



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT VIHIGA**

**ELC APPEAL NO. 14 OF 2021**

**(FORMERLY KAKAMEGA ELC APPEAL NO. 02 OF 2020)**

PETER KAUKAU ASITUHA.....1<sup>ST</sup> APPELLANT  
ENOCK KHALECHI OMULIMI.....2<sup>ND</sup> APPELLANT  
REUBEN OMBATI ANDENYI.....3<sup>RD</sup> APPELLANT  
JOSEPHAT ABUYEKA (ALIAS D.O).....4<sup>TH</sup> APPELLANT

VERSUS

OLEKIA MAHINDU MAKUNGA.....1<sup>ST</sup> RESPONDENT  
CHRISTINA WAKA MAKUNGA.....2<sup>ND</sup> RESPONDENT

(Being an appeal from the Ruling of the learned Hon. Magistrate Hon. S.O. ONGERI

on 13<sup>th</sup> day of December, 2019 in VIHIGA PM (EL) SUIT 48 OF 2019)

**JUDGEMENT**

**Introduction**

1.) Vide their Memorandum of Appeal dated 13<sup>th</sup> January 2020 and filed herein on 14<sup>th</sup> January 2020 the Appellants challenge the decision of the trial court in Vihiga PMC (EL) case No. 48 of 2019 (the suit) contained in its ruling dated 3<sup>rd</sup> December 2019. The Appellants are the Defendants and the Respondents the Plaintiffs in the suit.

The Ruling was in respect of a preliminary Objection raised by the Appellants questioning the capacity of the Respondents to file the suit without letters of administration yet, according to the Appellants, the suit land belonged to a deceased person.

2.) When the appeal came up for directions on 19<sup>th</sup> October 2021, the court directed that the appeal be canvassed by way of written submissions. Both parties filed their respective written submissions.

**The appellants' case.**

3.) The case of the appellants is as per the grounds of appeal contained in the Memorandum of Appeal namely that;

1. The learned trial magistrate erred in law by holding that the Respondents could initiate a suit on behalf of the Estate of a deceased person without first taking out Letters of Administration in respect of the said deceased person.
2. The learned trial Magistrate erred in law by holding that the Respondents had a right to initiate the suit on behalf of a deceased person without the relevant Letters of Administration and in so doing, failed to recognize that the suit as presented was a nullity and bereft of any legal standing.

3. The Learned trial magistrate otherwise erred in law in failing to recognize that the failure to first take out Letters of Administration by the Respondents was an incurable defect that could not be salvaged by the provisions of Article 159 of the Constitution.

4. The Learned trial magistrate erred in law by failing to consider the submissions presented before him by Counsel for the Appellants.

5. The Learned trial magistrate erred in law by dismissing the preliminary objection raised without giving effect to the arguments presented.

4) The Appellants filed their written submissions dated 1<sup>st</sup> November, 2021 through the firm of D.C Chitwah & Company Advocates. They submit that the Respondents had no capacity to initiate the suit without first obtaining Letters of Administration to the Estate of the deceased who was the registered owner of the suit land.

They referred the court to Section 2 of the Law of Succession Act and submitted that the Respondents who had not complied with provisions of the Law of Succession Act had no *locus standi* to initiate the suit. That by reason of non-compliance with the law the whole suit had been rendered a nullity: and the trial court ought to have upheld the Preliminary objection.

They relied on the case of **Hawo Shanko –Vs- Mihammed Uta Shanko [2018]**

**eKLR** where the High Court upheld a Preliminary Objection and struck out the suit because the plaintiff had failed to obtain Letters of Administration before filing the suit.

They also relied on the court of Appeal decision in **Trouistic union International & Anor –vs- Mrs Alice Mbeyu** where the court of Appeal held that the Administrator is not entitled to bring an action before taking out Letters of Administration. They pray that the Appeal be allowed and the preliminary objection upheld.

#### **The Respondents' case.**

5.) The Respondents oppose the appeal and contend that they had capacity to institute the suit. Written submissions were filed on their behalf by the firm of Balusi and Smart Advocates. They submit that the Respondents are persons who have a stake or overriding interest in the suit land and hence have capacity to question fraudulent transactions over the suit land. They rely on order 1 Rule 9 of the Civil Procedure Rules which provides that misjoinder or non-joinder of parties cannot be ground to defeat the suit.

They also rely on Article 159 of the Constitution of Kenya to argue that justice is not to be hampered by undue procedural technicalities. Finally, they rely on the case of **Asis Hotel Ltd –vs- I & M bank Limited [2019] e KLR**

#### **Issues for Determination**

6.) I have read the Memorandum of Appeal, the Record of Appeal and the written submissions filed by the parties. I have also taken into account the submissions made orally in court by way of highlighting on the submissions. I find that the issues for determination are firstly whether the Preliminary Objection placed before the trial court was proper and secondly whether or not the Appellants proved merit in the Preliminary Objection. The answer to the second issue will determine whether the trial court was right or wrong in its ruling.

#### **Analysis and Determination.**

7.) Being a first appeal, this court has a primary role to reconsider the evidence adduced in the lower court, re-evaluate and analyze it so as to make its own independent conclusions and thus determine whether the trial court's findings and conclusions are consistent with the evidence adduced and the applicable law. See case of **Kenya ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212**

8.) The court record shows that upon service with summons to enter appearance, the Appellants filed a memorandum of Appearance on 11<sup>th</sup> November 2019, a defence and a Notice of Preliminary Objection dated 8<sup>th</sup> November 2019.

The grounds of the Preliminary objection were that:

1) The Plaintiffs lack the requisite capacity to institute the current suit on behalf of the Estate of one ANJIENI ASITUHA (alias) INJIENG (deceased) before first obtaining letters of administration and/or authority from court.

2) The court therefore lacks the jurisdiction as an Environment and Land Court to entertain the current suit as a land matter as it is deemed to relate to an Estate of a deceased person.

3) The suit is therefore an abuse of the court process and is therefore a legal menopause.

9.) The Preliminary Objection was argued orally in court on 12<sup>th</sup> November 2019. Counsel for the Appellants submitted that the Plaintiffs (present Respondents) had no capacity to sue on behalf of the deceased persons. That the Respondents had described themselves in the Plaint as widow and grandson of the deceased. And that in the prayers they were seeking that the suit land revert to the deceased. That no Letters of Administration had been included among the bundle of documents filed by the Plaintiffs. They sought that the suit be struck out.

10.) Counsel for the Respondents submitted that Preliminary Objection did not satisfy the requisite conditions for a Preliminary Objection namely that it had to be based on pure points of law, show that all facts as pleaded were correct and that there is no fact that needed to be ascertained. They submitted that the Defendants had denied all the averments in the plaint. That ownership of the suit land was contested hence there were facts that needed to be ascertained. That the 1<sup>st</sup> Respondent was not bringing the suit on behalf of the deceased but on her own behalf. That the preliminary objection is misplaced.

The trial court considered the Preliminary Objection found it to be unmerited and dismissed it with costs to the Plaintiffs vide its ruling dated 3.12.2019

#### **Whether or not the Preliminary Objection was proper.**

11.) In determining whether the matters raised in the notice of preliminary objection constitute a preliminary objection, the court is guided by the decision in the case of **Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Limited (1969)E.A 696** where it was held that:

***“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 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 exercise of judicial discretion.”***

The court further stated that;

***“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.”***

12.) The first ingredient of a Preliminary Objection is that it must be based on pure points of law. The grounds upon which the Preliminary Objection is brought as shown in the Notice of Preliminary objection are pure points of law. The Appellant relied on Section 2 of the Law of Succession Act and the Law of Succession Act generally to submit that the procedure adopted by the Respondents in instituting the suit in respect of an estate of a deceased person was in contravention of the Act.

The second ingredient is that the objection must arise from matters that are pleaded and which if argued as a preliminary point may dispose of the suit.

The basis of the preliminary objection was the matters pleaded in the Plaint and defence. While the Respondents pleaded in the Plaint that they had capacity to sue on the basis of an overriding interest, the Appellants in paragraph 9 and 12 of the Defence dated 8<sup>th</sup> November 2018 challenged the capacity of the Respondents and the jurisdiction of the court.

The matters of capacity and jurisdiction if argued successfully by the Appellants would dispose of the suit by having it struck out.

I find that the matters raised in the notice of preliminary objection constituted a preliminary objection and that the same was properly before the court.

#### **Whether or not the preliminary objection had merit**

13.) Whether or not the Preliminary objection had merit depends on whether the Respondents had capacity to initiate the suit or not. In paragraph 25 of the Plaint the Respondents stated that they had *locus standi* to bring the suit because they have an overriding interest in the suit land. That the suit was for purposes of pursuing the nullification of fraudulent transactions undertaken on the suit land that tend to prejudice their proprietary interest.

14.) I have keenly read the entire Plaint. I find that the subject of the same is protection of the estate of the deceased from intermeddlers so as to preserve the same for lawful beneficiaries inclusive of the Respondents. This can be seen from the following:

The suit land namely land parcel known EAST BUNYORE/EBUSAMIA/854 belonged to Injieni Asituha, deceased, who died in 1978. That at the time of his death the suitland was registered in his name. This is pleaded in paragraph 9 of the Plaint.

In paragraphs 1 and 2 of the plaint the Respondents describe themselves as grandson and daughter-in-law of the deceased. In paragraph 13 of the Plaint the Respondents state that they have been residing on the suit land and have been utilizing it for over 30 years as bona fide heirs or dependants of the deceased's estate. In paragraph 14, they plead that they cautioned the 3<sup>rd</sup> and 4<sup>th</sup> Appellants that the land belonged to a deceased person and that it could not be sold to anyone until the succession process is fully undertaken. They pleaded in paragraph 14 that the 1<sup>st</sup> Respondent placed a restriction on the register of the suit land barring all dealings on the suit land until formal succession process was fully undertaken. They further state that they reported the Appellants to the administrative officers seeking that the Appellants be stopped from intermeddling with the estate of the deceased until such a time when the suit land shall have been formally distributed among the rightful heirs and dependants of the deceased by a court of law. Among the particulars of fraud listed under paragraph 22 of the Plaint is that Appellants caused the suit land to be transferred from the deceased long after his demise while fully aware about the proprietor's demise while fully aware that such disposition was irregular because no succession had been undertaken in respect of the estate of the deceased and therefore no one had capacity or authority to transfer the suit land from the deceased to anyone else. Finally, in the prayers the Respondent seek that the suit land be restored and revert to the name of the deceased

Proceeding on the presumption that the above highlighted facts as pleaded by the Plaintiff in the Plaint are correct, then it is clear that the

Respondents' claim is pegged on their relationship to the deceased. That they are as heirs or dependants in the estate of the deceased. If that be so then their claim whatever it is can only be actualized through administration of the estate through a succession process. And in their position they can only approach the court as regard the suit land as Administrators of the Estate of the deceased.

15.) Although the Respondents claim in paragraph 25 that they are pursuing protection of overriding interest which they hold over the suit land the claim as presented in the Plaint and more particularly the prayers is a claim to preserve the estate of the deceased until succession is done.

A litigant pursuing a claim of this nature must first obtain capacity by petitioning the court for and being granted Letters of Administration to the estate of the deceased.

Section 2(1) of the Law of Succession Act provides that:

***“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.*”**

Section 82 of the Act vests the power to file suit on behalf of the estate of a deceased person in the personal representative duly appointed through the process of succession as provided in the Act and not in any other person.

The Court of Appeal in the case of **Barnes Muema vs Francis Masuni Kyangangu[2019] eKLR** considered the question whether a litigant could file and sustain objection proceedings on behalf of the estate of his deceased grandfather claiming that the suit property was family land. The court was in agreement with the High Court's finding that such a litigant without Letters of Administration lacks *locus standi* and dismissed the Appeal. Also in the case of **Virginia Edith Wamboi Otieno vs Joash Ochieng Ougo & another[1987]eKLR** the Court of Appeal held that:

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

There is no dispute that the Respondents did not take out Letters of Administration before filing the suit.

16.) The Respondents have submitted that a suit cannot be defeated by reason of non-joinder or misjoinder of parties. They relied on the provisions of Order 1 rule 9 of the Civil Procedure Rules and the case of **Asis Hotel Ltd vs I & M Bank Limited [2019] eKLR** to emphasize the submission that non-joinder or misjoinder of parties would not be a reason to strike out a suit as there are other avenues of remedying the situation. My view is that the issue at hand is not of non-joinder or misjoinder of parties but a substantive issue of lack of capacity to sue which renders the suit incompetent at the date of its inception. For such there may not be other avenues of remedying the situation except to undo the suit, obtain the requisite capacity and start a new, subject to limitation period.

The Respondents further relied on article 159 of the Constitution to submit that justice is not to be hampered by undue procedural technicalities. My view is that lack of capacity to sue is not a procedural technicality for which a party can find refuge in article 159 of the Constitution.

17.) In the final analysis I find that the Appellants had demonstrated merit in their Preliminary Objection. The trial court ought to have upheld it.

Having so found I find that the Appeal has merit. I allow the appeal and make the following orders

1. The Ruling dated 3<sup>rd</sup> December 2019 and all consequential orders in VIHIGA PMC EL Case No. 48 OF 2019 is set aside.
2. The Preliminary Objection by the Appellants raised vide Notice of Preliminary Objection dated 8th November 2019 is upheld.
3. The suit namely VIHIGA PMC EL NO 48 OF 2019 is struck out.
4. Each party to bear its costs of the suit and the Appeal

Orders accordingly.

**DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 30TH DAY OF NOVEMBER, 2021.**

**E. ASATI**

**JUDGE**

**IN THE PRESENCE OF:**

**N/A FOR THE APPELLANTS**

**N/A FOR THE RESPONDENTS**

**COURT ASSISTANT- AJEVI**

**E. ASATI**

**JUDGE.**