



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND CASE NO. 95 OF 2019

MOSES K. YATOR.....1ST PLAINTIFF

ISAAC K. CHEBOI.....2ND PLAINTIFF

MARGARET KIMAIYO.....3RD PLAINTIFF

ARON KIBET MAIYO.....4TH PLAINTIFF

VERSUS

JOYCE JEROTICH KIPLAGAT.....DEFENDANT

RULING

This ruling is in respect of an applications dated 3rd December 2019 by the defendant/applicant seeking for the striking out of the plaintiff's suit. The application was heard and a ruling date reserved but before the ruling could be delivered the plaintiff/applicants filed an application under certificate of urgency seeking to stay the delivery of the ruling and allow the applicant's annexed replying affidavit to be deemed as duly filed and served.

Counsel for the defendant submitted that the entire suit was an abuse of the court process as the plaintiffs were not the administrators or the legal representatives of the estate of Dickson Kimaiyo Lagat, thus they lacked locus standi.

Mr. Kibii counsel for the defendant submitted that the proceedings before the court were in respect of a deceased person Dickson Kimaiyo Lagat as evidenced by paragraph 9 of the plaint and the plaintiffs' statements dated 25th May 2011 and 26th June .2019 and paragraph 5(b) of the replying affidavit.

That the late was a shareholder of the Growel farm, of which the plaintiff/respondent annexed a death certificate, thus it's not in issue that none of the plaintiffs is a legal representative of the estate of the late Dickson Kimaiyo Lagat as per Section 2 and 79 of the Succession Act which makes it mandatory that the legal representative has the power to run the affairs of the estate.

Mr. Kibii argued that the plaintiffs have invoked Article 22 of the Constitution which does not apply to these proceedings as it applies to the public property interest. Counsel cited the case of **George Kyaka & 9 others V Kevin Ndungu Kiriga & another [2018] eKLR** where the court was moved by a P.O and the court was of the view that the issues raised were factual and did not meet the threshold for P.O's whereas in this instant case, the court has been moved by an application, see also the case of **Local Building and Construction Limited V Institute of Blessed Virgin Mary Loreto Msongari & 2 others [2019] eKLR** where the suit was for non-joinder of parties whereas in this instant suit all the parties lack capacity. Counsel urged the court to strike out the plaintiffs' suit as capacity or locus goes to the root of the proceedings.

Ms. Kipsei Counsel for the plaintiffs relied on the replying affidavit and submitted that the 3rd and 4th plaintiffs have sued in their capacities as intended beneficiaries of the estate of the deceased as per paragraph 5 of the plaint. That at no point have the plaintiffs been described as administrators and that if succession proceedings were to commence then the suit land would not form part of the estate.

Counsel further submitted that the plaintiffs were to benefit directly and that the issue of whether the plaintiffs have capacity cannot be brought by way of application or affidavits. That a suit cannot be defeated due to misjoinder of parties as this would amount to dismissal on technicalities.

Ms. Kipsei submitted that the 2nd plaintiff is one of the trustees of the farm and have sued the defendant to confirm the legal entitlement to the estate of the late Dickson Kimaiyo Lagat. The 3rd and 4th plaintiffs are the widow and son and the beneficiaries of the said parcel. It was counsel's submission that the defendant had obtained the title to the suit land through fraudulent means and thus cannot purport to say that

the plaintiffs have no capacity. Counsel therefore urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

I have considered the application and the submissions by counsel and is of the view that the issue for determination whether the plaintiffs have locus standi to bring and sustain this suit against the defendant. This matter was filed in 2011 and was later transferred to the Environment and Land Court on 24th July 2019 and given a new number.

It is trite law that proper parties must be identified before an action can be found to be competent and have jurisdiction as was held in the case of **Apex International & Anglo Leasing Finance Ltd vs Kenya Anti-Corruption Commission [2012] eKLR**

Further in the case of **Wilmot Mwadilo & ors v. Eliud Timothy Mwamunga &anor [2017]eklr** the court held as follows:

“indeed the issue of locus standi of the plaintiffs goes to the root of the matter, poring over and examining of their documents cannot be avoided as this court will have to be satisfied that they had jurisdiction to institute the proceedings herein. Indeed no busy bodies ought to be permitted to occupy the court’s time if indeed they are not closely related to the matter. Judicious time is precious and must be guarded jealously”

This shows how important it is to first of all establish that a party suing has the legal capacity to sue or be sued in order not to waste the courts time dealing with parties who should not be elsewhere and not the court.

The applicant relied on section 2 of the Succession Act which provides as follows:

“(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act”

The proviso provides that all cases in relation to persons who died either testate or intestate are governed by this law. The applicant averred that the plaintiffs were suing on behalf of a deceased and at paragraph 4 and 5 of the plaint states as follows:

“the 1st and 2nd plaintiff bring these proceedings against the defendant as Trustees of the subject of parcel number known as Kiplombe/Kiplombe Block 10(Growel)/389 formerly known as Kiplombe/Kiplombe(Growel)/2 and on behalf of the members and legal beneficiaries of the said parcel of land”

“the 3rd and 4th plaintiffs are widow and son of the late Dickson Kimaiyo Lagat and are the legal beneficiaries of a share of the parcel of land formerly known as Kiplombe/Kiplombe Block 10(Growel)/2 and are currently known as Koplombe/Kiplombe Block 10(Growel)/389”

The 1st and 2nd plaintiffs are trustees to the Growel farm and are not suing to represent the estate of the deceased but the 3rd and 4th plaintiffs are however suing on behalf of the estate of the late Dickson Kimaiyo Lagat.

It is evident from a supplementary affidavit dated 15th November 2011 where a copy of a green card on record showing the 1st and 2nd plaintiffs as the registered persons (trustees) to the entire BLOCK 10 farm.

From the above it can be deduced that the property in dispute had not been registered in the name of the deceased therefore the law of Succession Act does not apply. The suit land was still under the trustees and that is why they are suing to protect themselves and the 3rd and 4th plaintiffs.

The plaintiff also claim that the suit land was fraudulently acquired by the defendant with particulars of fraud enumerated. In the case of **Amin Akberali Manji & 2 Others vs Altaf Abdulrasul Dadani & Another [2015] eKLR** the court held as follows:-

“There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case, the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves being in control, would not allow the company to sue”.

The case is not to show that the court can entertain a case where a party has no locus to institute a suit but to demonstrate that there are certain circumstances where there can be exceptions like in the above case of minority shareholders. In issues of locus in succession matters it is trite that a party must have letters of administration or Limited grant to have such authority to sue or be sued.

In the case of **Transcend Media Group Limited vs Independent Electoral Boundaries and Electoral Commission (I.E.B.C.) [2015] eKLR** where the holding was that a court should never strike out a case if it has chances of success, if it can be injected with real life by an

amendment, if it is plain, obvious, clear and beyond doubt and that the court ought not to engage in a minute and protracted examination of facts and documents before the matter proceeds for hearing.

Having considered the application and the submissions by counsel, I find that this is not a case of striking out. The plaintiffs have locus standi to bring the suit for hearing and determination. The 1st and 2nd plaintiffs are trustees as is evident of the green card and have a right to sue to in respect of the suit property. Striking of suits is a draconian measure that the courts should use sparingly but that does not mean that if a suit is hopeless and an abuse of the court process it cannot be dismissed. The court will readily use its discretionary powers and dismiss such suits.

I therefore dismiss the application dated 3rd December 2019 with each party bearing their own costs. This matter to be fixed for hearing on priority basis as it is an old matter.

DATED and DELIVERED at ELDORET this 23RD DAY OF APRIL, 2020

M. A. ODENY

JUDGE