REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO. 46B OF 2019

DAUDI ABDALLA.....PLAINTIFF

VERSUS

HAKIM YUSUF MOHAMUD (Sued as legal Representative of the estate

of YUSUF MOHAMUD ISMAIL deceased).....1st DEFENDANT

KHADIJA MOHAMUD ISMAI.....2nd DEFENDANT

RULING

1. Vide an Application by way of Notice of Motion dated 30th September 2019 brought under Order 40 Rule 1, and 51 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B, and 3A of the Civil Procedure Act, the Applicant seeks for interim injunctive orders against the Respondents, their agents and/or their servants from constructing, selling, advertising, transferring, making any developments and/or interfering whatsoever with the suit property Known as Plot No. 265 and Plot No. 123A Maralal, pending the hearing of the suit

2. The Application was opposed through the 1st Respondents' Replying Affidavit of the 4th December 2019 for reason that the Respondents were non suited to the Applicant's claim as they had not taken out letters of Administration for the estate of the late Mohamud Ismail and secondly that the Applicant's claim based on an agreement between the Applicant and the late Mohamud Ismail dated the 24th February 1986 was time barred and therefor the Court had no jurisdiction to hear the Application and suit. That the Applicant had therefore not established a prima facie case.

3. By consent, on the 27th January 2020, parties agreed to dispose the Application by way of written submissions wherein in his submission, the Applicant gave a brief history of the matter in question to wit that he was allotted plot No.123A in the year 1996 by the Commissioner of Lands wherein after, he had been issued with the letter of allotment and therefore the said plot was rightfully and legally his. That indeed the Respondents had acknowledged and admitted that they had no interest on plot No. 123A Maralal Township and that the plot belonged to the Applicant herein.

4. On the issue regarding the second plot No. 265, the Applicant submitted that he had acquired the said plot sometime in 1986 for Ksh 40,000/= through a sale deed between him and the late Mohamud Ismail, the grandfather to the Respondents herein, a fact which was confirmed by the Respondents in their Replying Affidavits. That the said parcel of land had been excised from plot No. 124 Maralal upon its subdivision in 1991.

5. That it had been after the death of Mohamud Ismail that his beneficiaries had moved onto the said parcel of land stating that the Applicant had not acquired a good title to the same. That the wrangles had gone on up to the 18th August 2019 when the Respondents had trespassed onto the said parcel of land, uprooted trees and farm produce growing therein before erecting a stone wall on the plot.

6. The Applicant then framed his issues for determination as follows:

i. Whether the Defendants/Respondents have any claim against Plot 123A Maralal and who is currently in occupation/possession.

ii. Whether the illegal constructions by the Defendants/ Respondents should be allowed to continue?

iii. Whether the Plaintiff/Applicant is entitled to the equitable relief of temporary injunction as against the defendants/Respondents?

iv. Whether the cost should issue.

7. On first issue for determination, the Applicant submitted that the Respondents knowingly or unknowingly had put up structures on his parcels of land after destroying his trees, which illegal action had forced him to put up structures on the road reserve that gave access to plot Nos 123A, 124, 125, and 126.

8. That the Respondents had further put up a wall in both plots No. 123A and 124 thus denying him access of either of the two plots. That the photographs annexed by the Respondents and marked as HMY 6 (a-e) alleging that the Applicant was in occupation of plot No. 123A was to mislead the Honorable Court. That the structures depicted on the said photographs were structures built on the road.

9. That the newly built a house and newly built wall in the photographs were structures built on plot No. 123A which action constituted trespass on the Applicant's land and to which the Court was empowered to order the Respondents to stop the trespass forthwith by removing the illegal structures and vacating from the said premises.

10. On the second issue for determination, the Applicant's submission was to the effect that since he had demonstrated that he was the legal proprietor of parcel of land No. 123A a fact which the Respondents had confirmed, that the illegal constructions of the newly built a house and wall being undertaken by the Respondents ought to be halted since the same continued to infringe on his right to own property which was unfair and unconstitutional.

11. On the issue as to whether the Applicant was entitled to equitable relief of temporary injunction as against the Respondents, while placing reliance on the celebrated decision in **Giella vs Cassman Brown (1973) EA 358,** the Applicant submitted that there were three conditions that a party had to prove for injunctive orders to be granted, namely:

i. A Prima facie case with a high probability of success

ii. Applicant would suffer irreparable harm if relief is Not granted

iii. In case there is doubt the Court will decide the matter on a balance of probability.

12. On the first condition, it was the Applicant's submission while relying on the case in **Mrao vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125** that he had established a Prima facie case because he had demonstrated through documentary evidence that he was the legal owner of the both the suit properties being No. 123A and Plot No. 265, which averment had been confirmed by the Respondents in their Replying Affidavits.

13. On the second condition, the Applicant relied on the decided case in **Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR** to submit to that he would suffer irreparable harm if the injunctive orders were not issued since he resided with his family on the suit land which was matrimonial land. That the illegal actions by the Respondents had pushed them to reside on the road as the Respondents continued to put up permanent structures on the suit property.

14. While still relying on the decided case in **Pius Kipchirchir Kogo** (supra) the Applicant submitted on the third condition that the balance of convenience was in his favour for if the injunctive orders being sought were not granted, he would have no place to call home whereas the Respondents would continue putting up permanent structures on the suit property at their detriment.

15. He also relied on the decided case in **Amir Suleiman vs Amboseli Resort Limited [2014] eKLR** to submit that he had fulfilled all the three conditions to be granted the injunctive reliefs sought. And while relying on the case in **Orix Oil Limited vs Paul Kabeu [2014] eKLR,** he had submitted that his Application ought to be allowed and the Respondents condemned to pay costs.

1st and 2nd Respondents' submission

16. The Respondents' submission was that the Court was being called upon to determine whether or not, having due regard to the applicable legal framework, principles of equity and the prevailing jurisprudence, the Applicant should be granted injunctive orders. It was their submission that a restraining order should be granted in the manner proposed the Applicant.

17. That the law is settled that the party seeking an interlocutory injunctive orders must satisfy the principles set out in the celebrated case in **Giella vs Cassman Brown (supra) and that a prima facie case was defined in the Notorious cases in Mrao vs First American Bank of Kenya Limited** (supra) and **Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014]**

18. That what the Court ought to ask itself was whether from the evidence presented before it through the affidavits sworn by parties, the Applicant had demonstrated that he had clear and unmistakable rights to the suit property which was directly threatened by the acts of the Respondent and which needed the urgency necessitated to prevent the damage that may result from such invasion sought to be restrained.

19. That the Court ought to determine these issues on two issues arising from the pleadings filed by the parties to wit;

i. Whether the Respondents had any locus standi to be sued

ii. Whether the Applicant's cause of action is time barred.

20. On the first issue for determination, it was the Respondents' submission that the suit property No. 241A and 124 Maralal also known as

plot 264 and 265 Maralal belonged to Mohamud Ismail (deceased) That Yusuf Mohamud Ismail was the father to the 1st Respondent while Yusuf Mohamud Ismail and the 2nd Respondent were siblings and children to Mohamud Ismail. That the 1st Respondent was therefore a grandchild to Mohamud Ismail.

21. That although the Applicant had sued the 1st Respondent in his representative capacity of the estate of Yusuf Mohamud Ismail, yet he had not demonstrated that both the 1st and 2nd Respondents as well as Yusuf Mohamud Ismail were legal representatives of the estate of Mohamud Ismail.

22. That the Applicant had not attached any document to show that the ownership of the suit land had been transmitted to the Respondents herein the effect to which the persons who ought to have been sued should have been the legal representatives of the estate of Mohamud Ismail (deceased).

23. That no evidence had also been adduced that the Applicant had taken out any citation proceedings related to the estate of Mohamud Ismail. To this end, it was the Respondents' submission that they were non-suited to the Applicant's claim since they did not have any locus standi to be sued. They relied on the decided case in **Muriithi Ngwenya vs Gikonyo Macharia Mwangi & 2 Others [2018] eKLR** to submit that the Court could not make orders against them as the same would be in vain since the orders could not be enforced as against them.

24. That the issue of misjoinder and non- joinder went to the heart of the suit and could not be wished away because it also touched on the jurisdiction of the Court.

25. On the second issue as to whether the Applicant's cause of action was time barred, the Respondents submitted that the Applicant had anchored his claim on a sale agreement entered between him and Mohamud Ismail (deceased) on the 24th February 1986. The present suit, via a plaint dated the 30th September 2019 was filed on the 3rd October 2019. The Applicant herein was therefore enforcing a contract after 33 years which was contrary to the provisions of Section 4(1) of the Limitation of Actions Act which provided that a contract could only be enforced within 6 years from the date it accrued.

26. That the Applicant had commenced suit against one Yusuf Mohamud Ismail (deceased) via Maralal RMCC No. 18 of 1994 where he had sought for restraining orders to issue against Yusuf Mohamud Ismail restraining him from detaining goods for unpaid rent. That Yusuf Mohamud Ismail had raised a counterclaim of ownership where judgment had been delivered in favour of Yusuf Mohamud Ismail on 15th December 1994. However, vide Nanyuki HCCA 6 of 2016 the said judgment had been set aside and the Applicant was neither granted leave to file a fresh suit nor was time extended to file another suit granted his favour.

27. The Respondents relied on the decided case in **IGA vs Makerere University [1972] EA 65** which was relied upon in the case of **Haron Onyancha vs National Police Service Commission & Another [2017] eKLR** to submit that the Applicant had slept on his right for more than 33 years and that equity did not assist the indolent but the vigilant. That if the cause of action was statute barred, a Court had no jurisdiction to deal with the stale matter and must down its tools and not take one more step.

28. That although the Applicant alleged that he was the legal and beneficial owner of plot No. 265 Maralal, he had not produced any documents of ownership. That plot No. 124 Maralal had been subdivided where the resultant subdivisions remained the property of Mohamud Ismail (Deceased) since no transfer was ever effected in favour of the Applicant.

29. The Applicant had never been in possession of plot No. 124 Maralal, but plot No. 123 Maralal where he had erected his residential home and which plot, the Respondents had no claim over.

30. That the provisions under Order 40 Rule 1 of the Civil Procedure Rules, were clear that a temporary injunction could be granted only where the property in dispute was in danger of being wasted, damaged or alienated. In the instant case, there was no evidence to show that the property in dispute was in danger of either being wasted, damaged or alienated. That the Court's discretion should be exercised reasonably, judiciously and on sound legal principles. The Applicant had not been able to persuade the Court to exercise its jurisdiction in his favour and therefore the Application must fail.

Determination.

31. Having heard the submissions by both sides as well as having regard to the authorities and annexures filed herein, consequently the pending issue for determination is whether this Court should grant the Applicant interim injunctive orders pending the hearing of the suit.

32. The Applicant's case is that he had demonstrated through documentary evidence that he was the legal owner of the both the suit properties being No. 123A and Plot No. 265 a fact which had been confirmed by the Respondents in their Replying Affidavits.

33. The Respondents on the other hand submitted that they had no claim to plot No 123 Maralal and although the Applicant alleged that he was the legal and beneficial owner of plot No. 265 Maralal, yet he had not produced any documents of ownership. That further although plot No. 124 Maralal had been subdivided, the resultant subdivisions remained the property of Mohamud Ismail (Deceased) since no transfer had ever been effected in favour of the Applicant.

34. The Respondents' response to the application for injunction was that Court had no jurisdiction in trying the matter for two reasons namely that they had no locus standi to be sued and secondly that the Applicant's suit was time barred by virtue of the provisions of Section 4(1) of the Limitation of Actions Act.

35. On the first objection, the Respondents submitted that although the Applicant had sued them in their representative capacity of the estate of Yusuf Mohamud Ismail, yet he had not demonstrated that they were legal representatives of the estate of Mohamud Ismail, by attaching any document to show that they were his administrators or that the ownership of the suit land had been transmitted to them or even proof of evidence that the Applicant had taken out any citation proceedings related to the estate of Mohamud Ismail. That the persons who ought to have been sued should have been the legal representatives of the estate of Mohamud Ismail (deceased). To this end therefore they were non-suited to the Applicant's claim since they did not have any locus standi to be sued.

36. On the second issue on their objection, the Respondents had submitted that the Applicant had anchored his claim on a sale agreement entered between him and Mohamud Ismail (deceased) on the 24th February 1986. The present suit, via a plaint dated the 30th September 2019 was filed on the 3rd October 2019 where the Applicant herein sought to enforce a contract after 33 years which was contrary to the provisions of Section 4(1) of the Limitation of Actions Act.

37. That the Applicant had commenced suit against one Yusuf Mohamud Ismail (deceased) via Maralal RMCC No. 18 of 1994 where he had sought for restraining orders to issue against Yusuf Mohamud Ismail restraining him from detaining goods for unpaid rent. That Yusuf Mohamud Ismail had raised a counterclaim of ownership where judgment had been issued in favour of Yusuf Mohamud Ismail on 15th December 1994. However, vide Nanyuki HCCA 6 of 2016 the said judgment had been set aside and the Applicant was neither granted leave to file a fresh suit nor was time to file another suit extended his favour.

38. I have given due consideration to the rival arguments and the authority cited, I find that the Respondents have raised weighty issues and although the same were not raised independently as a preliminary objection, yet they go to attack the jurisdiction of the Court.

39. Applying the principles in **Mukisa Biscuit Manufacturing Co. Ltd. vs West End Distributors Ltd. (1969) EA 696** to wit that an objection must consists of a point of law which if argued as a preliminary objection is capable of disposing of the suit. The Respondents herein have argued that the Applicant cannot bring a suit against them because they have no locus standi and secondly that the Applicant seeks to enforce a contract that was time barred. *Locus standi* is a primary point of law almost similar to that of jurisdiction and is therefore within the first principle in the **Mukisa Biscuit** case. It is a point of law capable of disposing the application.

40. In **The Owners of the Motor Vessel "Lilian S" –vs- Caltex (Kenya) Ltd [1989] KLR 1,** the Court stated as follows:-

> "…Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

41. From the arguments herein tendered through the pleadings and submissions, it is clear that plot No. 124 Maralal initially belonged to one Mohamoud Ismail (deceased). That in an alleged sale agreement of 1986 between him and the Applicant, the late Mohamoud Ismail had sold to the Applicant a piece of land for Ksh 40,000/= to be excised from plot No 124 Maralal.

42. That subsequently the original plot No 124 Maralal had been sub divided giving rise to plots No. 264 and 265 to which plot No 265 was to be transferred to the Applicant. That in 1994 the said Mohamoud Ismail passed away where his son Yusuf Mohamud Ismail took possession of the plot 265 laying claim on it. That the said Yusuf Mohamud Ismail also passed away in the year 2016 to which effect the Applicant sued his son the 1st Respondent as his legal representative and the 2nd Respondent who is a daughter to Mohamud Ismail.

43. Indeed there is no dispute that both Mohamoud Ismail and Yusuf Mohamud passed away before the issue of ownership of parcel No 256 Maralal could be decided. It also clear that the Court has not been furnished with any evidence to prove that there had been any grant of representation to the estate of the original owner of parcel of land No. 124 Maralal, Mohamoud Ismail which in essence meant that neither Yusuf Mohamud nor the Respondents had *locus standi* to defend and/or be sued until such a time as letters of administration would be taken out to the estate of Mohamoud Ismail.

44. The issue of locus standi was defined in the case of **Alfred Njau & 5 Others vs. City Council of Nairobi [1983] eKLR** to mean- "the right to appear in Court."

45. 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.

46. In **Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229** the Court of Appeal 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."

47. The Respondents have been sued as the legal representatives of the Estate of Yusuf Mohamud Ismail yet the subject in issue herein belongs to the estate of Mohamud Ismail (deceased) where no grant of representation has been applied for and or obtained. The Court of Appeal in the case of ***Erick Makokha & 4 Others vs Lawrence Sayani & 2 Others [1994] eKLR***, held as follows:

> "An application for injunction under Rule 5 (2) (b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, **"equity, like nature, will do nothing in vain"**. *On the basis of the maxim, Courts have held again and*

again that it cannot satisfy itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it."

48. The issue of *locus standi* is a point of law which goes to the root of any suit and its absence renders a suit fatally defective. For that reason, I strike out the suit and proceed to dismiss this application with costs to the Respondent.

Dated and delivered at Nyahururu this 14th day of July 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDG