REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC CASE NO. 114 OF 2018

ELIZABETH CHEBET LANGAT

ERNEST KIPROTICH CHERUIYOT

ERICK LANGAT CHERUIYOT

ENOCK KIPTOO CHERUIYOT (Suing as the administrators of the Estate of SAMWEL

CHERUIYOT LANGAT).....PLAINTIFFS

VERSUS

JOEL KIPNGENOH BYOMDO.....DEFENDANT

RULING

1. This is a ruling in respect of the application dated **27/08/2020** which was filed on **14/10/2020** and which seeks the following orders:

1. ***The plaintiff's suit be struck out;***

2. The costs of this application be paid by the plaintiff.

2. The application has been brought under the provisions of **Order 2 Rule 15(1) (b)** and **(d)** and **Order 51 Rule 1** and **3** of the **Civil Procedure Act**. The application is supported by the affidavit sworn on **27/08/2020** by the applicant's counsel, Joel Kimutai Bosek**.** The grounds on the face of the application and the supporting affidavit are that the plaintiffs have no *locus standi* to institute the present suit; that the suit property does not form part of the estate of the deceased person as it was removed from the Schedule of the property of the deceased in **Nairobi Succession Case No. 2691 of 2013** by a consent order and that the plaintiffs' cause of action is incompetent and that it is in the interest of justice that the suit be dismissed with costs.

Response

3. The 3rd plaintiff filed a replying affidavit sworn on **7/12/2020** in response to the application. The replying affidavit is to the effect that the suit property was removed from the list of assets of the deceased in **Nairobi Succession Cause No. 2691 of 2013** by consent of the parties herein pending the hearing and determination of the present matter.

Submissions

4. The defendant/applicant filed his submissions dated **8/02/2021** on **03/03/2021** while the plaintiffs filed their submissions dated **27/04/2021** on **28/04/2021**.

Determination

5. Upon perusal of the pleadings, the only issue for determination is whether the applicant is entitled to the drastic orders of striking out of suit.

6. Order 2 Rules 15(1) (b) (c) and **(d)** under which the application has been brought provide as follows:

"15. Striking out pleadings [Order 2, rule 15.]

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

7. It is strange that though one of the applicant's grounds states that the plaintiffs' claim discloses no reasonable cause of action and should be struck out, he never relied on **Order 2 rules 15(1) (a).** It is also not alleged in the same grounds that the plaintiff's plaint is scandalous frivolous and vexatious or that it may embarrass or delay the fair trial of the action or that it is an abuse of the court process. In this court's opinion, the application does not therefore qualify to fall under the provisions of **Order 2 rules 15(1) (b) (c)** and **(d).**

8. Striking out of a pleading is a very drastic remedy. The applicant must justify the striking out orders he seeks. In this court's view the applicant has mainly premised his application on the ground that the suit property is not part of the properties listed in the Schedule of properties of the estate of Samuel Cheruiyot Arap Langat (deceased). Other arguments against the plaintiff's suit are mere offshoots of that main theme. The other arguments are that the plaintiffs lack *locus standi*, and that the claim for adverse possession has been extinguished by the death of the claimant.

9. In his submissions Mr. Bosek for the applicant cites **Section 38 (1)** and **(2)** of the **Limitation of Actions Act** which provide as follows:

"38. Registration of title to land or easement acquired under Act

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act."

10. It is posited by the applicant's counsel that the deceased person never took the required steps under the law to have the suit property transferred to his name if indeed he had acquired the same by way of adverse possession; the suit property did not form part of the estate of the deceased and can not be subject to any succession proceedings. that being the case, it is further argued, the plaintiffs lack *locus standi* to bring the suit on behalf of the deceased as no claim existed on the suit property during the deceased's lifetime and his death can not convey any right known in law to the plaintiffs.

11. The applicant's counsel also argues that a claim for adverse possession is personal in nature and does not survive a deceased person under **CAP 26** of the Laws of Kenya. The deceased having died without having proved his claim for adverse possession, the claim did not survive him and therefore there was nothing to pass on to his estate and so his estate can not claim the same after his death; it is urged that the right to claim was extinguished upon his demise.

12. As to whether the plaintiffs are possessed of *locus standi* to institute and maintain the instant suit, the applicant's counsel cites **Re Estate of Seth Namiba Ashuma (deceased) 2020 eKLR** as having stated that adverse possession is not one of succession law. I agree with the position in that case entirely.

13. The applicant raises the interesting submission that the suit property having been hived off the Schedule of assets of the deceased in the succession cause then the plaintiffs lack *locus standi* to bring the suit.

14. The respondents on their part, citing **Karuntimi Raiji vs M'Makinya M'Itunga 2013 eKLR** submitted that a long hard look at the provisions of **Section 26** cited by the applicant and **Section 2(1)** of the **Law reform Act** would show that the claim for adverse possession survives for the benefit of the deceased's estate because it does not fall under any one of the excepted categories listed in that section. Further it was stated that the cause of action was vested in the deceased from the date that the suit land was registered in the name of the defendant in **1994** and his widow still retains possession to date and the matter should be allowed to go to full trial. The respondents cited **Cooperative Merchant Bank Ltd Vs George Frederick Wekesa Civil Appeal No 54 Of 1999** as stating that the power of the court to strike out is discretionary and that striking out is a draconian act which may be resorted to only in very plain cases.

15. The foregoing is quite a novel argument that I have encountered in this case and in my view and on a cursory glance it is not farfetched, for the purpose of a grant in succession is to enable the grantee to administer the property of the deceased person. The language of the grant is normally that *"…Be it known that on (date) letters of administration intestate of all the estate of ….. (deceased) …..which by law devolves*

to and vests in his personal representative....”

16. If the deceased had not established a claim for adverse possession over the suit land, then how can the administrators of his estate purport to include the said land among his assets? That is the issue the applicant raises by his application.

17. It must be recalled that this is an interlocutory application that would have the very drastic consequences of terminating the plaintiff's claim if allowed.

18. This court is also of the view that the applicant having failed to bring the application under **Order 2 Rule 1 (a),** that is, that the plaint discloses no reasonable cause of action or defence in law, he excluded himself from calling evidence by way of affidavit. That is because **Order 2 Rule (2)** states that:

> **“No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.”**

19. The affidavit dated **27th August 2021** is therefore of no value to the applicant if the applicant's claim is, and I understand it to be, that the plaintiffs lack *locus standi*, for that assertion requires this court to take a peek, no matter how brief, into some kind of evidence in the form of a grant of the letters of administration they hold and which is annexed to the affidavit evidence in support of the application. The applicant seeks to eat his cake and have it. I cannot therefore uphold at the present moment and in this application that the plaintiffs lack *locus standi* for that would go contrary to the practice required by the provisions of **Order 12 rule 2** of the **Civil Procedure Rules.**

20. The other ground on the applicant's application is to the effect that the cause of action was extinguished upon the death of Samuel Cheruiyot Langat. In my view the plaintiffs' claim to be the administrators to Samuel's estate. They hold the grant. The grant enables a holder to perform the same tasks as would have been performed by the deceased had he not met his demise. However it is not an open and shut issue as to whether the grant enables the holder to claim for adverse possession on behalf of the deceased. I note the lack of case law on that point in the applicant's submissions; the case of **Re Estate of Seth Namiba Ashuma (deceased) 2020 eKLR** is not cited in that regard but for an entirely different proposition; I do not therefore think that the applicant has swayed me to his side. Extinction of a cause of action is a ground that requires to be addressed substantively; it is this court's opinion that it goes to the merits of the main suit and can only be addressed by way of a substantive hearing of evidence in the suit.

21. Finally, the defendant/applicant's argument is that since the suit property is not part of the properties listed in the Schedule of the properties of the estate of the deceased, the suit should be struck out, while the plaintiffs/respondents argument is that the suit property was removed by consent of the parties pending the hearing and determination of this suit.

22. The terms of the consent that was filed by both parties in **Succession Case No. 2691 of 2013 - In the matter of the estate of Samwel Cheruiyot Arap Langat** are as follows:

> **1. <u>Pending the hearing and determination of Nakuru ELC 114 of 2018</u> the property Nakuru/Olenguruone/Kiptagich/59 be removed from the list of properties of the late Samuel Cheruiyot Arap Langat.**
>
> **2. …**
>
> **3. …**

23. From the terms of the said consent, the removal of the suit property from the Schedule of the assets of the deceased was predicated only on the hearing and determination of the present suit on its merits, which in my opinion, has not happened. The applicant herein appears to have forgotten that he applied in the succession cause to have the property removed from the list of assets! The removal was an act of the parties herein when they extended their battle into the arena of the succession cause and is quite temporal. While rejecting the applicant's apparent attempts at hoisting himself by his own bootstraps, this court finds that that ground is not helpful to the applicant even though it forms some part of the evidence that can be given at the hearing of the main suit.

24. The court in the case of **Alumark Investments Limited v Tom Otieno Anyango & 4 others [2018] eKLR** reiterated the position set out long ago in the case of **D.T. Dobie & Company (Kenya) Ltd. vs. Muchina (1982)KLR 1** and stated as follows:

> **“13. It is settled law that the court's power to strike out pleadings is to be exercised sparingly and cautiously, because the court exercises the power without being fully informed on the merits of the case through discovery and oral evidence. This was the finding in the case of D.T. Dobie & Company (Kenya) Ltd. vs. Muchina (1982) KLR 1 at p. 9 where it was stated as follows:**
>
> **“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.””**

25. I would think that it is quite unsafe in the circumstances of the instant application to grant the orders of striking out suit as sought. This is not such a plain and obvious case that invitingly winks at this court for a striking out order. Colossal damage may be occasioned to the claimants at an interlocutory stage without the hearing of any evidence and that is what the decision in the Court Of Appeal case in **D.T. Dobie & Company (Kenya) Ltd. vs. Muchina (1982) KLR** abhorrs. This court would rather the parties had their day in court and address

all the issues arising from the main suit after hearing of evidence from all sides.

26. In conclusion therefore, the present application dated **27/8/2020** lacks merit and it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 16TH DAY OF NOVEMBER, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.