



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC CASE NO. 49 OF 2019

IN THE MATTER OF ACQUISITION OF TITLE BY ADVERSE POSSESSION

MUTYANDIA KILONZO.....APPLICANT

-VERSUS-

JOHN MASIMBI IMUNDI.....1ST RESPONDENT

EARNEST MWENDWA.....2ND RESPONDENT

RULING

1. Through an Originating Summons dated 26/07/2019, the Applicant seeks a declaration that he has acquired a freehold interest in land parcel No. 860 Kiboko Settlement Scheme, by adverse possession;
2. The suit is opposed through a Preliminary Objection dated 30/09/2019 and grounded as follows;
 - a) The Applicant in his pleadings admits that the suit premises is and was registered in the name of Naomi Imundi whom the said Applicant states that she is deceased.*
 - b) With this knowledge, the Applicant ought to have first cited the Respondents to proceed and obtain Letters of Administration for the Deceased's Estate.*
 - c) The Respondents had by the time of filing of this originating summons not applied for and obtained letters of administration hence they have no capacity to be sued and any orders to be issued will be an exercise in futility for they cannot legally be enforced there against.*
 - d) In whole and in it's totality, this suit offends the provisions of section 45(1) and (2) of the Law of Succession Act cap 160 of the Laws of Kenya.*
3. There was no response to the Preliminary Objection.
4. Directions were given that the Preliminary Objection be canvassed by way of written submissions.
5. The Respondents' submit that the property being claimed is registered in the name of a deceased person and the Applicant has not produced any evidence to show that they are the legal representatives of the deceased's estate. They contend that they have no capacity to be sued on behalf of the estate.
6. They submit that a person must seek and obtain letters of Administration to be in a position to deal with the property of a deceased person legally.
7. The Applicant submits that a claim for adverse possession survives the death of a registered owner and becomes a claim against the estate. He relies on **Thika ELC Case No. 169 of 2017; Phyllis Wanjiru Kamau –vs- Wilson Gichuhi Gachangwe & 2 others (2019) eKLR.**
8. Having looked at the Preliminary Objection and Respondent's submissions, the only issue for determination is whether the Preliminary Objection has merit.

9. The Applicant has not exhibited any title documents but has acknowledged that the suit land is registered in the name of Naomi Kamundi. Similarly, no death certificate has been exhibited but the Applicant acknowledges that the registered owner is deceased.

10. The Respondents are stated to be the deceased's son and grandson respectively and the Applicant's complaint is that they are interrupting his quiet enjoyment of the suit land. He has not exhibited anything to show that the Respondents are the legal representatives of the deceased's estate. No one is disputing the fact that a claim for adverse possession survives the death of a registered owner however; such a claim must be brought against a duly appointed legal representative.

11. Contrary to the Applicant's submission, the decision in the **Phyllis Wanjiru case (supra)** does not in any way dispense with the requirement of legal representation. The decision is distinguishable in the sense that one of the defendants therein was the holder of a confirmed grant.

12. It is therefore clear that the Respondents have no capacity to be sued and proceeding with this suit will be an academic exercise. The Preliminary Objection has merit and in the circumstances I hereby proceed to strike out the Originating Summons with costs to the Respondents.

Signed, dated and delivered at Makeni via email this 28th day of May, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi