



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELC APPLICATION NO. 513 OF 2017

EPHANTUS NJUGUNA MURA.....PLAINTIFF

VERSUS

LUCY WANJIRU NJUGUNA.....1<sup>ST</sup> RESPONDENT

JOSEPH KARANJA NJUGUNA.....2<sup>ND</sup> RESPONDENT

(both sued as administrators of the estate PETER NJUGUNA WAIHAKWE -Deceased)

ELIJAH GACHINJU KIMANI.....3<sup>RD</sup> RESPONDENT

GEORGE KAMAU WANGIGI.....4<sup>TH</sup> RESPONDENT

SERVANTS OF THE SICK (KENYA).....5<sup>th</sup> RESPONDENT

DAVID MAINA NJOROGE.....6<sup>TH</sup> RESPONDENT

RULING

1. Before me for determination is a Preliminary Objection dated the 6<sup>th</sup> February 2018 and filed on the same date by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein in response to an Originating Summon that was filed by the Applicants on the 16<sup>th</sup> November 2017.

2. The Applicant in his originating summons sought for the following orders;

i. Whether the parcel of land **L.R. NO NYANDARUA/MALEWA/1550** as then registered belonged to Julia Gathoni Mura (deceased)

ii. Whether the parcel of land **L.R. NO NYANDARUA/MALEWA/1550** as held by the said Julia Gathoni Mura (deceased) was subject of a trust in favour of the Applicant and other identified beneficiaries prior to and at the time of its registration as aforesaid which trust had to date not been determined.

iii. Whether the parcel of land **L.R. NO NYANDARUA/MALEWA/1550** was on **22/10/2003** registered in the name of **PETER WAIHAKWE NJUGUNA (deceased)** when he was already dead and fraudulently incorporated as part of his estate.

iv. Whether the registration of the parcel of land **L.R. NO NYANDARUA/MALEWA/1550** formed the free property of the deceased **PETER WAIHAKWE NJUGUNA** at the time of his death and thereafter or at all.

v. Whether the administration of the estate of **PETER WAIHAKWE NJUGUNA (deceased)** by the 1<sup>st</sup> and 2<sup>nd</sup> respondents vide **NYAHURURU S.P.M. SUCCESSION NO 203B OF 2004** was subject of the trust pleaded in (2) above.

vi. Whether upon transmission of the parcel of land **L.R. NO NYANDARUA/MALEWA/1550** to the 1<sup>st</sup> and 2<sup>nd</sup> respondents upon the said administration of the estate of Peter Waihakwe Njuguna (deceased) was subject to the trust pleaded in (2) above.

vii. Whether the subsequent dealings with the parcel of land **L.R. NO NYANDARUA/MALEWA/1550** by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in which they subdivided the same into resultant 7 parcels **L.R. NO NYANDARUA/MALEWA/2171-2177** all inclusive, and thereafter alienated the same to themselves and to the 3<sup>rd</sup> – 6<sup>th</sup> respondent respectfully was in fraudulent breach of the

trust pleaded in (2) above.

viii. Whether the 3<sup>rd</sup> -6<sup>th</sup> respondents were beneficiaries of the trust pleaded in (2) above.

ix. Whether, on account of the fraudulent breach of the pleaded trust as pleaded in (2) and (8) above, the respondents jointly and severally hold the parcels of land **L.R. NO's NYANDARUA/MALEWA/2171-2177** subject to the pleaded trust.

x. Whether the respective registrations of the parcels of land **L.R. NO's NYANDARUA/MALEWA/2171-2177** should be rectified by cancellation of the same and in place thereof the parcels of land be registered in the name of Julia Gathoni Mura (deceased) to be administered as part of her estate

3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents, in their Preliminary Objection have raised the issue of the Applicant's lack of locus standi to institute the said suit. That further, the Applicant's claim is caught up by the law on Limitations of Actions Act and have prayed for the suit to be struck out.

4. The said Preliminary Objection was supported by the 3<sup>rd</sup> -6<sup>th</sup> Respondents herein.

5. On the 14<sup>th</sup> May 2018, directions were taken that the said Preliminary Objection be disposed of by way of written submission wherein parties filed their respective submissions and by consent, they agreed not to highlight on their submissions but to have the court rule on the same.

6. I have considered the Respondents' submissions wherein they all seem to raise the same issues to wit that the Applicant's claim is brought on behalf of and for the benefit of the Estate of Julia Gathoni Mura, whom we shall refer to as the deceased for ease of reference, being LR No. Nyandarua /Mulewa/1550.

7. That the Applicant in his Originating Summons seeks for the reversion of the subject suit land to the estate of the deceased making the alleged aggrieved party the representative of the deceased.

8. That this being the scenario, it was therefore trite that a representative of the deceased's estate ought to have pursued the cause of action on behalf of the deceased. That in the present instance, the Applicant cannot purport to be that representative because he has not procured letters of grant and as such he has no capacity to institute the present suit on behalf of the deceased's estate.

9. The second issue was that the cause of action, according to the Originating Summons arose on the 22<sup>nd</sup> October 2003 when LR No. Nyandarua /Mulewa/1550 was registered jointly in the names of Julia Gathoni Mura and Hannah Wangechi Mura both who are now deceased. That Julia Gathoni Mura had passed away in the year 2005 while Hannah Wangechi Mura had passed on in the year 2016, the cause of action accrued during their lifetime yet no action had been taken by either the deceased or the Applicant herein.

10. The time within which the matter ought to have been filed therefore lapsed on the 22<sup>nd</sup> October 2015 and no leave was sought from the court for extension of time.

11. The third issue raised by the Respondents was that the suit was incompetent as the Applicant ought to have ventilated his issues in the Nyahururu Senior Residents Magistrates Succession Cause No 203B of 2004, the Estate of Peter Waihakwe Njuguna. That the said court was the proper forum to address the issues raised herein since the suit land had formed the sole purpose of the subject of succession. The Applicant therefore ought to have contested the inclusion of the suit land as part of the free estate of Peter Waihakwe Njuguna, also deceased.

12. The Applicant on the other hand submitted that he had the locus standi to prosecute his application because the claim was based on trust, the suit having been held by the deceased in trust for in him and in favour of other identified beneficiaries. Relying on Section 51 of the Land Act, the Applicant submitted that he brought the action based on his beneficial interest in the pleaded trust and not based on any interest flowing from the administration of an Estate. That since he seeks relief as a beneficiary sui juris, not as a legal representative of the deceased's estate or any other estate, he did not require any other capacity, other than as a beneficiary of the pleaded trust, to give him the locus standi to seek relief in respect of his pleaded beneficial interest.

13. On the last issue raised by the Respondents that the Applicants suit was time barred, the Applicant, while relying on the provisions of Section 20(1) of the Limitation of Actions Act to buttress his submissions, pleaded that a trust is not subject of the Limitation laws.

14. The Applicant further submitted that the probate court had no jurisdiction to resolve a trust within administration of an estate. He relied on Section 3 of the Law of succession Act which defined an estate that is a subject of administration as the free property of a deceased person.

15. That Section 41(3) of the Probate and Administration Rules made under the Act provides that whenever a question of trust or other beneficial interest arises within the administration of an estate the court seized with cause shall set aside the affected property to abide determination of the proceedings under Order XXXVI Rule 1 (currently Oder 37 Rule 1) of the Civil procedure rules. That the suit herein was brought under the said provisions of the law. The Applicant applied for the dismissal of the Preliminary Objection.

16. After having analyzed the submissions by both parties as well as having paid regard to the authorities herein cited by both parties on the Preliminary objection, I find the matters for determination being:

- i. Whether the Preliminary Objection raised is sustainable.
- ii. Whether the said Preliminary Objection has merit and should be upheld.

17. I am obliged to revisit the all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** A preliminary objection per Law J.A. was stated to be thus:-

“So far as I am aware, 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the same case Sir Charles Newbold, P. stated:

‘ . . . .a preliminary objection is in the nature of what used to be a 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.’

18. The summation of all the Respondent’s submission is that the Applicant herewith lacked the necessary locus standi to bring the instance suit as he had not obtained a grant and/or the letters of administration to do so. The Applicant on the other hand was categorical that he sought relief in this suit as a beneficiary sui juris, not as a legal representative of the deceased’s estate or any other estate. That he therefore did not require any capacity other than as a beneficiary of the pleaded trust to give him the locus standi to seek relief in respect of his pleaded beneficial interest.

19. The Court of Appeal has authoritatively delivered itself on the issue of locus standi in **Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1 KAR, Morjaria v Abdalla [1984] KLR 490** and in **Trouistik Union International & Another v Jane Mbeyu & Another Civil Appeal No. 145 of 1990 to the effect that Locus standi** is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.

20. In **Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229** the court of appeal Court gave meaning to the term locus-standi by stating:

“ . . . . .to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

21. In the case of **Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR** the court of Appeal held as follows:

‘ . . . .The respondent acknowledges that he may have known of the existence of a Will, but according to him he doubted the validity of the Will. In his view therefore the deceased died intestate. As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased’s estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In Otieno v Ougo (supra) this Court differently constituted rendered itself thus:

‘ . . . an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.’

22. The court further held that it therefore mattered not that the Respondent had a cause of action. Indeed the issue was not whether he had a cause of action or not but that he lacked the requisite *locus standi* to seek relief from the Court without first obtaining letters of administration.

23. On the second issue as to whether the cause of action, was barred by the Limitation Statute. I do agree with the Respondent that indeed the cause of action in the present case arose on the 22<sup>nd</sup> October 2003 when LR No. Nyandarua /Mulewa/1550 was registered jointly in the names of Julia Gathoni Mura and Hannah Wangechi.

24. One of the grounds set out in the Originating summons more so ground No.2, the Applicant herein sought to find out whether the parcel of land LR No. Nyandarua/Mulewa/1550 as held by Julia Gathoni Mura (deceased) was a subject of a trust in his favour and in favour of the other beneficiaries prior to and at the time of its registration which trust has not been determined to date.

25. I have gained sight of the annexures attached to the Applicants Originating summons and I am of the view that the Applicant’s claim is based on a continuous trust, wherein the applicable law is **Section 20(1) (b)** of Cap 22 Laws of Kenya thereof which is not subject of limitation.

26. On the last issue, in the case of **Eunice Ngonyo Wahome v Joseph Kihara Theuri [2015] eKLR, Ombwayo J.** stated,

“This court finds that it is not possible to determine the issue of Trust in a succession matter where reliance is placed on affidavits and therefore it cannot be said that there was finality in the decision of the High Court in the Succession cause”,

27. The Applicant cannot be faulted for moving the court for determination of the question as to whether the Respondent's registration as the absolute proprietor of the suit property is subject to his pleaded trust.

28. I find that save for the grounds 2 and 3 where the Preliminary Objection has no merit, I shall proceed and allow the same on ground No 1 to the effect that the Applicant herein lacks the locus standi which is a primary point of law almost similar to that of jurisdiction which renders the suit incompetent.

29. In the upshot, I shall proceed to strike out the Originating Summons dated the 16<sup>th</sup> November 2017.

30. Each party shall bear its own costs.

**Dated and delivered at Nyahururu this 5<sup>th</sup> day of November 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**