



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
ENVIRONMENT AND LAND COURT
CIVIL SUIT NO. 175 OF 2014

MARY ROSE NAMU.....PLAINTIFF

VERSUS

JANE MUTHONI NGOROI.....DEFENDANT

RULING

Two issues arise for my determination in this case. That is:-

- 1. Whether JANE MUTHONI NGOROI the defendant herein who is also the plaintiff in EMBU HIGH COURT CIVIL CASE NO. 78 OF 2007 has the locus to prosecute the claim therein and the counter claim herein and;***
- 2. Whether a limited grant ad litem issued for purposes of prosecuting one case can be used in prosecuting a different case.***

First, a summary of this matter.

On 19th June 2007 **JANE MUTHONI NGOROI** filed an Originating Summons in **EMBU HIGH COURT CIVIL CASE NO. 78 OF 2007** against **DAVID NAMU NJAGI** seeking among others, order that she has been in continuous and un-interrupted occupation of the land parcel No. EMBU MUNICIPALITY 1112/988 since 1976 and should therefore be declared and registered as the owner thereof and the certificate of lease issued to the defendant be cancelled. Though I could not trace the defendant's replying affidavit to that claim, it is clear from the record that one was filed because on 25th March 2009, directions in that suit were taken before **Wanjiru Karanja J** (as she then was) that the Originating Summons be deemed as the plaint and the replying affidavit as the defence. The suit was then marked as Stood Over Generally.

One year later on 17th July 2008, roles changed and **DAVID NAMU NJAGI** was now the plaintiff suing **JANE MUTHONI NGOROI MITA** (defendant) in **EMBU HIGH COURT CIVIL CASE NO. 66 OF 2008** (later to become **EMBU HIGH COURT CIVIL CASE NO. 175 OF 2014** which is the current suit) seeking an order to evict the defendant from the same parcel No. EMBU/MUNICIPALITY 1112/988 on the ground that the defendant had erected illegal structures thereon.

The two suits were eventually consolidated on 25th February 2009 but on 4th April 2012, **DAVID NAMU**

NJAGI died and his wife **MARY ROSE NAMU** obtained a limited grant of letters of Administration ad litem for purposes of proceeding with **EMBU HIGH COURT CIVIL CASE NO. 66 OF 2008 ONLY**. Since **EMBU HIGH COURT CIVIL CASE NO. 66 OF 2008** was consolidated with this case, the capacity of the said **MARY ROSE NAMU** to prosecute this case cannot be doubted. The plaint was amended appropriately to describe **MARY ROSE NAMU** as suing as the administrator of the Estate of her deceased husband.

The plaintiff **MARY ROSE NAMU** has now taken up as a Preliminary Objection the locus of **JANE MUTHONI NGOROI MITA** in filing **EMBU HIGH COURT CIVIL CASE NO. 78 OF 2007** some nineteen (19) years after her husband **NGOROI MITO** had died.

Submissions have been filed both by the firm of **Asinuli & Associates Advocates** for the plaintiff and the firm of **Njeru Ngari and Company Advocates** for the defendant.

I have considered the pleadings herein. The Preliminary Objection raised by the plaintiff and the submissions by counsel.

I must first determine whether the Preliminary Objection as raised is infact a Preliminary Objection as known law. In **MUKISA BISCUIT COMPANY LTD VS WEST END DISTRIBUTORS (1969) E.A 696, LAW J.A** stated what he considered to be a Preliminary Objection in the following terms:-

“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”

The Preliminary Objection being raised herein is about the locus standi or capacity of the defendant **JANE MUTHONI NGOROI MITO** in filing the Originating Summons in **EMBU HIGH COURT CIVIL CASE NO. 78 OF 2007** and also a defence in this case. Locus standi is a matter of law and therefore the same can be raised as a Preliminary Objection. I will therefore consider it on its merit.

I must confess that having said so, I do not see any merit in that Preliminary Objection. It would appear that the said Preliminary Objection was provoked by two issues being:-

- 1. The pleadings in the Originating Summons filed by JANE MUTHONI NGOROI MITA in EMBU HIGH COURT CIVIL CASE NO. 78 OF 2007 and,***
- 2. The Limited Grant ad litem obtained by the said JANE MUTHONI NGOROI MITA on 16th November 2005 in EMBU HIGH COURT SUCCESSION CAUSE NO. 330 OF 2005.***

In their submissions in support of the Preliminary Objection herein, counsel for the plaintiff has stated as follows:-

“There is and can be no doubt that the defendant herein alleges that her late husband NGOROI MITO DIED on (sic) the year 1988. It is clearly indicated in her affidavit dated 18th June 2007 and filed on 19th June 2007 in paragraph 4 that her husband died in 1988.

The question here is did the defendant herein when filing her suit by way of Originating Summons in HCCC No. 78 of 2007 have locus in view of the death of the deceased almost 19 years before filing this suit. The answer here is negative if this is the case. However this suit by operation of a statute was null and void ab initia (sic) for want of locus of the plaintiff”

That submission, with respect to counsel, is clearly misplaced because it presupposes that **JANE MUTHONI NGOROI** who was the plaintiff in **EMBU HIGH COURT CIVIL CASE NO. 78 OF 2007** had filed that suit on behalf of her late husband **NGOROI MITA**. But that is not the case. In her

Originating Summons filed in **EMBU HIGH COURT CIVIL CASE NO. 78 OF 2007** the said **JANE MUTHONI NGOROI** is named as the plaintiff and nowhere in those pleadings is it suggested that she brings the suit in a representative capacity or as the administrator of her late husband's Estate. That is also clear from the issues that she has framed for the Court's determination which include:-

- 1: ***“Whether the plaintiff has been in continuous and un-interrupted occupation of L.R No. EMBU MUNICIPALITY 1112/988 since 1976”***
- 2: ***“Whether the plaintiff has made developments on the said plot”***
- 3: ***“Whether the plaintiff has acquired the said plot by adverse possession”***
- 4: ***“Whether the plaintiff should be declared and registered as the owner of the said plot and issued with a certificate of lease”***

etc etc.

She has only mentioned her late husband **NGOROI MITA** in her supporting affidavit by stating that he was allocated plot number 40 Shauri Yako within Embu Municipality but it is clear from the rest of the paragraphs in that affidavit that she is herself laying a claim to that land by virtue of having lived on it with her late husband. In paragraph 2, 3 and 4 of the said affidavit she has deposed as follows:-

- 2: ***“That in 1976 my late husband Mr. Ngoroi Mita was allocated plot number 40 Shauri Yako Embu Municipality”***
- 3: ***“That immediately after the said allocation my late husband and myself embarked on the development of the same by building houses in which we conducted business and continued being in occupation until he died in 1988”***
- 4: ***“That after the death of my husband I continued being in occupation and possession of the said plot to date from 1976 without any interruption”***

There can be no doubt from those averments that although the plot subject of this suit was initially allocated to her late husband in 1976, the defendant herein (and plaintiff in **EMBU HIGH COURT CIVIL SUIT NO. 78 OF 2007**) is laying her own claim to the plot by virtue of having lived there with her late husband from 1976 upto 1988 when he died, and also from 1988 to-date and is therefore entitled to orders that she has acquired the same by adverse possession. Therefore, the submissions by plaintiff's counsel that the defendant lacks ***“locus in view of the death of the deceased almost 19 years before filing this suit”*** clearly miss the point and must be rejected. The defendant **JANE MUTHONI NGOROI MITA** or **JANE MUTHONI NGOROI** certainly has the locus to prosecute her claim in the consolidated suit.

In relation to **EMBU HIGH COURT SUCCESSION CAUSE NO. 330 OF 2005**, the plaintiff's counsel makes the following submissions:-

“Further, the defendant has alleged that she is the legal representative of the late NGOROI MITA (deceased). The defendant herein avers that she was granted legal representation of the Estate of the deceased NGOROI MITA in H.C SUCCESSION CAUSE NO. 330 OF 2005. As per the record and the documents served upon the plaintiff, there is no evidence whatsoever to show that the defendant has obtained a grant of representation to give her locus”

As I have already indicated above, the defendant filed **EMBU HIGH COURT CIVIL CASE NO. 78 OF 2007** in her own right as a party who has occupied the land in dispute since 1976 and is therefore entitled to claim ownership by adverse possession thereof. She has not moved the Court as the administrator of her late husband's Estate.

And with regard to the Limited grant of letters of Administration Ad litem issued to defendant in **EMBU HIGH COURT SUCCESSION CAUSE NO. 330 OF 2005**, it is clear that it was a “**Limited grant only to enable her prosecute case No. SPMCC No. 345/98 at Embu**”. Such a grant would of course not authorize the defendant to prosecute this case because Case No. SPMCC 345/98 is not among the cases consolidated in this suit. A limited grant can only be used for the purposes for which it was issued and no more. However, as I have already found above, the defendant has moved the Court in her own capacity and therefore that limited grant is really of no consequences.

From the above, it is clear that the defendant has the locus to prosecute her Originating Summons in **EMBU HIGH COURT CIVIL CASE No. 78 of 2007** and also to defend the claim and prosecute her counter-claim in **EMBU HIGH COURT CIVIL CASE NO. 66 of 2008** (now consolidated with this suit.

In the circumstances, the plaintiff’s Preliminary Objection is dismissed with costs.

B.N. OLAO

JUDGE

1ST APRIL, 2016

Ruling delivered in open Court this 1st day of April 2016

Mr. Ngari for the Respondent present

Ms Muriuki for Asinuli for Applicant present.

B.N. OLAO

JUDGE

1ST APRIL, 2016