



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CAUSE NO. 36 OF 2020**

**LUCY WAMBUI NJOROGE (Suing as the legal representative of the  
estate of BENARD WAMIRI NGUGI-Deceased).....PLAINTIFF**

**-VERSUS-**

**LANDS REGISTRAR, NAIROBI.....1<sup>ST</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. Vide a Plaint dated the 24<sup>th</sup> of February 2020, the Plaintiff herein sought for the following Reliefs;

- i. A declaration that the 1<sup>st</sup> Defendant acted in bad faith and malice by purporting to issue sub-divided Titles without proper assessment of evidence before him.
- ii. An order of revocation of Titles for L.R. No. Dagoretti/Riruta/5879, L.R. No. Dagoretti/Riruta/5880, L.R. No. Dagoretti/Riruta/5881 and L.R. No. Dagoretti/Riruta/5882 by cancellation of the four titles and their respective Green cards.
- iii. An order directing the 1<sup>st</sup> Defendant to restore the Green card and issue Title Number Dagoretti/Riruta/232 in the names of John Peter Kinuthia and Bernard Ngugi Wamiri.
- iv. An order declaring the Plaintiff the beneficial owner of half undivided share of Title No. Dagoretti/Riruta/232 and is entitled to exclusive and unimpeded right of possession and occupation of the suit property.
- v. General damages.
- vi. Cost of this suit and interest thereon.
- vii. Such other or further relief as this Honorable Court may deem just to grant.

2. The Plaintiff herein has filed and/or lodged the subject suit, allegedly as the Legal Representative of the estate of one Bernard Wamiri Ngugi, Now Deceased, who is said to have been a joint registered owner of the property known as L.R. No. Dagoretti/Riruta/232, alongside one John Peter Kinuthia, who is also alleged to have passed on.

3. According to the Plaintiff, the suit property herein has since been subdivided and thereby culminating into the creation of four resultant parcels, namely: L.R. No. Dagoretti/Riruta/5879, L.R. No. Dagoretti/Riruta/5880, L.R. No. Dagoretti/Riruta/5881 and L.R. No. Dagoretti/Riruta/5882, respectively.

4. On the other hand, the Plaintiff has further averred that the offensive subdivisions appear to have been done by the beneficiaries of John Peter Kinuthia who died in the year 2014, and in particular, Francis Kinuthia and Joseph Wainaina Kinuthia, who have colluded and/or connived with the 1<sup>st</sup> Defendant herein.

5. Following the filing and service of the Plaintiff herein, the Defendants entered appearance and thereafter filed a **Notice of Preliminary Objection dated the 18<sup>th</sup> of June 2020** whereby the Defendants have raised the following grounds;

i. The plaintiff does not have locus standi to file this suit.

ii. This suit contravenes the provisions of Section 13A of the Government Proceedings Act as no Notice to Sue the Government was issued.

### **SUBMISSIONS BY THE PARTIES**

6. The subject matter came up on the 26<sup>th</sup> of September 2021, for directions on the Preliminary Objection dated the 18<sup>th</sup> of June 2020, on which date the Court directed that the Preliminary Objection be canvassed and disposed of by way of written submissions. In this regard, the parties were ordered to file and exchange the written submissions within set timelines.

7. Pursuant to and in line with the directions issued on the 26<sup>th</sup> of September 2021, the Court similarly directed that the matter shall be mentioned on the 22<sup>nd</sup> of November 2021, to authenticate the filing and exchange of written submissions.

8. Nevertheless, come the 22<sup>nd</sup> of November, none of the parties had filed written submissions. Consequently, the Court ordered and directed that the matter shall be reserved for delivery of the Ruling on the Preliminary Objection on the 2<sup>nd</sup> of December 2021, and the parties were thereafter granted liberty to file written submissions within 7 days, if any.

9. Be that as it may, as at the time of crafting the subject Ruling, only the Defendants had filed their written submissions, which are now on record.

10. To the contrary, the Plaintiff herein has not filed any written submissions, either in line with the directions of the Court or at all.

11. Suffice it to say, that the Honorable Court is still enjoined to consider the Preliminary Objection and to render itself on same, subject to the obtaining legal position.

### **ISSUES FOR DETERMINATION**

12. Having reviewed the Plaintiff herein as well as taking into account the documents attached thereto, and having also considered the Notice of Preliminary Objection, I am of the considered view that the following issues are germane for determination;

i. Whether the Plaintiff herein has taken out grant of letters of representation for and on behalf of the estate of the deceased, and if otherwise, whether the Plaintiff is seized of the requisite legal capacity.

ii. Whether the non-issuance of the statutory notice to the Attorney General invalidates the subject suit.

### **ANALYSIS AND DETERMINATION**

#### **Issue Number One**

**Whether the Plaintiff herein has taken out grant of letters of representation for and on behalf of the estate of the deceased, and if otherwise, whether the Plaintiff is seized of the requisite legal capacity.**

13. Before venturing to address the first issue herein, it is worthy to appreciate that what is before me is a Preliminary Objection and thus I need to take cognizance of the legal parameters, that define the circumstances under which Preliminary Objection can be raised and/or ventilated.

14. In view of the foregoing, I beg to take cognizance of the decision in the case of **Mukisa Biscuits Co. Ltd vs Westend Distributors Ltd [1969] EA at Pages 699-701**, where the Court of Appeal for Eastern Africa held as hereunder;

“The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.”

15. Having taken into account the foregoing observation, which defines the circumstances under which a Preliminary Objection can be raised, it is now appropriate to consider the issues raised as pertains to the subject matter.

16. It is imperative to note that the Plaintiff herein acknowledges and/or confirms that the original property herein was registered in the joint names of Bernard Ngugi Wamiri and John Peter Kinuthia, as joint owners thereof.

17. On the other hand, it has also been conceded by the Plaintiff that both the joint owners namely, Bernard Ngugi Wamiri and John Peter

Kinuthia, are both deceased. For clarity, the said Bernard Ngugi Wamiri is reported to have passed on the 5<sup>th</sup> of May 1972 whereas John Peter Kinuthia passed on in the year 2014.

18. To the extent that the person on whose behalf the Plaintiff has filed the suit, is conceded to have passed on, it was incumbent upon the Plaintiff herein to first and foremost procure and obtain a Grant of Letters of Administration over and in respect of the estate of the said deceased, before filing and/or commencing the subject suit.

19. In any event, the Plaintiff herein was aware and/or knowledgeable of the need to procure and/or obtain the Grant of Letters of Administration, to enable her to file the subject suit. For clarity, it is evident that the Plaintiff attempted to allege and/or show that the subject suit, has been filed by the Plaintiff in her capacity as the legal representative of the estate of the deceased.

20. However, what the Plaintiff has not been able to tender and/or avail to the Honorable Court, is evidence that the Grant of Letters of Administration, was indeed issued and sealed. In this regard, one would have expected the Plaintiff herein to attach and/or exhibit a copy of the Grant of Letters of Administration, and/or to allude to the case file number, wherefrom the grant was procured and/or obtained.

21. Better still, the Plaintiff herein could also avail a copy of the Grant of Letters of Administration by way of a supplementary bundle of documents and thereby to show the Court that indeed a Grant of Letters of Administration had been issued.

22. However, despite the opportunity and/or latitude to tender and/or avail a copy of the Grant of Letters of Administration, the Plaintiff herein has remained adamant and has not been able to attach or avail a copy of the Grant of Letters of Administration.

23. On the other hand, the Plaintiff has similarly refused and/or neglected to disclose the case files details to show wherefrom and when, the Grant is said to have been procured from.

24. Having had the opportunity to avail and/or furnish a copy of the requisite document, namely, the Grant of Letters of Administration, despite the necessity to do so, it must now be taken that no such Grant of Letters of Administration was ever procured and/or obtained whatsoever.

25. In the absence of Grant of Letters of Administration, the Plaintiff herein cannot lawfully and/or legally commence the subject suit. For clarity, to be able to file and/or maintain a suit for and on behalf of the benefit of the estate of a deceased, the Plaintiff ought to have procured and/or obtained a Grant of Letters of Administration beforehand.

26. For the avoidance of doubt, it is worthy to take into account and/or consideration the import of the provisions of Section 82 of the Law of Succession Act, Chapter 160, Laws of Kenya, which provides as hereunder;

**“82. Powers of personal representatives**

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;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant;

(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation: Provided that except so far as otherwise expressly provided by any will—

(i) no appropriation shall be made so as to affect adversely any specific legacy;

(ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.”

27. On the other hand, it is also appropriate to refer to and take cognizance of the Decision in the case of Virginia Edith Wambui Otieno vs Joash Ochieng Ouko [1987] eKLR whereby the Honorable Court stated as hereunder;

“But the difficulty remains that the general rule in relation to administration is that a party entitled to administration can do nothing as administrator before letters of administration are granted.

Section 80(2) of the Law of Succession Act provides that a grant of letters of administration, with or without the will annexed, shall only take effect as from the date of the grant. In contrast section 80(1) provides that a grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such.

This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of a fresh action, because he derives title from the will and the property of the deceased vest in him from the moment of the intestate's death (see 1 Williams on Executors and Administrators (14th edn) paras 84 et seq and 230 et seq).

But an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception. The doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death, cannot be invoked so as to render the action competent (see Ingall v Moran [1944] 1 KB, and the case which follow namely Burns v Campbell [1952] KB 15). This doctrine is as old as Wankford v Wankford [1702] where Powys J said:

‘but an administrator cannot act before letters of administration granted to him.’

28. As a result of lack and/or absence of the requisite Grant of Letters of Administration, the Plaintiff herein cannot commence and/or otherwise maintain the subject suit.

29. In view of the foregoing, it is my humble finding that the suit herein, which has been filed and/or commenced by the Plaintiff before being granted the Letters of Administration, was/is a nullity *ab initio*.

30. In a nutshell, I answer the first issue by stating that the entire suit herein is premature, misconceived and thus legally untenable. For clarity, no amount of amendment can redeem and/or salvage the suit herein.

## **Issue Number Two**

### **Whether the non-issuance of the statutory notice to the Attorney General invalidates the subject suit.**

31. As pertains to the second limb of Preliminary Objection, it is necessary and/or appropriate to refer to the provisions of **Section 13A of the Government Proceedings Act, Chapter 40, Laws of Kenya.**

32. For clarity, the provisions of Section 13A, (Supra), provide as hereunder;

#### **“13A. Notice of intention to institute proceedings**

**(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings.**

(2) The notice to be served under this section shall be in the form prescribed in the Third Schedule to this Act and shall include the following particulars—

(a) the full names, description and place of residence of the proposed plaintiff;

(b) the date upon which the cause of action is alleged to have accrued;

(c) the name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant;

(d) a concise statement of the facts on which it is alleged that the liability of the Government and of any such servant or agent has arisen;

(e) the relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim.

(3) The provisions of this section shall not apply to such part of any proceedings as relates to a claim for relief in respect of which the court may, by virtue of proviso (i) to section 16 (1), make an order declaratory of the right of the parties in lieu of an injunction.”

33. From the foregoing provisions, it is evident and/or apparent that before any civil proceedings can be taken and/or commenced against the

Hon. Attorney General, for and on behalf of the Government of the Republic of Kenya and/or a department and/or office in the government, the claimant is required by law to issue and serve the requisite statutory notice, giving to and in favor of the Attorney General, 30 days before the actual filing and/or lodgment of the suit.

34. It is imperative to note that the wordings of the said provision of the law, are couched in peremptory terms and thus the issuance and service of the statutory notice is a mandatory prerequisite.

35. Notwithstanding the foregoing, the issue pertaining to the provisions of **Section 13A of the Government Proceedings Act, Chapter 40, Laws of Kenya**, was a subject of concern and was indeed contended to be unconstitutional.

36. Following the issue of the unconstitutionality or otherwise of the said Section 13A, the matter was dealt with in the decision in the case of **Kenya Bus Service Ltd & Another vs Minister For Transport & 2 others [2012] eKLR** where the Honorable Court ordered as hereunder;

**“Section 13A of the Government Proceedings Act as a mandatory requirement for the institution of suit against the government violates the provisions of the Article 48 of the Constitution.”**

37. Owing to the fact that the provisions of Section 13A of the Government Proceedings Act, Chapter 40, was found and declared to be unconstitutional, the said section is thus said to be deleted and/or obliterated from the face of the statute. Same is therefore non-existent.

38. In view of the foregoing, the Plaintiff herein was not obliged and/or obligated to comply with the said provision which was non-existent, and thus stood deleted from the Statute Books.

#### **FINAL DISPOSITION**

39. Having considered and/or addressed the twin issues which were highlighted and/or enumerated herein before, I come to the conclusion as hereunder;

- i. The Plaintiff herein was not seized and/or possessed of the requisite Locus standi to commence and/or maintain the subject suit.
- ii. That the subject suit herein was filed and/or lodged in contravention of the provisions of **Section 82 of the Law of Succession Act**, and in particular, before the issuance of the Grant of Letters of Administration, as by law required.
- iii. The entire suit is Incompetent and same is hereby struck out.
- iv. The Plaintiff was not obliged to comply with and/or adhere to the provisions of Section 13A of the Government Proceedings Act, Chapter 40, in so far as same stands obliterated from the face of the statute, having been declared to be unconstitutional vide the decision in the case of **Kenya Bus Service Ltd & Another vs Minister For Transport & 2 others [2012] eKLR**.
- v. Despite the incompetence of the suit, the 1<sup>st</sup> Defendant herein appear to have engaged in certain illegalities and on this account, the Defendants cannot be rewarded with costs. Consequently, each party shall bear own costs.

40. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF DECEMBER , 2021**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**ENVIRONMENT AND LAND COURT.**

**MILIMANI.**

In the Presence of;

**June Nafula Court Assistant**

**Mr. Motari Senior Litigation Counsel for the Defendants.**

**N/A for the Plaintiff, who was aware of the Ruling Date.**