



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 13 OF 2020 (OS)

AGGREY MURAGA.....1ST PLAINTIFF

SARAH MWATHERA.....2ND PLAINTIFF

VERSUS

ERIC KINOTI.....1ST DEFENDANT

MOSES NDEREBA ETHANG'ATHA.....2ND DEFENDANT

WILLIAM NKUMBUKU ETHANG'ATHA.....3RD DEFENDANT

HUMPHREY KIRAMANA.....4TH DEFENDANT

RULING

1. This matter relates to a preliminary objection dated 15/05/2020. It was raised on the grounds that the plaintiffs have no *locus standi* to bring the suit on behalf of the estate of Ethang'atha Mwirabua (herein after '*the deceased*') for there is no grant of representation. Thus, making the suit a non-starter.

2. The plaintiffs opposed the preliminary objection vide the replying affidavit of Aggrey Muraga Ethang'atha sworn on 5/06/2020. He deponed that the Land Parcels No. Tigania West/Uringu II/644, 2096 and 937 are registered in the names of himself, 1st and 2nd defendants respectively. That none of them are registered in the name of Deceased. Thus, a grant of representation is not required.

3. The applicants/ defendants submitted that the plaintiffs are litigating on behalf of the estate of the late Ethang'atha Mwirabua, yet no grant of representation has been produced to grant them authority to litigate on behalf of the deceased. They relied on the case of; Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another [1987] eKLR and Eliud Mathu Chege v Mary Waithera Chege [2018] eKLR to support their submissions.

4. The respondents submitted that the plaintiffs' case is anchored on customary trust regarding the Suit Lands which are not registered in the name of the Deceased. During adjudication the Deceased had already passed on and the Suit Lands were registered in his sons' names. The plaintiffs have moved the court seeking equitable distribution of the Suit Lands. Thus, the preliminary objection raises factual issues as opposed to points of law. They relied on the case of George Mbugua Njuguna & 3 others v Joseph Gachuhi & another [2020] eKLR to support their submissions.

5. The issue for determination is *whether the preliminary objection is merited?*

6. The definition of a preliminary objection was well set out in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 as follows:

"So far as I'm 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."

Further Sir Charles Newbold P added:

"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 had to be ascertained.... "

7. This court must consider whether the issues raised in the preliminary objection are matters of facts or law. In their pleadings, the plaintiffs contend that the 1st plaintiff and the defendants are brothers of the same biological father, the Deceased who died in 1990, while the 2nd plaintiff is the daughter of their cousin. The plaintiffs allege that the 1st plaintiff, 2nd and 3rd defendants hold the Suit Lands in trust for the heirs of the Deceased. They seek that the Suit Lands be distributed equally amongst the heirs.

8. A look at the title deeds of the Suit Lands reveals that Land Parcel No. Tigania West/Uringu II/ 644, 2096 and 937 are registered in the names of the 1st plaintiff, 1st and 2nd defendants respectively. In the case of **Eliud Mathu Chege v Mary Waithera Chege [2018] eKLR** Gacheru J held as follows:

“It is trite that ‘locus standi’ signified right to be heard or right to appear in court. It conversely mean that a person who has no locus standi has no right to appear or to be heard in such proceedings.

...

It is also trite that assets of a deceased person are administered by the legal representative of the said estate.”

9. It follows that no person may institute proceedings for and on behalf of a deceased person without the grant. In this case however, the Suit Lands are not in the name of the deceased hence the grant of letters of representation is not applicable in this case. The issues raised seem to be in the arena of trust which is an issue of fact which needs to be ascertained through production of evidence. The plaintiffs have used terminologies like **“distribution of the properties to the heirs of the deceased”** which on the face of it may appear as if this is a succession case. However, on the same breadth, the plaintiffs have indicated in bold letters that their claim is based on TRUST.

10. In the circumstances, I am of the view that the preliminary objection is not merited and the same is dismissed. Costs shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF SEPTEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 9.7.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE