



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 8 OF 2019**

**PAMELLA KWAMBOKA NYAREGA.....1<sup>ST</sup> APPELLANT**

**JOYCLEEN NYAREGA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**EDWARD KASO OBWOCHA .....1<sup>ST</sup> RESPONDENT**

**EDITH NYAMOITA MANYONGA.....2<sup>ND</sup> RESPONDENT**

***(Being an appeal from the Ruling and Order of Hon. S.K. Onjoro (Senior Resident Magistrate) delivered on the 1<sup>st</sup> day of February 2019, in the original KISII CMCC ELC Case No. 207 OF 2018)***

**JUDGMENT**

**INTRODUCTION**

1. The genesis of this appeal relates to an agreement for sale for parcel number LR. WEST KITUTU/BOGUSERO/ 2063 (*herein after referred to as 'parcel 2063'*). The Appellants entered into a sale agreement with the Respondents for the sale of parcel 2063 registered in the name of Pauline Nyamanyi Nyarega (*'the deceased'*) for a sum of Kshs 3,000,050/-. The Appellants soon realized that the sale could not be completed for reasons that they had not obtained Grant of letters of Administration in respect to the deceased's estate. The Appellants offered to refund the Respondents the amount they had paid under the agreement but the offer was rejected. The Respondents instead took possession of parcel 2063 and constructed a concrete wall and also put up a gate.

2. Contemporaneously filed with the plaint, was the Notice of Motion dated 6<sup>th</sup> August 2018. The Appellants sought a temporary injunction to restrain the Respondent, his servants and/or agents from entering, wasting or constructing on parcel 2063 pending hearing and determination of the application and the suit.

3. In their defence, the Respondents contended that the 2<sup>nd</sup> Appellant held herself out as the duly appointed legal administrator of the deceased's estate and feigned capacity to transact in regard to parcel 2063. The Respondents averred that upon execution of the sale agreement they took possession of parcel 2063 in accordance with the terms and conditions of the sale agreement. The Respondents also filed a reply to the Appellants' Notice of Motion dated 6<sup>th</sup> August 2018.

4. The Respondents further raised a Preliminary Objection on the following grounds:-

1. *The Plaintiff/Applicants herein are devoid and/or divested of the requisite Locus Standi, to mount, originate and/or maintain the instant suit, whatsoever and/or howsoever.*
2. *The instant suit is barred and/or prohibited by dint of section 82 of the law of Succession Act, Chapter 160, Laws of Kenya.*
3. *On the other hand, the suit herein is Pre-mature, Misconceived and Bad in law.*
4. *Besides, the plaint herein together with the instant Application do not disclose any reasonable cause of action against the Defendants/Respondent.*
5. *At any rate, the instant suit together with the Notice of Motion Application amount to and/or constitute an abuse of the due process of Court.*

6. In the premises, the Plaintiffs/Applicants hereon are Non-Suited.

5. The subordinate court in its ruling on the preliminary objection found that the Appellants had no *locus standi* to file the suit and struck out the Appellants' suit. It is this Ruling that has precipitated this appeal on the grounds set out in the Memorandum of Appeal dated 28<sup>th</sup> February 2019 as follows:

1. The learned magistrate erred in law and in fact and misdirected himself fundamentally in holding that the Appellants have no *locus standi* to bring the suit.
2. The learned Magistrate erred in law and misdirected himself fundamentally in making orders to aid the law breakers hence perpetuating an illegality.
3. The learned magistrate failed to apply laid down principles of granting a temporary injunction hence arrived at a wrong decision.
4. The learned magistrate erred in law and in fact in striking out the Appellant's suit.
5. The learned magistrate failed to take into account relevant matters and/or took into account irrelevant matters hence arrived at a wrong decision.

6. I directed that the appeal be canvassed by way of written submissions and both parties filed written submissions.

7. The Appellants submitted that the suit before the subordinate court was filed after it had obtained Grant of letters of Administration *ad litem*. They contend that the Grant was obtained on 5<sup>th</sup> September 2018 and the suit filed thereafter on 11<sup>th</sup> September 2018. They submitted that the trial court erred in striking out their suit on account of *locus standi* as they had filed Grant of letters of Administration as part of their documents. It was advanced that the **Constitution of Kenya, 2010** frowns on the striking of pleadings based on technicalities. *Article 159 (2) (d)* enjoins the court to administer justice without undue regard to procedural technicalities. They cited the cases of **Dobie & Company (Kenya) Ltd. vs. Muchina (1982) KLR 1** and **Nairobi Civil Appeal 146 of 2001 Crescent Construction Co. Ltd v Delphis Bank Ltd (2007) eKLR** to support their position.

8. The Respondents submitted that the property was registered in the name of the deceased and no suit could be commenced without first seeking Grant of letters of Administration. They cited the case of **Charles Ratemo Nyambati v Jacton Ocharo & Others, Kisii ELC Petition No. 33 of 2013** where the court observed that the law is that grant is what clothes a person with *locus standi* to stand on and sue on behalf of the Estate of the deceased. It was submitted that even where a Grant of letters of Administration has been procured and/or obtained, it is incumbent upon the appointed administrator to indicate that the suit is being filed in representative capacity. The suit by the Appellants violated provisions of *Order 4 Rule 4 of the Civil Procedure Rules, 2010*. The Respondents called cited the case of **Law Society of Kenya vs Commissioner of Lands & 2 others (2001) KLR**.

#### ISSUES FOR DETERMINATION

9. There are two key issues for determination before this court. The first one is whether the Appellants were clothed with *locus standi* to institute and prosecute the suit before the subordinate court. The second issue is whether failure to disclose the capacity in which the Appellants are suing is fatal and should result in their suit being struck out.

#### ANALYSIS AND DETERMINATION

10. As the first appellate court it is my duty to examine and evaluate the evidence on record and reach an independent conclusion bearing in mind that I did not have the opportunity to hear or see the witnesses testify (see **Selle and Another v Associated Motor Boat Company Ltd [1968] EA 123**).

11. It is trite law that one must first obtain a Grant of letters of Administration that will give him/her the authority to file the suit brought on behalf of the deceased's estate. In the case of **Hawo Shanko v Mohamed Uta Shanko [2018] eKLR** 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."*

12. *Order 4 Rule 4 of the Civil Procedure Rules* provides that:-

*"Where the Plaintiff sues in a representative capacity, the Plaintiff shall state 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 sued, and in both cases it shall be stated how the capacity arises."*

13. The trial court in its holding found as follows;

*"...The Applicants did not state as to whether they obtained letters of administration Ad litem or attached the same in their*

application. It was imperative that before filing of the suit the applicant obtains letters of administration Ad litem otherwise they would lack the locus standi to institute the suit.

*The Applicants did not further address this issue in their submissions or by way of a further affidavit despite the Respondent bringing up the issue”*

14. I have looked at the Appellant’s submissions filed before the trial court and I am constrained to agree with the finding of the trial court that the Appellant did not address the issue of *locus standi* in their submissions. Their submissions filed before the subordinate court were entirely on their Notice of Motion application dated 6<sup>th</sup> August 2018.

15. However, having considered the plaint as well as the Plaintiffs’ documents, more particularly the Kenya gazette Vol. CXX No. 66 and the Grant of Letters of Administration issued to the Appellants by Hon Obina in **Succession Cause No.94 of 2018**, I find that there was sufficient proof that the Grant of letters of Administration had been obtained by the Appellants. This can be gleaned from paragraph 5 of the plaint which implies that letters of administration had been obtained though not confirmed. Paragraph 5 of the plaint stated that;

*“The 2<sup>nd</sup> Plaintiff later realized that the sale of the portion of land parcel no. WEST KITUTU/BOGUSERO/2063 could not be completed for want of grant of letters of administration Intestate of the Estate of the late PAULINE NYAMANYI NYAREGA which is yet to be confirmed.”*

16. **Section 82 (a) of the Law of Succession Act** provides that personal representatives shall, subject only to any limitation imposed by their grant, have the powers to enforce, by suit or otherwise all causes of action which by virtue of any law survive the deceased or arising out of his death for his personal representative.

17. It is therefore my finding that although the Appellants did not state the capacity in which they sued, they had taken out Grant of letters of Administration and had the *locus standi* to institute the suit.

18. With regard to the second issue, the Defendant submitted that the Appellants in their plaint did not show the manner in which their capacity to sue on behalf of the deceased arose. The Appellants on the other hand argued that the failure to indicate the capacity in which they sued is a mere technicality that can be cured by an amendment of the plaint. They also urged the court to administer justice without undue regard to procedural technicalities. **Article 159 (2) (d), of the Constitution** provides that;

*“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*

*(a)*

*(b)*

*(c)*

*(d) justice shall be administered without undue regard to procedural technicalities”*

19. The Supreme Court in the case of **Raila Odinga and Others v IEBC and Others SCK Petition No. 5 of 2013 [2013]eKLR** held that;

*“The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course.”*

20. In the case of **Law Society of Kenya v. Centre for Human Rights and Democracy & Others, Supreme Court Petition 14 of 2013** stated that;

*“Indeed, this Court has had occasion to remind litigants that Article 159 (2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do, is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis (Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 2013, [2013] e KLR).”*

21. Although Order 4 Rule 4 of the Civil Procedure Rules is couched in mandatory terms, Order 4 Rule (1) (6) allows the court to exercise its discretion on whether or not to strike out a suit for failure to comply with Order 4 rule 4.

The said rule provides as follows:

**Rule 4 (1) (6).** *“The Court may of its own motion or on application by the plaintiff or defendant, order to be struck any plaint or counterclaim which does not comply with sub-rule (2), (3), (4) and (5) of this rule”.*

22. In exercising my discretion, I am guided by the provisions of Article 159 (2) (d) of the Constitution of Kenya 2010 which enjoins the

court to administer justice without undue regard to procedural technicalities. I am also guided by the wise counsel of Madan JA in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR** that:

*“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.*

*No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”*

**23.** Since I have arrived at the finding that the Appellants had *locus standi*, it is in the interest of justice that they be given an opportunity to be heard.

**24.** In the end, I allow the appeal and make the following orders;

1. I set aside the subordinate court’s ruling dated 1<sup>st</sup> February 2019 to the extent that it allowed the Preliminary Objection and substitute it with an order dismissing the objection.
2. The Appellants’ suit herein Kisii CMCC ELC No. 207 of 2018 against the Respondents shall proceed to hearing of the Notice of Motion dated 6<sup>th</sup> August 2018 on dates to be fixed in consultation with the parties before the trial court.
3. The costs of the appeal shall be costs in the suit.

**Dated, signed and delivered via Zoom** this 28<sup>th</sup> day of May 2020.

**J.M ONYANGO**

**JUDGE**