



South Nyanza Sugar Company Limited v Andiga (Suing as administrator of the Estate of Francis Ndiga Ongoko) (Civil Appeal 52 of 2019) [2023] KEHC 2197 (KLR) (14 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 52 OF 2019
TA ODERA, J
MARCH 14, 2023**

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED APPELLANT

AND

**YUNIS ANYANGO ANDIGA (SUING AS ADMINISTRATOR OF THE ESTATE
OF FRANCIS NDIGA ONGOKO) RESPONDENT**

(Being an Appeal from the Judgment and Decree of Hon M. M. Wachira (SRM) delivered on 20th February 2019 at Migori in Chief Magistrates Court Case No 276 of 2015))

JUDGMENT

INTRODUCTION

1. In his decision of February 20, 2019, the Learned Trial Magistrate, Hon M.M. Wachira, (SRM) entered Judgment in favour of the Respondent as against the Appellant in the sum of Kshs 137, 738.50 plus interests and costs thereon.
2. Being aggrieved by the said decision, on March 28, 2019, the appellant filed a Memorandum of Appeal dated March 26, 2019. It relied on four (4) grounds of appeal.
3. Its Written Submissions were dated July 2, 2022 and filed on June 24, 2022 (sic). The respondent did not file any submissions.
4. The Judgment herein is therefore based on the Appellant's Written Submissions only.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.



6. This was aptly stated in the case of *Selle & another vs. Associated Motor Boat Co Ltd & others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
7. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Respondent had locus standi to file the suit at the trial court.
8. The appellant submitted that the contract and/or agreement, that was the subject of the suit at the trial court was drawn between the appellant and the deceased, Francis Ndiga Ongoko. It was therefore its case that the respondent lacked locus standi to bring the suit for and on behalf of the estate of the deceased as she did not exhibit any grant of letters of administration of whatever nature as the basis in which she lodged the suit at the Trial Court and on behalf of the alleged estate.
9. It placed reliance on the case of *Alfred Njau v City Council of Nairobi* (eKLR citation not given) which defined *locus standi* to mean, "a place of standing and refers to the right to appear or be heard in court or other proceedings and to say a person has no locus standi means that he has no right to appear or be heard in such proceeding." It added that the issue of a party filing a suit without obtaining even a limited grant was addressed in the case of *Julian Adoyo Onguga v Francis Kiberenge Abano* Migori Civil Appeal No 119 of 2015 (eKLR citation not given) where the court held that the issue of locus standi in a civil matter since it runs through the heart of the case in that 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.
10. It further relied on the cases of *Bolton vs Salim Khamoi* (1958) EA 360 and *Isaya Masira Momanyi v Daniel Omwoyo & another* ELC No 167 of 2016 (eKLR citation not given) where the common thread was that a suit filed by a party without letters of administration was null and void. He further submitted that a personal administrative or administrator of an estate is clothed with the powers and duties as espoused in section 82 of the *Law of Succession Act* if he or she has obtained and been granted either full and/or limited letters of administration.
11. It was its case that the Learned Trial Magistrate erred in finding that the respondent had *locus standi* by virtue of the respondent's appearing in the Contract Book at the execution page of the contract as the appointed Power of Attorney. It asserted that the proceedings were not commenced by virtue of Power of Attorney donated to the respondent as no Power of Attorney as registered by law was exhibited. It added that no such description was found in any of the pleadings drawn and filed by the Respondent. It was emphatic therefore that the suit at the trial court was not commenced by a recognized agent clothed with Power of Attorney.
12. It asserted that Order 9 Rules 1 and 2 of the *Civil Procedure Rules* 2010 provide for appearance through, inter alia, a recognized agent and Order 9 Rule 2(a) defines the recognized agents who may so appear or act to include persons holding Power of Attorney, but that no such powers were exhibited in the trial court. It further invoked Section 4 of the *Registration of Documents Act* which requires registration of documents purporting to confer or conferring right or interest, but that this was not done in the instant case.
13. It contended that even if the respondent were to rely on the fact that her name featured as a Power of Attorney in the contract book, having brought this suit as the deceased's administrator, such power of attorney could not be capable of providing the capacity to administer the estate as the donor of such



- power had died thus the Power of Attorney donated had extinguished by law upon the death of the donor. It added that the respondent did not submit on the issue of the locus standi even though the same was raised by the Appellant during the proceedings. In this regard, it placed reliance on the case of *Loice Wanjiru Meru & 3 others v John Migui Meru* ELC Appeal No 3A of 2017 (eKLR citation not given) where the court held that a Power of Attorney is extinguished on the death of the donor.
14. It was its contention that having failed to address the issue of the Respondent's locus standi it erroneously arrived at the decision that the Respondent was entitled to the award on quantum for Kshs 137,738.50. It urged the court to allow its appeal.
 15. In principle every person who is a party in a civil proceeding is entitled to represent himself personally or through an agent. Order 9 Rule 2 provides for recognized agents as thus;
 - “2. The recognized agents of parties by whom such appearances, applications and acts may be made or done are—
 - (a) Subject to approval by the court in any particular suit persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties;
 - (b) Persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;
 - (c) In respect of a corporation, an officer of the corporation duly authorized under the corporate seal.”
 16. In the instant case, it was clear that the Respondent was bringing this suit on behalf of the deceased which in essence ought to have taken out Letters of Administration in order to be in a position to legally represent the deceased's estate.
 17. It is trite law that suits must be prosecuted by and against living persons and that a power of attorney is extinguished on the death of the donor. This court had due regard to the case of *Loice Wanjiru Meru & 3 Others v John Migui* (*supra*) as submitted by the appellant. It is plainly clear on record that upon the death of the deceased herein, the power of attorney donated to the respondent stood extinguished by operation of law. That was the effect of his death on the Power of Attorney.
 18. Upon his death the respondent ought to have applied for letters of grant of administration ad litem permitting him to act on behalf of the deceased party.
 19. Under section 2 of the *Law Reform Act* cap 26 (Laws of Kenya) and section 4 of the *Fatal Accidents Act* cap 32 (Laws of Kenya), the person who is entitled to bring a cause of action in respect to the estate of a deceased person is a personal representative or an executor or administrator respectively. A person therefore ought to obtain an appropriate grant so as to have the necessary *locus standi*. The grant may be a full grant or a limited grant.
 20. Whereas a full grant of representation takes care of the entire administration of the estate of a deceased person, a limited grant, as the name suggests, is limited to a specific purpose in relation to the estate of



a deceased person. Limited Grant of Letters of Administration Ad Litem which is provided for under Form 14 of the Fifth Schedule of the Act deals with suits. The said provision states as follows:-

“When it is necessary that the representation of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

21. From the foregoing, it is clear that a Limited Grant of Letters of Administration Ad Litem is usually used when the estate of a deceased person is required to be represented in court proceedings if the Grant of Letters of Administration Intestate has not been obtained.
22. Notably, it was quite apparent that the respondent instituted the suit without having obtained the necessary grant beforehand. No doubt this rendered the suit a nullity.
23. This court had due regard to the case of *Macfoy v United Africa Ltd* [1961]3 ALL ER 1169 where the court held that:-

“... if an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

24. That was precisely the position obtaining in this case. Locus standi relates mainly to the legal capacity of a party to sue. It is 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.
25. 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. There is always the need to protect the estate of the deceased and this can only be done using the letters of administration granted by the court as the administrator is accountable to the court.
26. Indeed, it is settled law that a person cannot sue on behalf of the estate of the deceased unless he has first obtained a grant of letters of Administration either limited or full. The Respondent had no capacity to sue ab initio. She lacked the locus standi to institute the suit in the lower court. The suit that was filed in the lower court was thus a nullity from inception.
27. Accordingly, the Appellant’s appeal that was lodged on 28th March 2019 was merited and the same be and is hereby allowed. The effect of this determination is that the Lower Court suit be and is hereby struck out as it was safe to do so.
28. The Respondent will bear the costs of this appeal.
29. Orders accordingly.

T. A. ODERA - JUDGE



14.3.2023

DELIVERED VIA TEAMS PLATFORM IN THE PRESENCE OF;

No Appearance for Appellant,

No Appearance for Respondent,

Court Assistant; Bor.

T.A ODERA - JUDGE

14.3.2023

