



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**E.L.C NO 26 OF 2019 (O.S)**

**IN THE MATTER OF THE LAND PARCEL NO. KERICHO/KIPSONOI/SETTLEMENT SCHEME/87**

**AND**

**IN THE MATTER OF AN APPLICATION FOR DETERMINATION OF RIGHT TO ADVERSE POSSESSION**

**BETWEEN**

**ESTHER CHEROP BUSIENEI.....APPLICANT**

**VERSUS**

**PETER MOMOEN LANGAT.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. This ruling is on a preliminary objection premised on two postulates viz:

*(1) That the applicant is not competent and lacks capacity to institute this suit without a grant of letters of administration in respect of the estate of her late husband's father known as MOMOEN LANGAT under or through whom the applicant claims ½ of the suit land.*

*(2) That the applicant filed this suit contrary to orders of this honourable court given on 26/11/2016 in HCC NO 93 of 2009 (O.S)*

2. The notice to raise the objection was filed in court on 23<sup>rd</sup> October, 2019. It is clear from the notice that the respondent – **PETER MOMOEN LANGAT** – would wish the suit herein struck out, with judgement and ensuing costs granted in his favour.

**BACKGROUND**

3. The applicant – **ESTHER CHEROP BUSIENEI** – filed this suit against the respondent on 17<sup>th</sup> April, 2019 vide an originating summons dated 16<sup>th</sup> April, 2019. She claims ownership of half (1/2) of Land parcel NO.KERICHO/KIPSONOI/SETTLEMENT SCHEME/87 via adverse possession or trust. The respondent is the registered owner of the land.

4. The applicant is a step-mother to the respondent, the respondent's own mother having been her co-wife, and the husband of both, who is also the respondent's father, being the son of the alleged original owner – **MOMOEN A. LANGAT**. The respondent is said to have exploited the closeness of his name to that of the original owner to fraudulently secure registration of the land in his name. It is the applicant's position that she is entitled to half (1/2) the land, hence her claim.

5. But the respondent disputed all this and in particular denied being fraudulent as alleged. He averred that the applicant is not in occupation of the land and does not have her matrimonial home there. He averred that the land is his own and was registered as such from the beginning. According to the respondent, the applicant has her own land, portions of which she has sold, and is now eyeing a portion of his own land and claiming it as her own.

6. It seems clear that there was an earlier suit which was broadly similar to this one, but which had the applicant and her late husband as the suing parties. The earlier suit underwent a full trial but before judgment was delivered, the suing parties withdrew it. The court accepted the withdrawal but directed that any party wishing to file another related suit would have to pay the costs of the earlier suit first. The second limb of the preliminary objection is in fact based on this directive.

## SUBMISSIONS

7. The application was canvassed by way of written submissions. The respondent's submissions were filed on 14<sup>th</sup> November, 2019. According to the respondent, the applicant is claiming that the disputed land was first allotted to her deceased father in law. They submitted that she required to obtain letters of administration if she was tracing her entitlement to him. As she has not obtained that or any other grant, she is said to lack capacity to institute the suit. He cited various cases to buttress his point, among them being **TROUSTINIK INTERNATIONAL UNION & ANOTHER VS. JANE MBEYU & ANOTHER: CA NO. 145 OF 1990 (1993 EKLK)** and **TIMOTHY MUGO KARANI VS KITHAKA IKUTHI & OTHERS ELC NO. 54 OF 2014, EMBU (J.R.)**.

8. The respondent also made reference to the earlier suit and recalled the directive that parties should not file another suit before settling costs arising in the earlier matter. This court was told that this suit was filed without the applicant first paying costs related to the earlier matter.

9. The applicant's submissions were filed 2<sup>nd</sup> December, 2019. It was submitted, inter alia, that there is lack of clarity as to whether the objection is based on points of law. More specifically, the point raised objecting to the filing of suit before payment of costs was said not to be based on any known law. It was said that the court made the order on the basis that the costs were not only ascertainable, but actually ascertained, and with a demand to pay subsequently made.

10. It was also submitted, much in line with the holding in the case of **MUKISA BISCUIT COMPANY VS WESTEND DISTRIBUTORS LIMITED (1969) EA 696 at page 702**, that a preliminary objection raises a pure point of law argued on the premise that the facts raised by the other side are correct. This was said not to be the position here as what the respondents raise requires canvassing of evidence to proof.

11. As regards requirement to obtain the requisite grant from probate court, the claim of adverse possession was said to require no such grant. The applicant explained himself thus: ***"The applicant need not have obtained letters of administration to assert her claim on adverse possession. The claim can be brought by any person in so far as it is in accordance with the Statute of Limitation."***

## ANALYSIS

12. As pointed out earlier, the premise of the objection is two-fold. It's first and foremost based on the assertion that the applicant's claim requires her to obtain the requisite grant from Probate and Administration Court before filing the suit. But the applicant counters this by submitting that the claim is one of adverse possession based solely on the Law of Limitations of Actions and therefore not one requiring any grant as alleged. The applicant is right on this issue. A claim of adverse possession is usually personal to the person making it. Such person usually lays the claim on the basis of sufficiently long uninterrupted period of possession and/or occupation in an open manner that is adverse to the interest of the titled owner. No grant is required by such claimant. In this particular matter, it needs to be appreciated that the claim is made against a living person, not a deceased one.

13. It can be argued that the applicant is also claiming the land on the basis of trust. Such claim again is made against a living person, not a deceased one. Besides, this is an alternative claim, which is secondary to the claim of adverse possession. Even if one were to argue that a grant would be required for this secondary aspect of the claim, one would have to reckon with the fact that dismissing the suit would also terminate the claim based on adverse possession, which does not require a grant.

14. My finding therefore is that the first limb of the objection is without merit and I refuse to uphold it.

15. I now come to the second limb. This one concerns a court order requiring that costs arising in an earlier suit be paid first before a suit like this one is filed. To the applicant, this is not a point of law. He admits however that such an order was made. Here, the applicant is wrong. A court order is a legal order. A preliminary objection can be raised on it. It was wrong for the applicant to come to court without having complied with the order.

16. And if, for any reason, the applicant had to come to court, she needed to put herself in good stead with the court by first seeking its leave. The court would have listened to her reasons for filing a suit without complying with its order. It would have made a decision whether such reasons are a good justification for her action. But in this case, the applicant just rushed to court as if the court order didn't exist. The applicant was wrong. She only needed to give thought to so many instances where courts of law deny audience to litigants for not complying with orders that have been made as pre-condition for hearing their cases. One such instance is where a party is told to pay assessed costs on or before a given hearing date. The applicant can not run away from the obligation to pay costs. She should pay first before she is heard.

## DECISION

17. The second limb of the objection therefore has merits. I entirely agree with the respondent on this issue. The applicant should understand that she can not run away from an obligation which she is duty-bound to fulfil first. She must first pay costs as earlier ordered by the court. I therefore uphold the objection on this ground and hereby strike out the applicant's suit with costs.

**Dated, signed and delivered at Kericho this 10<sup>th</sup> day of March, 2020.**

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**A. K. KANIARU**

**JUDGE**