



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC SUIT NO. 18 OF 2018

ESTHER MAKUMBI MATUNDU.....PLAINTIFF

VERSUS

MWANG'A KISYULA.....DEFENDANT

RULING

1) By his Notice of Preliminary Objection dated 10th April, 2018 and filed in Court on even date, the Defendant has raised a point of law that the plaint as drawn is defective for reasons that:-

1. The Plaintiff has no *locus standi* to bring these proceedings since she is not either an appointed executor under any will or an appointed administrator *ad colligenda bona* for the estate of Michael Matundu Kisyula, whose right to the subject land she claims.

2. The Plaintiff has not been granted and/or filed Grant of Letters of Administration *ad litem*, and therefore has no *locus standi* to file and/or prosecute these proceedings on behalf of the estate of Michael Matundu Kisyula, or at all.

2) On the 29th April, 2019 the Court issued directions to dispose off the application by way of written submissions. Both the Defendant and the Plaintiff filed their submissions on 02nd May, 2019 and 30th May, 2019 respectively.

3) The Counsel for the Defendant has submitted that in her pleadings, the Plaintiff has claimed that she is the lawful wife of Michael Matundu Kisyula, now deceased. That in her plaint, the cause of action is vague as she has not articulated out clearly the wrongs that the Defendant has done and which this Court is called upon to correct. That however, that is not the basis of the Preliminary Objection in that *locus standi* and cause of action are two different things. The Counsel cited the case of ***Alfred Njau & Others vs. City Council of Nairobi [1982-88]1KLR*** where the Court of Appeal held that;

“Cause of action is the fact or combination of facts which give rise to a right to sue, whereas locus standi is the right to appear or be heard in Court, or other proceedings.... to say that a person has no locus standi means that he cannot be heard, even on whether or not he has a case worth listening to.”

It was further submitted on behalf of the Defendant that the Plaintiff has claimed that she is entitled to properties registered in the name of the Defendant on account of the properties being held by the Defendant in trust of the late Matundu Kisyula, her alleged husband, amongst other persons. That it is clear from her pleadings that she claims any right to the subject property on account of being “the lawful wife” of the late Michael Matundu Kisyula, a brother of the Defendant. That the Plaintiff has therefore approached the Court to claim land rights in the subject properties on behalf of the estate of the late Michael Matundu Kisyula. That she has neither attached a grant *ad colligenda bona* nor letters of administration *ad litem* and as such, she is not a proper party to sue for the collection of debts owing to the estate of the late Michael Matundu Kisyula nor does she have the necessary *locus* to bring these proceedings. The Counsel further submitted that the Plaintiff has not indicated that there are pending probate proceedings in relation to the estate of the late Michael Matundu Kisyula and consequently, she lacks the requisite *locus standi* to bring to this Court, maintain and/or prosecute these proceedings, on behalf of the estate of the deceased. That as such, the suit is a nullity, cannot stand and therefore must be dismissed. That the general rule in relation to administration is that, a party in a succession cause even if entitled to administration cannot file proceedings on behalf of the deceased’s estate before letters of administration are granted. The Counsel cited the case of ***Rajesh Pranjivan Chudasama vs. Sailesh Pranjivan Chudasama [2014] eKLR*** where the Court of Appeal, sitting in Mombasa held that;

“.....a litigant is clothed with locus standi upon obtaining a limited or full letters of administration in cases of intestate succession.....”

The Counsel further cited the case of ***Patrick Kiseki Mutisya (suing as the Personal Representative of the Estate of Nzomo Mutisya (Deceased) vs. K. B. Sangani & Sons Ltd & others [2012]*** where Asike Makhandia J (as he then was), upheld the dismissal of a suit on

Preliminary Objection on the ground that it was filed by incompetent parties citing with approval the case of *Macfoy vs. United Africa Ltd [1961] 3 ALL E.R. 1169* at page 1172 where Lord Denning rendered himself as follows:-

“if an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order to set aside. It is automatically null and void and without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad.....”

That even if the Plaintiff was the only survivor of the deceased Michael Matundu Kisyula, she would not have the capacity to sue on behalf of the estate, unless she had been granted the relevant letters of administration and cited the case of *Virginia Edith Wamboi Otieno vs. Joash Ochieng Ougo & Another CA 31 of 1987* where the Court of Appeal held thus:-

“But an administrator is not entitled to bring an action as before he has taken out letters of administration. If he does the action is incompetent from the date of inception.”

4) The Counsel concluded by urging the Court to dismiss the suit with costs to the Defendant.

5) In reply, the Plaintiff's Counsel submitted that the allegation by the Defendant that the plaint is vague as amounting to side shows meant to divert the attention of the Court in regard to the real issues in disputes. That the Preliminary Objection is not based on the substance of the suit. The Counsel termed the allegations that the Plaintiff does not have the capacity to bring this suit as farfetched since the Defendant has admitted in his defence that he holds land parcels Number Nzavi/Nziu/712 and 855 in trust and that he had started the process of subdivision with an intention to transfer a share to the Plaintiff without raising the issue that she had no capacity to receive the said property.

6) The Counsel went on to submit that the actions of the Defendant proceeding to share the properties to the Plaintiff clearly indicates that the Defendant totally recognizes and regards the Plaintiff as the bona fide beneficiary thereof and in addition the properties in question were not registered in the names of the said Michael Matundu Kisyula. That the property in dispute was registered in the name of the Defendant in trust of the dependants of his father and as such, there was nothing for the Plaintiff to administer for her late husband.

7) The Counsel submitted that it would have been impossible for the Plaintiff to undertake the process of obtaining letters of administration since her two co-wives have been compromised by the Defendant.

8) It was also the Counsel's submissions that should the Court be inclined to consider the Preliminary Objection as merited, it should direct the Plaintiff to regularize her position and allow her to pursue justice and order each party to bear the costs.

9) On the issue of what constitutes a Preliminary Objection, the Counsel cited the case of *AKN vs. JNM [2014] eKLR* where the Court reiterated the principle set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd. vs. West End Distributors Ltd [1969] EA 696*.

10) Needless to say, a Preliminary Objection should be based on pure points of law as held in the case of *Mukisa Biscuit Manufacturing Co. Ltd. vs. West End Distributors [1969] EA 696*.

11) In the plaint dated 13th October, 2017 and filed in Court on 16th October, 2017, there is no averment that the Plaintiff has brought the suit on behalf of the estate of the late Michael Matundu Kisyula. All what she has averred in paragraph 3 of her plaint is that the Defendant holds land parcels number Nzau/Nziu/855, 373 and 712 in trust for himself and other beneficiaries, an issue the Defendant has admitted in paragraph 3 of his defence dated 06th March, 2018 and filed in Court, on 14th March, 2018. It is only in the Plaintiff's supporting affidavit sworn at Kitui on 13th October, 2017 and filed in Court on 16th October, 2017 in support of the Notice of Motion application of the same date has the Plaintiff deposed in paragraph 2 that she is the lawful wife of Michael Matundu Kisyula who is said to be deceased. The application was later amended vide the Notice of Motion application dated 22nd May, 2018 and filed in court on 23rd May, 2018. Parties are bound by their pleadings and as such my finding is that the objection raised by the Defendant is not a pure point of law. If there are contradictions between the Notices of Motion applications and the plaint filed by the Plaintiff, those will remain issues for cross-examination in a substantive suit. As the plaint stands, there is nothing that makes this Court to infer that the Plaintiff has brought the suit on behalf of the estate of Michael Matundu Kisyula and hence the need for her to annex letters of administration ad litem. As the matter stands, the Plaintiff has locus standi and in the circumstances, the Notice of Preliminary Objection lacks merit and same is dismissed with costs to the Plaintiff.

Signed, Dated and Delivered at Makueni this 30th day of September, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Ms. Jerobon holding brief for Mr. Musembi for the Plaintiff/Respondent

Ms. Kyalo holding brief for Mr. Peter Mbithi for the Defendant/Applicant

Ms. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

30/09/2019.