



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CIVIL CASE NO. E008 OF 2021

ELIZABETH NDUKU MUTISO...PLAINTIFF/APPLICANT

VERSUS

KALPESH LALJI PATEL.....DEFENDANT/RESPONDENT

RULING

1. The application herein was instituted vide a notice of motion dated 30.08.2021 (herein referred to as the 1st application) wherein the applicant is seeking for orders that:-

i.Spent.....

ii. That the defendant/respondent be restrained by a way of injunction by himself, his employees, agents and or any other person(s) claiming his authority from demolishing the plaintiff/applicant's premises situate in Land Parcel Mbeere/Wachoro/1356 and or evicting and or in other way interfering with the plaintiff's user of Mbeere/ Wachoro/1356 pending the hearing and determination of this application.

iii. That the defendant/respondent be restrained by way of a temporary injunction by himself, his employees, agents and/or any other person(s) claiming his authority from demolishing the plaintiff/applicant's premises situate in Land Parcel Mbeere/Wachoro/1356 pending the hearing and determination of this suit.

iv. That the costs of this suit be in the cause.

2. The application is premised on the grounds on its face and further supported by the affidavit sworn by applicant.

3. Another application was also instituted vide a notice of motion dated 20.09.2021 (herein referred to as the 2nd application) wherein the applicant is seeking for orders that:-

i. Spent

ii. That this Honourable court be pleased to review with a view of setting aside the orders obtained on 14.09.2021 that temporary injunction be and is hereby issued restraining the defendant/respondent by himself, his employees, agents and or any other person(s) claiming his authority from demolishing the plaintiff/applicant's premises situated in Land Parcel Mbeere/Wachoro/1356 to last until 27.09.2021 when the application shall be heard inter partes.

iii. That pending the hearing and determination of this application inter partes, the plaintiff/respondent, her servants and or agents or otherwise howsoever be restrained from selling, leasing, tilling, digging, excavating and or dealing in any way whatsoever with the subject suit property known as Mbeere/Wachoro/1356.

iv. That pending the hearing and determination of this suit, the plaintiff/respondent her servants and/or agents or otherwise howsoever be restrained from selling, leasing, tilling, digging, excavating and or dealing in any way whatsoever with the subject property known as 1356.

v. That the O.C.S. Makutano Police Station be directed to assist and ensure compliance by the plaintiff/respondent.

vi. That the costs of this application be paid to the defendant/applicant.

4. The application is premised on the grounds on its face and further supported by the affidavit sworn by the applicant. The applicant's case is that the court made orders on 14.09.2021; that the applicant has weaponized the interim order and that the plaintiff misled the court by failing to make full and candid disclosure of the fact that she is in the process of selling the subject suit property known as Land Parcel Mbeere/Wachoro/1356 to a third party despite filing an application for injunctive relief and the suit herein, which grievously affect the substratum of the suit and the defendant's interests over the suit property.

5. The parties took directions to have both applications heard together and be disposed off by way of written submissions.

6. I have certainly perused and understood the contents of the applications, the responses thereto and submissions filed herein. The main issue for determination is whether the applications are merited.

7. The applicant in the 1st application submitted that she was misguided and or misled by the defendant/respondent into believing that she has capacity to dispose off the aforementioned land parcel by way of sale and subsequently entered in a sale agreement dated 17.02.2021. That, the dealing in the suit property is contrary to the law given that the plaintiff/applicant lacked the capacity to deal in her deceased husband's estate without having obtained a grant of letters to do so. To this end, that the sale agreement dated 17.02.2021 is rendered void and the same cannot raise legal obligations to the parties therein. On the other hand, the applicant/respondent in his affidavit averred that the plaintiff/respondent has since weaponized the order having misled the court by failing to make full and candid disclosure of the fact that she is in the process of selling the subject suit property known as Land Parcel Mbeere/Wachoro/1356 to a third party despite filing an application for injunctive relief which grievously affect the substratum of the suit and the defendant's interests over the suit property.

8. The applicant in the 2nd application herein has sought to review the orders that were made on 14.09.2021 in regard to a temporary injunction over the suit property and further submitted that this trial court lacks jurisdiction to entertain the 1st application before it. It is a rule that such an issue ought to be determined *in limine* as the court cannot exercise jurisdiction which it does not have but can only exercise jurisdiction as conferred by the constitution or other written law. A court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. (See **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR**).

9. The applicant in the 2nd application has argued that the 1st application is fatally defective as this court lacks both pecuniary and territorial jurisdiction thus the orders sought cannot issue. It is of importance to note that the orders sought by the applicant in the 2nd application are in regards to the order dated 14.09.2021 wherein he has sought orders for review or setting aside of the court orders made on 14.09.2021.

10. Further, the same applicant averred that the applicant in the 1st application lacks legal standing to institute these proceedings on behalf of her late husband without first obtaining grant of letters of administration as required by law; therefore, it is of importance to interrogate whether the plaintiff/applicant has the necessary standing to move the court for the orders sought.

Limited Grant of Letters of Administration *Ad Litem* which is provided for under **Form 14** of the **Fifth Schedule** of the Act and deals with suits; the said provision states as follows:-

'when it is necessary that the representation of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution'.

11. From the foregone, it is clear that a Limited Grant of Letters of Administration *Ad Litem* is usually used when the estate of a deceased person is required to be represented in court proceedings. (See the case of **Greenway vs. Mc Kay (1911) 12 CLR 310**).

12. Similarly, in the case of **Hawo Shanko Vs Mohamed Uta Shanko (2018)**, it was held as follows:

'...The general consensus is that a party lacks the locus standi to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the plaintiff or applicant has not been formally authorized by the court by way of a grant limited for that purpose, then it will be difficult to control the flow of court cases by those entitled to benefit from the estate; it is the Limited Grant which gives the Plaintiff the locus to stand before the court and argue the case...one has to first obtain a limited grant that will give him/her the authority to file the suit she ought to have sought a limited grant before filing this suit.'

13. The court further stated that;

'...without a limited grant being issued, the Plaintiff allowing the filing of the suit, the Plaintiff would be like someone who has entered a closed room without opening the door. All what the court can tell someone who is before it without having obtained a grant limited to the filing of the suit is that despite the validity of the same or the strength of the case, the court cannot hear the suit as the initiator thereof lacks the capacity to file the suit. The correct procedure is not to allow the Plaintiff to go back and obtain the limited grant for that purpose then allow him to continue with the suit. The suit as initiated is void ab initio and cannot be resuscitated by the issuance of a subsequent limited grant.

...if any relationship with the deceased does exist whether son, daughter, wife, widow is not sufficient. That relationship does not give the locus standi to any relative to obtain suit before obtaining limited grants. One's relationship to the deceased does not clothe such a party with the locus standi. It is the Limited Grant with does'

14. I adopt the view of Mrima J. in the case of Julian Adoyo Ongunga & Another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi (Deceased) eKLR whereby the court described a party filing a suit without an Ad Litem as follows;

...Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain the suit even where a valid cause of action exists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties...'

15. Having found that the plaintiff/applicant lacks legal standing to the current application, I am of the view that the defendant/ applicant's application equally fails since the orders sought can't be granted against a party who lacks legal standing to move this court in the first instance.

16. In the end, I find that both applications have no merits and they are struck out with no orders as to costs.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF DECEMBER, 2021

L. NJUGUNA

JUDGE

.....for the Plaintiff

.....for

the

Defendant