



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

ELC CASE NO. 305 OF 2015

JAEL ATIENO KWAJE (Suing as the Administrator in the Estate of

CALEB APUNDA KWAJE (Deceased).....PLAINTIFF

REUBEN ODIRE ANYANGO

VERSUS

PRISCA OMONDI

MONICA ODEWA

JOHANNES OKELLO

MRS MIGOYA.....DEFENDANT

RICHARD OKELLO MIGOYA

R U L I N G

There are some anomalies in this file which, hopefully, will be rectified before the matter proceeds to trial.

Firstly, there are two complaints both captioned **ENVIRONMENT AND LAND COURT KISUMU CASE No 350 of 2015**. The complaints are in two different files bearing the same case **No 350 of 2015** but one complaint appears to have been filed at the **ENVIRONMENT AND LAND COURT ELDORET** on 29th September 2015 while another was filed at **HIGH COURT KISUMU** on 18th February 2016. Both complaints are however dated 28th September 2015 and the plaintiff and defendants are the same. Secondly, although the plaintiff in both complaints is **JAEL ATIENO KWAJE** (suing as the Administrator of the Estate of **CALEB APUNDA KWAJE** (deceased)), there are other pleadings including a Chamber summons filed under a Certificate of Urgency dated 4th September 2015 in which there are now two plaintiffs namely: -

- 1. JAEL ATIENO KWAJE (suing as the Administrator of the Estate of CALEB APUNDA KWAJE, – 1st Plaintiff; and**
- 2. REUBEN ODIRE ANYANGO – 2nd plaintiff**

Hopefully this will be rectified before the trial commences. There cannot be one plaintiff named in the complaint yet the Chamber Summons bears the names of two plaintiffs. For purposes of this ruling, the plaintiff is **JAEL ATIENO KWAJE** (suing as the Administrator of the Estate of **CALEB APUNDA KWAJE**) because that is the party named in the complaint.

The dispute relates to a parcel of land known as **0421/29 KIBOS HALAKA SCHEME** which the plaintiff alleges that the defendants have trespassed upon. She therefore seeks orders that they be evicted as well as general damages and costs.

The defendants have filed a joint statement of defence claiming that the land is in fact a squatter settlement scheme belonging to the Government of Kenya and therefore neither the plaintiff nor the defendants have a better title. Most importantly and for purposes of this ruling, the defendants have given notice in paragraph ten (10) thereof that a Preliminary Objection would be raised on the ground that the suit is fatally defective.

On 9th February 2016, the defendants filed the following Notice of Preliminary Objection dated 5th February 2010: -

“NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE that the defendants herein shall raise the following objection in limine at the hearing of the Chamber Summons dated 4th September 2015 that the suit be dismissed and/or struck out with costs on the ground that:-

- 1. The plaintiff is incompetent and bad in law and unmaintainable.**
- 2. The plaintiffs lack locus standi to institute this suit.”**

When the matter was placed before me on 2nd September 2020 during the service week at Kisumu Environment and Land Court, **MR ARIKO** holding brief for **MS OPONDO** for the defendants informed the Court that the Preliminary Objection be canvassed by way of written submissions. As there was no appearance by either the plaintiff or her counsel **MR K. OMOLLO**, though served, I directed that the defendants do file and serve the written submissions within 14 days. Thereafter, **MR K. OMOLLO** would have 14 days from the date of service to respond. Ruling would be delivered on 14th October 2020 by way of electronic mail. However, by the time the file was placed before me at the **BUNGOMA ENVIRONMENT AND LAND COURT** for purposes of drafting the ruling, neither of the parties had filed any submissions. I have therefore relied solely on the Notice of Preliminary Objection in preparing this ruling.

The onus was on the defendants to place before this Court sufficient evidence to prove that this suit is not only bad in law and incompetent but also that the plaintiff lacks the necessary locus standi to prosecute it. When a pleading is bad in law, it means, inter alia, that it has no legal foundation or any chance of succeeding. Such a pleading is therefore only instituted for purposes of annoying the other party. Looking at the plaint herein, and in the absence of any proof from the defendants, it is not possible for this Court to conclude that the suit is bad in law or incompetent. The plaintiff’s claim is that in 1991, her late husband and one **REUBEN ONYANGO** purchased the suit land from one **RICHARD OCHIENG ONDIEK** on which the defendants trespassed on 11th June 2009. On the face of it, that is a justiciable claim.

On the claim that the plaintiff lacks the necessary locus standi, again, other than the bare claim by the defendants, nothing has been placed before this Court to prove that assertion.

The term locus standi is defined in **BLACK’S LAW DICTIONARY 9th EDITION** as: -

“The right to bring an action or to be heard in a given forum.”

In **ALFRED NJAU & OTHERS .V. CITY COUNCIL OF NAIROBI 1983 eKLR**, the Court of Appeal defined that term as follows: -

“The term locus standi means a right to appear in Court and, conversally, as, is stated in Jowits Dictionary of Law, to say that a person has no locus means that he has no right to appear or be heard in such and such a proceeding.”

By questioning the plaintiff’s locus standi to file this suit, it is not clear if the defendants mean that the plaintiff has no right or interest in the land parcel **NO 0421/29 KIBOS HALAKA SCHEME** or that although she has moved to this Court as the Administrator of the Estate of **CALEB APUNDA KWAJE**, she is in fact not the Administrator of the Estate. By not filing submissions as directed on 2nd September 2020, the parties left it to the Court to determine the Preliminary Objection on the basis of the pleadings. Unfortunately, however there is not enough material on the pleadings to enable the Court do so and it would be inappropriate for the Court to second guess or speculate as to why the plaintiff lacks the locus standi to prosecute this case or why the suit is in fact incompetent or bad in law. A Court cannot embark on a fishing expedition. It can only make a determination on basis of what has been placed before it in the form of facts and the law. It must also be remembered that striking out a pleading is a draconian power and must be exercised judiciously – **D. T. DOBIE & COMPANY (KENYA) LTD .V. MUCHINA 1982 KLR 1**. To uphold the Preliminary Objection would inevitably lead to striking out of the plaint and in my assessment, this is not one of those plain and clear cases where the exercise of such power would be justified.

The up – shot of the above is that the defendants’ Preliminary Objection dated 5th February 2016 and filed herein on 9th February 2016 is devoid of merit. It is accordingly dismissed with no orders as to costs.

Boaz N. Olao.

J U D G E

14th October 2020.

Ruling dated and signed at BUNGOMA this 9th day of October 2020. The same is delivered by way of electronic mail as was advised to the parties on 2nd September 2020.

Boaz N. Olao.

J U D G E

14th October 2020.