



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

E.L.C CASE NO. 2 OF 2018

ELIJAH CHEPKWONY CHIRCHIR.....PLAINTIFF/RESPONDENT

VERSUS

JOEL KIPNGENO ROP & 5 OTHERS.....DEFENDANTS/APPLICANTS

RULING

Introduction

1. This Ruling is in respect of the Defendant's Preliminary objection dated 7th February 2019 in which he raises the following grounds:

- i. That this suit is fatally/incurably defective, bad in law, incompetent and misconceived*
- ii. That the said suit offends the provisions of section 82 of the Law of Succession Act as it is brought by a person with no capacity to act for the estate of Kipchirchir Arap Maina (Deceased)*
- iii. That the said suit is an abuse of the process of the Court and ought to be dismissed at the first instance with costs to the Defendants.*

2. A brief background of the facts is necessary in order to contextualize the Preliminary Objection. By a Complaint dated 5th June 2018 the Plaintiff filed suit against the Defendants seeking an eviction order against them in respect of L.R NO. KERICHO/KABARTEGAN/438. In the said Complaint he describes himself as the legal administrator of the estate of Kipchirchir Arap Maina (deceased).

3. In their Defence dated 29th January 2019 the Defendants deny the Plaintiff's claim without specifically raising the issue of the Plaintiff's capacity to institute the suit. They subsequently filed the Preliminary Objection which is the subject of this ruling.

4. The Preliminary objection was canvassed by way of written submissions and counsel for both parties filed their submissions.

Issues for determination

5. The issues for determination are as follows:

- a) Whether the Plaintiff's suit offends the provisions of S. 82 of the Law of Succession Act
- b) If the answer to (a) is in the affirmative, whether the suit ought to be struck out.

Analysis and Determination

6. Before delving into the merits of the Preliminary objection it is important to define what a Preliminary Objection is. The case of **Mukhisa Biscuits Company Limited vs Westend Distributors Ltd [1969] EA 696 at page 701** held as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.

Justice Newbold in the said suit argues that

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 or if what is sought is the exercise of judicial discretion”

7. In the instant case suit, the 1st defendant argues that the Plaintiff’s suit offends the provisions of section 82 of the Law of Succession Act.

8. The said section provides as follows:

“Personal representatives shall, subject to any limitation imposed by their grant, have the following powers:

(a) To enforce by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of the death for his personal representative”

9. It has been submitted on behalf of the Defendant that at the time of filing suit, the Plaintiff did not enclose any grant of representation to demonstrate that he had any capacity to sue as a personal representative of the estate of Kipchirchir Arap Maina (Deceased) and he therefore lacks locus standi. He has argued that the Ad Litem Grant attached to the Replying affidavit is not for purposes of instituting or defending a suit but is a Grant of representation for purposes of preserving and protecting the assets of the deceased until such time as a substantive administrator shall be appointed.

10. In his response counsel for the Plaintiff has submitted that the Plaintiff obtained a Limited Grant of Letters of Administration Ad Litem on 21.9.2017 before instituting this suit and he therefore has the legal mandate to represent the estate of Kiphirchir arap Maina (Deceased). He has submitted that the defendant is merely using technicalities to delay the determination of this suit.

11. The Law of Succession Act provides for different types of Limited Grants. These are discussed in the case of **In Re Matter of the Estate of Morarji Bhanji Dhanak (Deceased) (2000) eKLR**

12. Section 67 (1) of the Act provides as follows:

“No grant of representation other than a limited grant for collection and preservation of the assets shall be made until there has been published notice of the application for grant.”

13. Rule 36(1) of the Probate and Administration Rules elaborates on the grant provided for under S.67(1) as follows:

S. 36(1) “Where owing to special circumstances, the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased.”

14. Ad colligenda bona defuncti means “For collecting the goods of the deceased”

15. The above grant cannot be used for purposes of filing suit. What one needs for purposes of filing suit is provided for under Section 54 which states as follows:

“A court may according to the circumstances of each case limit any grant of representation which it has jurisdiction to make, in any of the forms described in the 5th Schedule to this Act”.

16. In particular rule 14 of the 5th Schedule to the Law of Succession Act provides for a grant for purposes of filing suit as follows:

“14. Administration limited to suit

When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administer is unable or unlikely to act, letters of administration may be granted to the nominee of a party to the suit, limited for the purpose of representing the deceased herein or in any other cause or suit which may be commenced in the same, or in any other court between the parties or any other parties touching the matters at issue in the cause or suit and until a final decree shall be made therein and carried into complete execution”

17. What emerges from the distinction in the two types of Limited Grant discussed above is that the Plaintiff obtained the wrong Limited Grant which is not meant for instituting a suit on behalf of the estate of the deceased. Since the correct type of limited grant is what would clothe the applicant with the locus standi to institute the suit it follows that relying on a wrong grant to file suit deprives him of the locus standi.

18. Locus standi is the right to be heard or appear in court or other proceedings. This is a point of law that cannot be wished away as a technicality. In the case of **Alfred Njau & Others v City Council of Nairobi (1982-88) 1 KAR 229** cited with approval in the case of **Beatrice Wambui Kiarie v Beatrice Wambui Kiarie & 9 Others (2018) eKLR** the Court of Appeal stated as follows:

“...to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to”

19. For the foregoing reasons, I find merit in the Preliminary objection. Consequently, the Plaintiff's suit is struck out with costs to the Defendant.

Dated signed and delivered at Kericho this 14th day of March, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. W.Ngeno for the Plaintiff
2. Miss Chepkirui for Mr. Mwita for the Defendant
3. Court assistant – Rotich