



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 54 OF 2019**

**PERIS MASHIPEI MPAAYEL.....PLAINTIFF**

**VERSUS**

**MOINKE ENE ERNEST MPAAYEL.....1<sup>ST</sup> DEFENDANT**

**PAUL MPOYO MPAAYEL.....2<sup>ND</sup> DEFENDANT**

**MATHEW MEMEITA MPAAYEL.....3<sup>RD</sup> DEFENDANT**

**MAILOJI OLE KARINA.....4<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Defendants' Notice of Preliminary Objection dated the 15<sup>th</sup> October, 2019 based on the following grounds:

1. That the Plaintiff's suit and the interlocutory application be and are hereby struck out in terminie.

2. That the cost of this motion, and the motion of the Applicant/ Plaintiff and the substantive suit be to the Defendant/ Objector.

3. That there be such other or further relief as the Honourable Court deems fair and expedient to grant.

The objection is premised on the grounds on the face of it.

The parties filed their respective submissions to canvass the instant Notice of Preliminary Objection.

### **Analysis and Determination**

Upon consideration of the instant Notice of Preliminary Objection including the rivaling submissions, the only issue for determination is whether the interlocutory application and this suit should be struck out with costs to the Defendants.

The Defendants in their submissions stated that land reference number KJD/ OLCHORO ONYORE/ 16817 PART A measuring 221 Hectares does not exist. Further, that the Plaintiff has no locus standi to seek the orders sought for in the interim and substantive suit. They submit that there exists Nairobi High Court Misc. Appl No. 612 of 2003 and the Plaintiff is estopped by the doctrine of sub judice from instituting this suit. To buttress their averments, they have relied on the following decisions: **Dr. Joseph Arap Ngok Vs Justice Moijo Ole Keiwua & 5 others ; Law Society of Kenya Vs Commissioner of Lands (2000) eKLR; Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga Vs Eliud Timothy Mwamunga & Sagall Ranchers Limited ( 2017) eKLR; Nguruman Limited Vs Jan Bonde Nielsen & Another (2017) eKLR and Jasbir Singh Rai & 3 Others Vs Tarlochan Singh Rai & 4 Others ( 2014) eKLR.**

The Plaintiff in her submissions contended that there are no pure points of law that have been raised in the Preliminary Objection. She explains that she has locus standi as there exists a Certificate of Confirmation of grant. Further, that she lodged this suit to protect her property which had been distributed to her. She insists the facts raised in the Preliminary Objection need to be ascertained. She relied on the following decisions: **David Karobia Kiiru Vs Charles Nderitu Gitoi & Another (2018) eKLR and Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga Vs Eliud Timothy Mwamunga & Sagall Ranchers Limited (2017) eKLR** to support her arguments.

It is the Defendant's contention that the Plaintiff does not have locus standi to institute this suit as she is not the only Administrator. The Plaintiff contends that she only instituted this suit to safeguard her interests on the portion of land she had been allocated vide the Certificate of Confirmation of Grant. She submits that she indeed has locus standi as she is one of the Administrators as per the Certificate of Confirmation of Grant. From a perusal of the Plaintiff, I note the Plaintiff at paragraph (8) indicated that vide Succession Cause No. 1836 of 2005 Nairobi together with the 1<sup>st</sup> Defendant, they were each allocated pieces of land reference number KJD/ OLCHORO ONYORE/ 16817 Part A and Part B respectively as per the Deed Plan. I note she has annexed a copy of the Certificate of Title for land reference number KJD/ OLCHORO ONYORE/ 16817 in the name of the deceased Ernest Letoya Ole Mpaayei. Further, in her prayers in the suit she seeks a permanent injunction to restrain the Defendants from interfering with land reference number KJD/ OLCHORO ONYORE/ 16817 Part A which was allocated to her. She filed a Copy of the Certificate for Confirmation of Grant dated the 6<sup>th</sup> December, 2006; Minutes of the Mpaayei Family Meeting dated 18<sup>th</sup> June, 2005 where property was shared out between herself and the 1<sup>st</sup> Defendant's house as well as a Deed Plan showing the two portions of the land. From the said Grant, it confirms that she is indeed one of the Administrators to the estate of Ernest Letoya Ole Mpaayei and was allocated half portion of the aforementioned parcel of land.

**Black's law dictionary** defines locus standi as the right to bring an action or to be heard in a given forum. I note that the said forum also includes a Court of law.

In the case of **Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited 1969 EA 696**, defined a Preliminary Objection as follows;

**“.....a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point... Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”**

From the facts before me, I note that the Plaintiff has only sought to preserve her portion of the land and not the whole of the suit land. I further note that the deceased family had actually agreed on the division of the suit land between the families of the Plaintiff and 1<sup>st</sup> Defendant as evident in the Deed Plan. Further, that the Certificate of Confirmation of Grant also indicated that the Plaintiff and 1<sup>st</sup> Defendant were to share the suit land equally. The Plaintiff even filed photographs showing her fenced portion. In that regard, I beg to disagree with the Defendants that the portion claimed by the Plaintiff does not exist. On the averments that there exists another suit, the Defendants never presented any documents to that effect.

Article 159 (2) (d) of the Constitution stipulates that **' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.'**

In the case of **Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR** Justice Ochieng held that .. **'to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities. '**

Further, in the case of **RAMJI MEGJI GUDKA LTD –Vs- ALFRED MORFAT OMUNDI MICHIRA ;& 2 OTHERS [2005] eKLR** held as follows:

**“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said:-**

**“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral**

**evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”**

It is against the foregoing while relying on article 159 (2) (d) of the Constitution as well as associating myself with the decisions cited above, that I decline to strike out the suit and the Notice of Motion application. I find that the instant Preliminary Objection is not based on pure points of law as required. Further, that the facts raised in the Preliminary Objection need to be ascertained. I opine that this suit should be set down for hearing and determined on its merits.

It is against the foregoing that I find the Notice of Preliminary Objection dated 15<sup>th</sup> October, 2019 premature and will disallow it. Costs will be in the cause.

**Dated signed and delivered via email this 21<sup>st</sup> day of July, 2020**

**CHRISTINE OCHIENG**

**JUDGE**