



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 183 OF 2016

RICKEY ANTONEY MULUYIA.....PLAINTIFF

VERSUS

REBECCA ACHONDO MULUYIA

REGISTRAR OF LANDS

THE HONOURABLE ATTORNEY GENERAL.....DEFENDANTS

RULING

The preliminary objection is dated 22nd November 2018 by the 1st defendant and she submits that, this suit was instituted by the plaintiff in his own capacity as a party to the suit. The plaintiff claims that the suit property was initially registered in the names of his father one John Muluhyia Murongole before it was transferred to the 1st defendant. The plaintiff also claims that as at the time the transfer happened and also at the time of instituting this suit, his father John Muluhyia Murogole was of unsound mind and that is why he instituted the suit herein.

It is claimed by the plaintiff in his plaint and statement that the suit property initially belonged to his father and therefore they submit that the father was the proper person to file this suit. Order 32 Rule 1 of the Civil Procedure Rules 2010, as read together with rule 15 of the same order is very clear on how minor and persons of unsound mind can institute and defend suits.

They submit that the provisions of order 32 rule 1 which are to the effect that a minor can only sue or defend through a next friend also applies to persons of unsound mind by virtue of rule 15 of the same order. That since the suit property was initially registered in the sole name of one John Muluhyia and the plaintiff herein is seeking to secure that property so that it reverts back to the said John Muluhyia, then the proper person who ought to have instituted the suit is John Muluhyia as the plaintiff but suing through a next friend since it has been alleged that he is/was of unsound mind. That the plaintiff herein has no right whatsoever to institute this suit in his capacity and ought to have signed a written authority and act as a next friend or guardian of one John Muluhyia whose interests are purportedly sought to be secured. They further submit that the plaintiff had no interest whatsoever in the suit property which he may purport to have been securing for his own as the land solely belongs to one John Muluhyia. The upshot of the foregoing and in accordance to order 32 rule 2 as read with rule 15, the entire suit herein ought to be struck out with costs to the defendants. Be that as it may, the prayers and reliefs sought by the plaintiff herein cannot be obtained as the said John Muluhyia has since died. In conclusion, they pray that the entire suit herein be struck out with costs to the defendants.

The plaintiff submitted that his case is premised on the fact that the plaintiff is the son of one John Muluhyia Murongole (deceased) and the said John Muluhyia Murongole (deceased) was the husband of the 1st defendant. On the other hand the said John Muluhyia Murongole (deceased) was also the rightful owner of parcel of land known as Kakamega/Savane/148 which is the parcel in dispute in this case.

It came as a shock to the plaintiff that the 1st defendant has since transferred the said parcel of land i.e. Kakamega/Savane/148 to herself without the consent of the said John Muluhyia Murongole and or without even asking any of the family members whose interests in the property of John Muluhyia Murongole may be affected. The plaintiff instituted this suit in his own name. The plaintiff has not invoked the name of his father as a party to this suit. The plaintiff did not bring this suit on behalf of his father so as to call into operation the provisions of Order 32 Rules 1, 2 and 15.

The provisions of Order 32 rule 1 say that a suit by a minor shall be instituted in the name of the minor. The plaintiff's suit is not a minor's suit. Neither is it a suit by a person of unsound mind. It is the plaintiff's suit. And he has brought this suit for himself and on his own behalf to protect his interest as a beneficiary to the estate of his father John Muluhyia Murongole (deceased) who was of unsound mind at the time before his demise. The plaintiff has not even stated that he is the next friend of his father so as to call into operation the provisions of Order 32 rules 1, 2 and 15. The plaintiff does not therefore require such authority as is mentions in this law. The preliminary objection brought by the defendant is a waste of precious judicial time. The said preliminary objection cannot form the basis of an application to strike out the plaintiff's suit.

This court has considered the preliminary objection and the submissions therein. The defendant filed a notice of preliminary objection dated 22nd November, 2018 seeking to strike out the suit for the following reasons:-

1. The suit was filed by a person lacking locus standi.
2. The suit was filed in contravention of the provisions of order 32 rule 1 and rule 2 and Rule 15 of the Civil Procedure Rules.

In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, Law JA stated:

“so far as I am 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 Objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

I find the issue of locus standi is on a point of law and should be considered at this stage of the trial. I have perused that plaint filed in court and in paragraph 6 it states that the plaintiff is the son of John Muluhyia Murongole and the said John Muluhyia Murongole is the husband of the 1st Defendant. The plaintiff claims that the suit property was initially registered in the name of his father one John Muluhyia Murongole before it was transferred to the 1st defendant. The plaintiff also claims that as at the time the transfer happened and also at the time of instituting this suit, his father John Muluhyia Murogole was of unsound mind. Paragraph 9 states that John Muluhyia Murogole is of unsound mind and has been suffering from brain dementia for over ten months. One of the prayers is that the suit land be registered in the name of John Muluhyia Murogole. Clearly as the plaint stands any orders granted will benefit the said John Muluhyia Murogole who as it has come out now has since died in 2018. Order 32 rule 1 of the Civil Procedure Rules states as follows;

(i) Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

(ii) Before the name of any person shall be used in any action as next friend of any infant, where the suit is instituted by an advocate such person shall sign a written authority to the advocate for that purpose and the authority shall be filed.

Consequently, Order 32 Rule 15 of the Civil Procedure Rules states as follows:-

“The provisions contained in rules 1 to 4, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity to be incapable of protecting their interests when suing or being sued.

Order 32 rule 2 of the Civil Procedure Rules states as follows:-

“Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the suit dismissed with costs to be paid by the advocate or other person by whom it was presented”.

In the present case the plaintiff seeks to sue on his own behalf where the subject matter belonged to his deceased father before it was transferred. According to him his father was of unsound mind at the time of filing suit. I find that these pleadings are not consistent with order 32 of the Civil Procedure Rules. The plaintiff has no locus and I uphold the preliminary objection and strike out the suit. There will be no orders as to costs as the parties are relatives.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9TH DAY OF APRIL 2019.

N.A. MATHEKA

JUDGE