



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 59 OF 2018 (OS)

APPOLONIA OMBOK.....APPLICANT

VERSUS

MAURICE ODHIAMBO OWITI.....1ST RESPONDENT

LAND REGISTRAR KISUMU.....2ND RESPONDENT

RULING

The 1st Respondent filed a Notice of Preliminary Objection opposing the Applicant's Notice of Motion seeking orders to the Respondents to open the access road hived from Kisumu/Othany/572 and connecting Kisumu/Othany/575 to the main road on three grounds: that the Applicant has no capacity or standing to bring the application and the entire suit; that the application as drawn is brought under the wrong provisions of law; and that the institution and filing of the motion offends provisions of Order 4 Rule 4 of the Civil Procedure Rules. Parties proceeded by way of written submissions.

1st Respondent's Submissions

Counsel for the 1st Respondent submitted that the Applicant had deponed that she was the eldest wife of the late Manase Ombok Jagero, the registered proprietor of Kisumu/Othany/572, meaning that the deceased had more than one wife yet the Applicant had not provided any evidence to the effect that she was the authorised legal representative of the deceased's estate. That it was therefore apparent that the Applicant has no locus standi to bring the suit and that the suit is null and void *ab initio*. That the motion is therefore based on a nullity and consequently is also null and void. Counsel cited the case of *Isaya Masira Momanyi v Daniel Omwoyo & Kebungo Orina Kisii ELC No. 167 of 2016* in which it was held that a party cannot commence a suit on behalf of the estate of a deceased without letters of administration.

Counsel submitted that the application was brought under Order 40 Rules 1, 4, and 10 of the Civil Procedure Rules and Section 3A of the Act. That Order 1 deals with cases in which temporary injunction may issue while Rule 10 deals with detention, preservation and inspection of property. Counsel asserted that from the pleadings, it was clear that the prayers sought do not fall under the provisions of the law invoked in the application.

Counsel submitted that Order 4 Rule 4 of the Civil Procedure Rules mandatorily required a Plaintiff suing in a representative capacity to state, in the pleadings, the capacity in which he sues and where the Defendant is sued in a representative capacity, the plaintiff shall state the capacity in which he is suing and in both cases how that capacity arises. That the Applicant had sued without stating the capacity in which she had sued, rendering the entire suit incompetent, bad in law, and an abuse of the court process.

Applicant's Submissions

Counsel for the Applicant submitted that the application was brought under Section 38 (4) of the statute of limitations Act that deals with registration of title to land and easement, providing that the proprietor, the applicant and any other person interested may apply to the High Court for determination of any question arising under the section. That the Applicant brought the suit in her own capacity.

Counsel asserted that the Applicant had locus standi to bring the suit as she produced a marriage certificate illustrating that she and the deceased were married sometime in 1963 and as such she acquired a life interest therein under the Law of Succession Act.

Counsel submitted that Section 28 of the Land Registration Act guaranteed the Plaintiff's interests in terms of spousal right over the matrimonial property which was the suit property. That the property became matrimonial property when the deceased died and the Applicant acquired a life interest. Counsel cited the case of *Bob Njoroge Ngarama v Mary Wanjiru Ngarama [2014] eKLR*.

Counsel submitted that the dispute was whether there is an access road easement that exists with Land Parcel No. LR. 13537/104, an issue that can only be determined by tendering of the evidence. Counsel submitted that under Section 100 of the Land Registration Act, the Applicant was within her right in law to pursue the recognition and non-interference of the access road by the 1st Respondent.

Issues for Determination

1. Whether the application is fatally defective for citing wrong provisions of the law

Order 51 Rule 10 of the Civil Procedure Rules provides that an application shall not be refused for merely failing to state the order, rule or statutory provision under which an application is made:

“10 (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

The Supreme Court in *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* [2013] eKLR, when considering an application made without citing the relevant provision of the Constitution, held:

“The question then is, whether this omission is fatal to the applicant’s case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite [the relevant provision] will not be fatal to the applicant’s cause.”

Odunga J. in *Republic v Anti-Counterfeit Agency & 2 others Ex-Parte Surgippharm Limited* [2014] eKLR held:

“However, in light of the provisions of Article 159(2)(d) of the Constitution the mere fact that a party cites the wrong provisions of the law ought not to deprive the Court of a jurisdiction where such jurisdiction exists.”

It follows therefore that the failure of the Applicant to cite the correct provisions and instead citing the wrong provisions of the law under which the originating summons was brought did not render the originating summons fatally defective.

2. Whether the issue of locus standi can dispose of the suit

The threshold for preliminary objections is now trite law as per Law, JA and Newbold, P in *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696:

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit...A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the 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.”

Ojwang J. (as he then was) in *Oraro v Mbaja* [2005] 1 KLR 141 held:

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement ... that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.”

The Respondent’s contention was that it was apparent on the face of the pleadings that the deceased had more than one wife and therefore, the Applicant could only bring this suit as the legal representative of the deceased. The Applicant on the other hand asserted that she had acquired a life interest in the suit property under the Law of Succession Act, and by virtue of Section 28 of the Land Registration Act, she had acquired spousal rights over the suit property.

The question of whether the Applicant was indeed the deceased’s wife and whether the deceased had more than one wife cannot be determined without the adducing of evidence to authenticate these facts. Therefore, these grounds are not sufficient to warrant dismissal of the suit for want of capacity. On the other hand, it is the Applicant’s own admission that she has brought this suit by virtue of her spousal rights over the suit property as per Section 28 of the Land Registration Act. However, Section 11 of the Land Laws (Amendment) Act 2016 amended Section 28 of the Land Registration Act by removing spousal rights over matrimonial property as one of the interests that shall be automatically deemed as being overriding interests subsisting in registered land without their being noted in the register. The upshot is that the Applicants brought this suit relying on a repealed provision of the law that is no longer in force.

Further, the general consensus is that a party would not be vested with the requisite *locus standi* to bring a suit involving a deceased's estate without obtaining a limited grant beforehand. See *Hawo Shanko v Mohamed Uta Shanko* [2018] eKLR where the court held that:

“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 does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same. One has to first obtain a limited grant that will give him/her the authority to file the suit.” The preliminary objection is hereby upheld and the Applicants application dismissed.

DATED AND DELIVERED THIS 28TH DAY OF FEBRUARY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

KEMBOI FOR 1ST RESPONDENT

MBAGADA FOR APPLICANT

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE