



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO 717 OF 2015

MARY NJERI MBURU

(suing as the legal representative of the estate of KARUGU GUANDAI...1ST PLAINTIFF

PATRICK NJUGUNA WACHIRA.....2ND PLAINTIFF

=VERSUS=

BOB ROBERT DRANI (Sued as the legal representative of the estate of

PATRICK FRUTO DRANI.....DEFENDANT

RULING

1. This is the notice of motion dated 12th November 2020 brought under Order 2 Rule 15(1)(a),(b),(c) and (d) and Order 51 Rule 1 of the Civil Procedure Rules, Section 1A,1B,& 3A of the Civil Procedure Act, and all other enabling provisions of the law.

2. It seeks for orders that:-

a) A declaratory order that the suit filed by the Plaintiffs is bad in law and is a non-starter for want of capacity and a proper cause of action.

b) A declaratory order that the suit filed by the Plaintiffs is bad in law and is a non-starter for want of cause of action.

c) The suit instituted by the Plaintiffs herein characterized by the amended plaint dated 14th June 2019 and the entire suit be dismissed/struck out.

d) Costs of and incidental to this suit.

3. The application is based on grounds on the face of the application and it is supported by the affidavit of Bob Robert Drani, the Defendant herein sworn on 12th November 2020.

4. He deponed that it has emerged that Winfred Nyambura Karugu is the only known widow and sole legally appointed personal representative of the Estate of Peter Karugu Guandai (Deceased) by dint of the Limited Grant of letters of administration ad colligenda bona issued to her in **Nairobi High Court Succession Cause No.1931 of 2009: In the matter of the estate of Peter Karugu Guandai (deceased)**.

5. The application is opposed. There is a replying affidavit sworn by Mary Njeri Mburu, the 1st Plaintiff herein sworn on the 10th March 2021.

6. There are also grounds of opposition filed by the 2nd Plaintiff dated 3rd March 2021.

7. On the 22nd April 2021, the court with the consent of the parties directed that the application be canvassed by way of written submissions.

8. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit and the grounds of opposition, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether this application is merited.

9. It should be noted that this matter is part heard. The 1st Plaintiff testified on 5th February 2020. She told the court that she was issued Limited Grant of Letters of Administration in **Machakos Succession Cause No 548 of 2011. In the matter of the Estate of Peter Karugu Guandai** on 5th October 2011. The same was validly issued and has not been set aside and or revoked.

10. The 2nd Plaintiff's application to be enjoined to these proceedings was determined by this court. The amended plaint dated 14th June 2019 was filed with leave of the court.

11. It is my view that the Plaintiffs ought to be heard on the claim. The defendant will raise all these issues during the trial. No prejudice will be occasioned to the Defendant if this matter is heard to conclusion.

I am guided by the case of **Lavington Security Ltd vs Consolidated Bank of Kenya Ltd & 3 Others [2020] eKLR** where the court stated as follows:-

“14. In the same breath, a court must exercise restraint and proceed very cautiously when it has been asked by a party to strike out pleadings before a matter has proceeded for full trial. Indeed, striking out pleadings before hearing of a matter is a draconian step and must be used sparingly and in the clearest of the cases as was held in the case of D.T. Dobie Co Ltd vs Muchina [1982] KLR and in the case of Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR where Musinga J (as he then was) held as follows:

“It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption”.

12. I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 11TH DAY OF NOVEMBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Mwangi for Mrs. Mwadumbo for the 1st Plaintiff

Ms Kamau for Mr. Mbigi for the 2nd Plaintiff

Mr. Nthei for Mrs. Lumumba for the Defendant

Steve – Court Assistant