



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL CASE NO. 84 OF 2013

GETRUDE CHAO WAITA

STEPHEN MBAKI WAITA (Suing as the legal administrators of the estate of

FRANCIS WAITA MBAKI.....**PLAINTIFF**

VERSUS

AGNES WAMAITHA KIBUCHI

EDITH WANGARI KANYEKI.....**DEFENDANTS**

R U L I N G

1. For determination is the Preliminary Objection dated 22/3/2019 filed by the defendants. It pleaded thus;

1) That the suit is incompetent for having failed to comply with the provisions of the Law of Succession Act.

2) That the plaintiffs have no legal capacity and or *locus standi* to institute suit on behalf of the deceased herein and in particular relation to the subject property known as PLOT NO. 627/VI/MN.

3) That this suit is *res subjudice* as the issues raised herein are directly and substantially in issue in Succession Cause No. 76 of 2012 which is pending hearing and determination before another court.

4) That the plaintiffs suit is thus misconceived, mischievous, bad in law, frivolous and vexatious.

2. Parties argued the preliminary objection through written submissions. The defendants/applicants submit that this suit cannot be sustained by the current plaintiffs because there is a judgment that was delivered on 12/2/2018 in **Succession Cause No. 92 of 1997; In the matter of the estate of the late Francis Waita Mbaki** where the High Court revoked the letters of administration that had been issued to the plaintiffs/respondents on 19/5/2006. That to date the plaintiffs have never bothered to apply for grant of letters of administration of the estate of the late Francis Waita Mbaki. Therefore, the plaintiffs are strangers to the Case. The defendants put reliance on the decision of **Julian Adoyo Ongunga Vs Francis Kiberenge Abano (2015) eKLR** where Mrima J had this to say,

“Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”(underline mine for emphasis).

3. Secondly the applicants submit that the suit contravenes the provisions of Section 6 of the Civil Procedure Act. It is the defendants case that the issues for determination in Succession Cause No. 76 of 2012 are similar to the issues raised in this case and the evidence to be produced herein would be the same as the evidence to be relied upon in the Succession matter. The defendants therefore urged the Court to dismiss this suit.

4. The plaintiffs on their part submitted that the objection is without merit. It is their argument that by the time the suit was filed, they were the Court appointed administrators of the late Francis Waita Mbaki. The respondents relied on the provisions of Section 93 of the Succession Act Cap 160 which provides for validity of transfers of any interest in law or moveable property to a purchase provided the transferor had a

lawful grant at the time of transfer or sale. That by parity, all acts done by holders of a valid grant cannot be invalidated by mere sub-segment revocation or variation of representation.

5. They continued that the original legal representatives are protected from action for payment or disposition made in good faith under the grant. They supported their argument by the holding in the Case of *Ismail & Ano Vs Njati (2008) 2E.A 155 at 161* where the Court found that **“the revocation of the grant did not affect the validity of the lawful sale of house No. 29 on Plot 4 Block 61 Livingstone Street, Kariakoo Dar es Salam to the first appellant.”**

6. The issue on locus as raised by the defendants is that the plaintiffs do not have capacity to continue the suit because the grant issued to them was revoked on 12th February 2018 by a judgment of the Court in Cause No. 92 of 1997. The plaintiffs have not disputed the existent of these facts except they contend that they are exempted from liability for actions done while they were holding the valid letters of administration of the deceased estate. The issue at hand is not whether or not they are liable to payments done or dispositions made during the life span of their letters of administration.

7. Given that the plaintiffs do not deny the revocation of their grant, their capacity to continue this suit was removed from them from the date of the revocation i.e. 12th February 2008. From then on, they cannot conduct any actions on behalf of the estate of the deceased including continuing this suit.

8. The second issue raised is that the case is *subjudice* Succession Cause No. 76 of 2012 as the issues for determination in both suits are the same. The plaintiffs/respondents did not contest this line of the objection. The inference drawn is that they concede to the same. Section 6 of the Civil Procedure Act provides that;

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same of any other court having jurisdiction in Kenya to grant the relief claimed.”

9. In light of the submissions rendered I am persuaded to find as I hereby do that the Preliminary Objection is merited. Accordingly, the same is allowed and the plaintiffs’ suit is hereby struck out. I will not award costs of suit because at the time of instituting the suit, the plaintiffs had capacity to do so. Each party is ordered to meet their respective costs of the struck out suit and the preliminary objection.

Dated, signed and delivered at BUSIA this 12th day of May, 2020.

A. OMOLLO

JUDGE

Judgment delivered electronically through mail this 12th Day of May, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE