



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC NO 34 OF 2019

KIPNGETICH KALYA KONES (Suing as the Administrator of the estate of

KIPKALYA KIPRONO KONES (deceased).....PLAINTIFF/RESPONDENT

VERSUS

WILSON KIPLANGAT KONES.....DEFENDANT/APPLICANT

RULING

1. The Plaintiff, vide a Plaint dated 27th May 2019 instituted the instant suit against the Defendant whereby he sought for an order of eviction against the Defendant, from the deceased person's share of the land parcel No. LR No. 9932/3 land which was registered in the name of Sambut Tea Limited. The Plaintiff also sought for an injunction restraining the Defendant, his agents, privies, servants and others whosoever claiming through him, from entering, trespassing, tilling, wasting harvesting trees and/or in any manner dealing with the deceased's share of land parcel No. LR No. 9932/3 registered in the name of Sambut Tea Limited.
2. The Defendant/Applicant has now filed his Notice of Motion dated the 13th October 2021 brought pursuant to Order 51 rule 1(3)(4) of the Civil Procedure Rules, Section 1A, 1B, 3A of the Civil Procedure Act, Section 47 and 73 of the Law of Succession Act and all other enabling provisions of the law seeking that the suit to be struck out for lack of legal capacity by the Plaintiff/Respondent to institute the same.
3. The application is supported by the grounds therein and the sworn affidavit of Wilson Kiplangat Kones dated the 15th October 2021.
4. The application was opposed by the Plaintiff/Respondent's through his Replying Affidavit dated the 1st November 2021 wherein pursuant to the directions of the court of the 14th October 2021, the Application was disposed of by way of written submissions.

Defendant/Applicant's submissions.

5. The Applicant, in support of his application filed his submissions to the effect that on the 25th September 2009, the widows of the late Kipkalya Kiprono Kones, herein referred to as the deceased, namely Pauline Cheron Kones and Lily Chepkemoi Kones were issued with full Grant of Representation and/or Letters of Administration to administer the estate of the deceased via Nairobi High Court Succession Cause No. 2923 of 2008 and therefore the Plaintiff/Respondent's application and issuance of Limited Grant ad Litem on the 22nd May 2019 by the subordinate court purportedly to prosecute this suit, was in illegal and un-procedural.
6. The Applicant further submitted that the Plaintiff/Respondent had no locus standi to purportedly institute and prosecute this suit on behalf of the estate of the deceased by the strength of the Limited Grant issued to him on 22nd May 2019 contrary to the full Grant of Representation issued to the widows of the deceased on 25th September 2009.
7. That the Plaintiff/Respondent herein had illegally obtained the Limited Grant to institute the suit knowing very well that his mother and stepmother had already obtained a full Grant to administer the estate of the deceased. The Limited Grant issued under Sections 54 of the Law of Succession Act was thus overtaken by the full of Grant and therefore the same offends the provisions of Sections 79, 82 and 83 of the Law of Succession Act thus rendering the Plaintiff/Respondent's representation null and void.
8. The Applicant relied on the provisions of Section 3(1) of the Law of Succession Act to define personal representative and went on to submit that in the present instant the Plaintiff/Respondent was not a personal representative of the estate of the deceased and therefore could not file the present suit as there had been Legal Administrators who had powers to fully administer the estate, including the institution and prosecution of the suit as per the tenants of Section 82 of the Law of Succession Act.

9. That Section 54 of the Law of Succession Act only provided for a Limited Grant for filing of a suit, when the full grant had not been issued and its intent was to preserve and protect the estate of the deceased. That in the present case, the beneficiaries of the estate of the deceased had already lodged a Succession Cause wherein they had obtained Letters of Administration dated 25th September 2009 in the names of Pauline Cherono Kones and Lily Chepkemoi Kones hence the Limited Grant obtained by the Plaintiff/Respondent was unprocedural, illegal and had been overtaken by events as a result of the existence of the full grant by the aforesaid Administrators.

10. The Applicant relied on the decided case in (sic) **Helena Wangeci Njoroge(deceased) [2015] eKLR** to submit that the provisions in Section 82 of the Law of Succession Act can only be fully exercised by a substantive administrator, that is the person holding, not a Limited Grant, but a full Grant. Likewise, the duties imposed by Section 83 of the Act were to be discharged to their fullest by the holder of a substantive Grant of representation.

11. The Applicant submitted that since the Plaintiff/Respondent had no legal capacity and or locus standi to institute and prosecute the suit, the same should be struck out with costs.

Plaintiff/Respondent's submissions

12. In opposition to the application herein, the Plaintiff/Respondent's submission was to the effect that he had not been aware of the Grant issued to the Administrators of the deceased's estate and that he had discussed with them and had agreed that they could take over the matter upon amendment. That dismissing the suit would not be in the interest of the estate of the deceased and neither would it solve the issues in controversy. That the defect in the suit was one that did not warrant a dismissal but was curable by an amendment.

13. That the application was not merited as the Plaintiff had filed a suit by virtue of the Letters of Administration ad Litem. That his only mistake was not to have coordinated with the family members and that this mistake did not rendered the suit so defective that an amendment would not breathe life into it.

14. That he had only sought to protect the interest of the estate of the deceased person and had only acted in good faith and therefor the court should do justice and allow the Administrators to continue with the suit which had disclosed triable issues.

15. That the striking out of the suit was draconian since the omission herein could be cured through an amendment of pleadings. That pursuant to the provisions of Article 159(2) (d) of the Constitution, justice ought to be dispensed without undue regard to procedural technicalities.

16. That the Applicant herein had not demonstrated in either his application or Supporting Affidavit that he had suffered an injustice occasioned by the lapse the subject of the application and neither had he demonstrated that the amendment would be prejudicial to him and therefore the court should rise up to the higher calling to do justice and sustain the suit for the determination on its merits rather than to dismiss it and send the estate of the deceased away from the seat of justice without being heard. The Respondent sought that the application be dismissed costs.

Determination

17. I have considered the application herein and having reviewed the pleadings and submissions by the parties, it is clear and not in dispute that the beneficiaries of the estate of the deceased lodged a Succession Cause wherein they had obtained Letters of Administration to the estate of Kipkalya Kiprono Kones (Deceased) dated 25th September 2009 in the names of Pauline Cherono Kones and Lily Chepkemoi Kones, in Nairobi High Court Succession Cause No. 2923 of 2008.

18. The deceased's estate having vested in the names of Pauline Cherono Kones and Lily Chepkemoi Kones as administrators, they had thus been bestowed with the powers set out in Section 82(a) the Law of Succession Act wherein they could now discharge the duties set out in Section 83 of the Act.

19. Section 82(a) the Law of Succession Act provides as follows;

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

20. It should be pointed out that the provisions in Section 82 of the Law of Succession Act can only be fully exercised by a substantive administrator, which is the person holding, not a Limited Grant, but a full Grant. Likewise, the duties imposed by Section 83 of the Act are to be discharged to their fullest by the holder of a substantive Grant of representation as was decided in **Re the estate of Helena Wangeci Njoroge (Deceased) [2015] eKLR**

21. The matter for determination herein is whether the Plaintiff/Respondent herein had the locus standi to file the present suit.

22. From the pleadings herein it is clear that the representatives of the Kipkalya Kiprono Kones (Deceased), Pauline Cherono Kones and Lily Chepkemoi Kones obtained Letters of Administration dated 25th September 2009 issued by Nairobi High Court in Succession Cause No. 2923 of 2008 wherein the same was advertised in the Kenya Gazette No. 1686 of 3rd July 2009. It is also not in dispute that during the subsistence of the said Letters of Administration, the Plaintiff/Respondent herein applied for and was issued with the Limited Grant of Letters of Administration ad litem on the 22nd May 2019 in the senior Principle Magistrate Court Bomet in Ad litem Cause No, 27 of 2019.

The said Limited Letter of Grant was limited for the purpose of filing suit until further representation were granted.

23. The Letters of Administration having been issued to the deceased's representatives on the 25th September 2009, they took effect from the date of such grant as provided for by the provision of Section 80(2) of the Law of Succession Act. In effect therefore, the Plaintiff/Respondent herein was not a personal representative of the deceased in respect of the provisions of Section 3 of the Law of succession Act which defines a personal representative to include the executor or administrator, as the case may be, of a deceased person. The Plaintiff/respondent herein could therefore not move any court to propound the deceased's estate as he did not poses the locus standi.

24. In **Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229** the Court of Appeal gave meaning to the term locus-standi by stating:

“.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

25. From the Plaint herein filed, I note that the deceased was a shareholder of Sambut Tea limited and held 125 acres on land parcel No LR No 9932/3. The Court of Appeal has authoritatively delivered itself on the issue of locus standi in case of **Trouistik Union International & Another v Jane Mbeyu & Another (2008) IKLR (G&F) 730 where it was held that'**;

“To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the law of succession Act. That section confers that power on personal representatives and on them alone”

26. **The issue on locus standi** is a primary point of law almost similar to that of jurisdiction and since the Plaintiff/Respondent was not an administrator to the deceased's estate herein, he lacked the capacity to sue on behalf of the deceased's estate which renders the suit incompetent. Indeed the Court of Appeal authoritatively delivered itself on the issue of locus standi in **Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1 KAR, Morjaria v Abdalla [1984] KLR 490** and in **Trouistik Union International (supra) to the effect that Locus standi** is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.

27. The issue of *locus standi* being a point of law which goes to the root of any suit, its absence therefore renders a suit fatally defective. The issue of the lack of locus standi cannot therefore be termed as a mere technically as the Plaintiff/Respondent herein would want us to believe and therefore the provisions of Article 159 (2) (d) of the Constitution cannot in the present circumstance salvage this suit. For this reason, I strike out the suit. The application dated the 13th October 2021 succeeds with costs to the Defendant/Applicant.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 16TH DAY OF DECEMBER, 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE