company advocates yet the said advocate was no longer practising and is neither currently residing in the country. He urged the court to take Judicial notice of this fact as required under section 60 of the Evidence Act which provides that courts shall take judicial notice facts such as names of it's members, officers of the courts and even advocates and other persons authorized by law to appear or act before it. The 1st respondent further relied on section 59 of the Evidence Act which provided that no fact of which the court shall take judicial notice of needs to be proved.

9. Ground 1 was argued as the last ground and the 1st respondent submitted that the applicant lacks capacity to file the instant application as she was neither the legal representative of the deceased estate or the registered owner of the suit parcel of land. It was said that at the time of filing the suit the applicant did not indicate the capacity in which she was bringing the suit and that it was only after the 1st respondent raised the issue of lack of capacity in his replying affidavit that the applicant then filed a further affidavit purporting to have obtained letters of administration. The 1st respondent reiterated that the application was incompetent and an abuse of the court process and urged the court to strike it out and award him costs.

10. The applicant's submissions were filed on 30.6.2021. The applicant first stated that a preliminary objection must be on a pure point of law only. She relied on the case of **Civil Application No. 36 of 2014; between the independent Boundaries Commission and Jane Cheperengerer & 2 others,** where the Supreme Court **endorsed the principles in Mukisa Biscquits manufacturing Co. Ltd Vs West End Distributors [1969] EA 696.** In Mukisa's case the court stated that a preliminary objection consists of a point of law which has been pleaded, or one that arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. It was emphasized that the court ought to be satisfied that there is no proper contest as to the facts.

11. On ground 1, which is whether the applicant is the legal representative of the deceased person, she submitted that she was, by virtue of letters of administration issued upon her in Succession Cause No. 26 of 2020, which according to her made her the legal custodian of the estate of the deceased.

12. On ground 3 the applicant submitted that despite the advanced age of Senior P.N. Mugo, the said advocate still practiced in the name and style of P.N Mugo & Co. Advocates in Embu and the court was urged to confirm this. The applicant was of the view that grounds 1 and 3 were issues of fact and not law and that the court would determine them at the trial.

13. On ground 2, while relying on Section 19 of the Civil Procedure Act and Order 3 rule 1 of the Civil Procedure Rules, the applicant was of the view that the fact that a court has been moved in a less desirable manner should not be a basis for dismissing the suit. According to the applicant if a court is satisfied that a different approach ought to be used, of it's own motion it may direct the offending party to regularize it's approach.

14. While further on placing reliance on Article 159 of the Constitution, Sections 1A and 1B of the Civil Procedure Rules as well as Section 3 and 19(1) of the Environment and Land Court Act the applicant was of the view that courts should take an approach that leans towards substantive determination of disputes upon hearing both parties. She relied on the case of **Civil Appeal No. 27 of 2016 David Karobia Kiiru Vs Charles Gitoi** to emphasize on this. She further called upon the court to invoke the oxygen principle as a means to an end and consider that the respondents will not suffer any miscarriage of justice if her application is admitted.

15. I have considered the objection as raised and the rival submissions by the parties. I have also looked at the suit as filed. The governing principles on preliminary objection are found in the case of **MUKISA BISCUITS MANUFACTORING CO. LTD Vs. WEST END DISTRIBUTORS [1969] EA 696.** In the case, Law JA expressed himself as follows:-

> *"So far as I am aware, a preliminary Objection consists of a pure point of law which has been pleaded, or which arise by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit".*
>
> And Sir Charles Newbold P also had this to say;
>
> *"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 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".*

16. I have considered the grounds raised in the objection. As reiterated in the Mukhisa case, a preliminary objection is one that raises a pure point of law. The applicant is of the view that grounds 1 and 3 are grounds of facts and only ground 2 is on a point of law. I do not entirely agree with the applicant. To me ground 3 is the only ground of fact raised in the objection as a ground that requires the court to establish and verify it by way of evidence. One would require evidence establishing whether or not the firm of P.N. Mugo and Co. advocates exists. Without much ado therefore, I dismiss this ground.

17. Ground 1 challenged the legal capacity of the applicant to bring the application. According to the 1st respondent the applicant was neither a legal representative nor a registered owner of the suit parcel of land. The 1st respondent further argued that the applicant did not state in what capacity she filed the application.

It is trite law that for one to institute a suit in relation to a deceased estate they must obtain grant of letters of administration which will give them the requisite locus standi.

18. This was elaborated in the case of ***Hawo Shanko v Mohamed Uta Shanko*** **[2018] eKLR** where the court held that:

> **"The general consensus is that a party lacks the locus standi to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the Plaintiff or applicant has not been formally authorized by the Court by way of a grant limited for that purpose, then it will be difficult to control the flow of Court cases by those entitled to benefit from the estate... It does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same. One has to first obtain a limited grant that will give him/her the authority to file the suit."**

Under Order 4 Rule 4 of the **Civil Procedure Rules** the law provides that:-

> *"Where the Plaintiff sues in a representative capacity, the Plaintiff shall state the capacity in which he sues and where the Defendant is sued in a representative capacity, the plaint shall state the capacity in which he is sued, and in both cases it shall be stated how the capacity arises."*

19. It is evident that the applicant at the time of filing the suit never brought to the court's attention any documentation or evidence that she was a legal representative of the estate of the deceased. Further the applicant was not a registered owner of the land but had brought the application in the capacity of being an alleged purchaser to the land. Further in line with Order 4 rule 4 the applicant did not disclose the capacity in which the brought the suit.

20. However, I note that though this was the position the applicant filed a further affidavit to which she annexed letters of administration intestate to the effect that she had been appointed as an administrator to the estate of the registered owner of the land by virtue of being a purchaser. In Kisii ELC NO. 8 of 2019 **Pamella Kwamboka Nyarega & another v Edward Kaso Obwocha & another [2020] eKLR** the court faced with similar circumstances had the following to say:

> **"It is therefore my finding that although the Appellants did not state the capacity in which they sued, they had taken out Grant of letters of Administration and had the *locus standi* to institute the suit".**

It is my finding that the applicant having taken out letters of administration and though she did not state the legal capacity in which she brought the suit, the applicant had the requisite locus standi to institute the present suit before the court.

21. On ground 2 of the objection, the application and the entire suit is said to be incompetent and an abuse of the court process for having being instituted by way of Miscellaneous application instead of a plaint. The suit essentially seeks for removal of caution/restriction and eviction orders against the respondent. As a general rule suits are instituted by way of plaint unless the rules prescribe any other manner. This is as provided under Order 3 Rule 1 of the Civil Procedure Rules which stipulates that:

> *"Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed."*
>
> *This is also provided under Section 19 of the Civil Procedure Act which provides that:*
>
> *"Every suit shall be instituted in such manner as may be prescribed by rules."*

22. *Cautions and restrictions are found under Part VII of the Land Registration Act. The procedure on which such suits should be instituted is dealt with under* order 37 rule 8 of Civil Procedure Rules, 2010, which states as follows:

> *"An application under the Land Registration Act, 2012 other than under part VII and VIII thereof shall be made by Originating Summons unless there is pending a suit involving the same land when the application may be made in that suit".*

23. It will be noted that the provisions of Order 37 rule 8, specifically excludes institution of a suit seeking removal of a caution or restriction by way of originating summons.

The 1st respondent has relied on the cases of **Misc Application No. 13 of 2020 ELC Eldoret; Rajab Kosgey Magut Versus Nuru Jepteting Choge** and **Misc Application No. 15 of 2020 ELC Mombasa Tatecoh Housing and Co-op Society Versus Qwetu Sacco** where the courts held that suits for orders of eviction and removal of cautions can only be commenced by way of a plaint. I associate myself with the cases and make a determination that orders for eviction and removal of cautions can only be commenced by way of plaint and not by way of miscellaneous application. In essence, the long and short of it is that in the absence of any specified manner under the rules in which a suit ought to be instituted then such suit should be brought by way of plaint.

24. The applicant further urged the court to invoke the provisions of Article 159 of the Constitution and allow the application. According to the applicant, even if the application is struck out the applicant will still move the court in a different approach and seek the same prayers. The applicant seems to be urging the court to overlook the issue of procedure and focus on the substance of the application. However though Article 159(2) cautions courts from focusing on procedural technicalities, I am of the view that where the law is specific as in Order 37 rule 8, then the said Article cannot be invoked to salvage the situation and allow entertaining of applications filed by way of wrong procedure.

25. In the case of **Joseph Kibowen Chemjor vs William C. Kisera [2013] eKLR, Justice Munyao Sila** observed as follows;

I am alive to the provisions of Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to technicalities. My view is that the commencement of suit in a manner in which the instituting documents cannot be held to be "pleadings", goes beyond a mere technicality. It is different where the document filed can be assumed and be regarded as a particular pleading. This probably is the commencement of "suit by a letter" which Mr. Chebii alluded to in his submissions. If framed intelligibly such letter can be regarded as a plaint. However there has to exist special circumstances before such letter can be accepted to be a pleading. Such allowances ought not to be stretched so as to permit counsels to develop a habit of writing letters instead of filing plaints and argue that proceedings can be commenced in whichever way. The purpose of having rules of procedure is to have proceedings controlled in a logical sequence so that justice can be done to all parties. It is incumbent upon parties and counsels to follow the procedures laid out. This of course does not imply that a court has no discretion to permit some sort of deviation especially where the deviation is minimal and no prejudice is caused to the other party.

If I am to allow the current "pleadings" to stand, I do not see how this matter will be determined without prejudice being caused to the defendant. Even if no prejudice will be caused to the defendant I would rather strike out this application at this stage, which will only invite minimal cost, rather than to allow the proceedings to stand, and thereafter be at a loss on how to thereafter proceed with the matter. The former action will benefit all parties and is certainly the lesser of the two evils.

26. I fully agree with Munyao J in the above case and make a finding that the application herein is incompetent and fatally defective. The upshot of the foregoing is that the preliminary objection is upheld and the application is hereby struck out with costs to the 1st Respondent.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 13TH DAY OF OCTOBER, 2021.

In the presence of the respondent in person and in the absence of P.N. Mugo advocates for the applicant.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

13.10.2021