



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO 172 OF 2019 (OS)

JOSEPH NYANJUI MBUGUA

(Suing as the Attorney JOHN KAMAU MUNYUA).....PLAINTIFF

VERSUS

ANDREW NGIGI KURIA

WAIRIMU KURIA

(Sued as the Legal Representatives of the Estate of KURIA MUNAGE)....DEFENDANTS

JUDGMENT

1. On 19/11/2019, the plaintiff, **Joseph Nyanjui Mbugua [the attorney]**, took out an originating summons dated 18/11/2019 on behalf of his principal, **John Kamau Munyua**, seeking the following orders:

a) That this honourable court be pleased to issue a declaration that half portion of Land Parcel Kiambaa/ Waguthu/80, which is registered in the name of the deceased respondent is held beneficially and/or in trust for the applicant to wit. (sic)

b) A declaration that the applicant is entitled to ownership, use and possession of half portion of Land Parcel Kiambaa/ Waguthu/80.

c) That upon granting prayers 1 and 2 above, the property

known as Land Parcel Kiambaa/Waguthu/80 be sub-divided or portioned into 2 equal portions and the same be registered to both the applicant and the deceased respondent herein.

d) That costs of this application abide the results of the intended suit. (sic)

2. The originating summons was expressed as having been taken out under Section 45 of the Trustees Act, Cap 167; Section 126 of the Registered Land Act [repealed] and "Order XXXVI rule 1(a) and 7" of the Civil Procedure Rules.

3. The originating summons was supported by the plaintiff's affidavit sworn on 18/11/2019 and his supplementary affidavit sworn on 29/10/2021. He contended that he was the duly appointed attorney of John Kamau Munya [hereinafter referred to as "**the principal**"]. The principal had resided in the United States of America since 1963. He added that the two defendants, **Andrew Ngige Kuria** and **Wairimu Kuria**, were administrators of the estate of the late **Kuria Munage** [hereinafter referred to as the "**the deceased**"].

4. His case was that the principal and the deceased jointly acquired Land Parcel Number **Kiamba/Waguthu/80 [the suit property]** in the 1960s but because the principal was residing in the United States of America at the time, they caused the land to be registered in the name of the deceased. Upon purchasing the suit property, the principal took his half portion of the suit property and has had possession of the half portion since then. In 1994, when the principal lost his sister, he buried her remains on his half portion of the suit property. In 1996, when the principal lost his father, he similarly buried his remains on his half portion of the suit property. There had been no dispute about the fact that the deceased held the title in trust.

5. The plaintiff further contended that the deceased died in 1986 and the principal had continued to have possession of his half portion of the suit property. However, in 2012, the two defendants applied for a grant of letters of administration relating to the estate of the deceased,

Kuria Munage, in **Nairobi High Court Succession Cause No. 2420 of 2012**, in which they itemized the suit property as wholly belonging to the estate of the deceased. The defendants were subsequently issued with a grant in the said cause. Aggrieved, the principal, through his present attorney, filed an application seeking an order revoking the said grant. On 20/9/2019, Ongeru J revoked the said grant and directed parties to initiate proceedings in the Environment and Land Court for determination of the dispute relating to ownership of the suit property. That is what culminated in the taking out of the present originating summons.

6. The originating summons was canvassed through written submissions dated 18/11/2019, filed by the firm of *Gachoka & Co Advocates*. Counsel for the plaintiff reiterated the plaintiff's case as summarized above and urged the court to grant the orders sought in the originating summons. Counsel made the following submissions at paragraph 2 of page 2 of the written submissions.

“The respondents who are the administrators/representatives of the estate of the late Kuria Munage were served with the summons but did not file any response. We submit that the applicant’s originating summons is unopposed. The summons was filed as a result of the High Court finding in Succession Cause No. 242 of 2012 in the Estate of Kuria Munage. We enclose herewith the ruling of that court dated 20/9/2019 by Justice Asenath Ongeru. We note that the Judge noted that the respondents did not dispute that the applicant has buried his relatives on the suit premises and has been in occupation of half portion where he has planted nappier grass.”

7. I have considered the originating summons, the supporting affidavit, and the written submissions filed by counsel for the plaintiff. Further, I have read the High Court Ruling dated 20/9/2019 which led to the initiation of this suit. Ongeru J made the following disposal orders in paragraph 25 of the said ruling:

“25. (i) That the grant issued to the respondents herein on 15/2/2021 be and is hereby revoked pending determination of ownership in the Environment and Land Court.

(ii) That the caution registered by the objector to remain in force until the case in Environment and Land Court is determined.

(iii) That either party is at liberty to file suit in the Environment and Land Court.

(iv) That each party to bear its own costs of this application.”

8. What emerges from the above orders is that the High Court revoked the grant which it had issued to the two defendants herein. Do the defendants have *locus standi* to be sued on behalf of the estate of the deceased in the absence of a grant? My answer to the above question is, regrettably, in the negative. The grant which was revoked is what had given the defendants the *locus standi* to be sued. Without a grant, they have no *locus standi* to be sued on the behalf of the estate of the deceased.

9. My understanding of the relevant law is that, once the plaintiff realized that the defendants had failed to disclose to the succession court that half portion of the suit property was held in trust for the principal, he should have objected to confirmation of the grant and sought a stay of further proceedings in the succession cause pending the hearing and determination of the dispute relating to ownership of the suit property by the appropriate court. It does, however, appear that he opted to go for an order revoking the grant [instead of an order staying proceedings relating to confirmation of the grant]. The High Court order revoking the grant effectively stripped the defendants off the necessary *locus standi*. Initiating of this suit against the defendants in the absence of a grant was therefore an exercise in futility because the plaintiff cannot sustain an action against the defendants in the absence of a grant appointing them as administrators of the estate of Kuria Munage.

10. In the circumstances, I will strike out this originating summons without venturing into its merits. The plaintiff will be at liberty to bring a proper substantive suit relating to the land ownership dispute against the estate of Kuria Munage once representatives of the estate are duly appointed within the framework of the Law of Succession Act. There will be no order as to costs of this suit. These are the orders of the court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 29TH DAY OF NOVEMBER 2021

B M EBOSO

JUDGE

Court Assistant: Lucy Muthoni