



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**MISC. CIVIL APPLICATION 24 OF 2018**

**MWAURA KAMAU HARUN.....APPLICANT**

**VERSUS**

**PRICAL ENTERPRISES LTD.....1<sup>ST</sup> DEFENDANT/ RESPONDENT**

**PETER MUGO MBUTHIA.....2<sup>ND</sup> DEFENDANT/ RESPONDENT**

**RULING**

The matter for determination is the **Notice of Motion** Application dated **19<sup>th</sup> July 2018**, by the Applicant seeking for orders that;

- a) That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Defendants be ordered to vacate with immediate effect from the parcels of land namely Chania/Kanyoni/2407 and Chania/Kanyoni/2413 which they have been intermeddling with, in way of illegal occupation.*
- b) That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Defendants be ordered to jointly pay costs of this Application.*
- c) That the County Commissioner, Kiambu County and the OCS Kamwangi Police station be ordered to ensure that due performance and compliance with order no. (b) above.*

The Application is premised on the grounds that the Respondents have been occupying the suit land despite the fact that they do not have good titles to the land in question, and thereby intermeddling with the Estate of the Applicant's father. Further that the 1<sup>st</sup> Respondent filed an Application at the **Environment & Land Court at Thika** being **ELC 575 of 2017**, seeking orders to allow them enjoy their stay on land parcel **No.Chania/Kanyoni/2407**, without interference but their Application was dismissed for lack of merit.

In his **Supporting Affidavit**, the Applicant averred that he is the only child of one **Mwaura Wangonya(deceased)** who is the registered owner of the suit properties. He averred that on **16<sup>th</sup> June 2017**, he wrote and served **Notices** to both parties requiring them to vacate from the suit lands as they had been illegally occupying them. He alleged that upon service, the Respondents filed a case at the Environment & Land Court at Thika, which Application was dismissed entirely with costs for lack of merit. He further averred that due to the court process, he temporarily put the Eviction Notices on hold pending the hearing and determination of the suit and upon determination of the suit, he issued written eviction notices to each of the Respondents as evidenced by **annexture 5(a) & (b)** .

It was his contention that at the time of filing the Application, the Respondents had not vacated neither had they bothered to contact him as they are still in the suit property and therefore still intermeddling with the property of the deceased contrary to **Section 45** of the **Law of Succession Act, Cap 160 Laws of Kenya**. He therefore urged the Court to allow his Application.

The Application is opposed and the 1<sup>st</sup> Respondent through its Director swore a **Replying Affidavit**, and acknowledged that the Applicant is the only child of **Mwaura Wangonya(deceased)**. It was his contention that they purchased land parcel **No.Chania/Kanyoni/2407**, from one **Martha Wangari Mwaura**, who is also beneficiary of the said Estate being the wife to the deceased. He averred that after the said purchase, they were granted possession of the said property and they have been utilizing it. They alleged that the Court unequivocally stated that the Applicant's only recourse is in the Succession Cause and therefore the Application has been brought in bad faith and in contravention of the Orders of the Honourable Court as per the **Ruling of 27<sup>th</sup> April 2018**. It was his contention that the eviction notices are unprocedural and their Advocates have made attempts to pursue the requisite Succession Cause as per the directions of the Court. He also averred that the reason as to why they are yet to vacate the suit premises is because they have an interest in the suit land and the Applicant has not pursued the Succession Cause to allow them stake their claim. He averred that his step mother is also a beneficiary and that she is the one that sold the suit property.

The 2<sup>nd</sup> Defendant/Respondent also filed his **Replying Affidavit** and averred that the entire suit is incompetent and an abuse of the court process and he urged the Court to dismiss the same for lack of capacity to sue. Further he averred that the Applicant is a stranger to the suit

properties and the Estate and therefore the Application has nil chances of success.

The Applicant filed a further Affidavit in Reply to the Respondents' affidavits and averred that this Court ruled that the 1<sup>st</sup> Defendant has no good title and therefore cannot claim any legitimate ownership and their continued occupation and utilization of the land is in complete contempt. He further averred that the issue before Court was not an eviction issue and therefore the Court could not rule on it and the Defendants have nothing to do with the Succession matters as they are not family, He further averred that the person who sold the suit land to the Respondents and no interest had hence did not defend the suit and they had been advised by this Court in **ELC 575 of 2017**, to seek refund of the purchase price.

He further averred that the suit is competent and brought in good faith and that only the Court can determine competency. He further averred that his capacity to sue is intact as he is the only son of the deceased who is the registered owner of the suit properties.

The Application was canvassed by way of written submissions to which the Court has now carefully read and considered. The 2<sup>nd</sup> Defendant/Respondent has called into question the *locus standi* of the Plaintiff/Applicant to bring this suit. It is trite that capacity to bring a suit goes to the root of the suit and without *locus standi*, the suit cannot stand. See the case of **Priscilla Jesang Koech ...Vs... Rebecca Koech & 3 others [2018] eKLR**, where the Court held that;

***“Locus Standi is the cornerstone of any case. Before a party files a case, he or she must be certain that they are clothed with the requisite capacity to sue and be sued. In the case of Law Society of Kenya vs. Commissioner of Lands and Others, Nakuru High Court, Civil Case No. 464 of 2000. It was held that:***

***If a party has no locus standi, then the said party cannot bring a suit to court. The issue of locus standi goes to the root of any suit and the said issue of locus standi is a point of law which is capable of disposing of a matter preliminarily.”***

*It is not in doubt that the Plaintiff/Applicant herein is the only child of the deceased and therefore has an interest in the suit properties as a beneficiary of the Estate of the deceased. It is also not in doubt that the suit properties are still in the name of the deceased. Until and unless the Plaintiff/Applicant gets letters of Administration, he cannot legally represent the Estate of the deceased without being duly authorized to do so on behalf of the deceased Estate. See the case of Isaya Masira Momanyi ...Vs... Daniel Omwoyo & Another [2017] eKLR;*

***“It is trite law that the estate of deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Only a person who has been issued grant of letters of administration has capacity to represent the estate of a deceased person.”***

The powers of the personal representative are set out under **Section 82** of the **Law of Succession Act, Cap 160** of the Laws of Kenya which provides as follows:

**82. Personal representatives shall subject only 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 his death for his personal representative;***

***(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them as they think best:***

***(i) Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and***

***(ii) No immovable property shall be sold before confirmation of the grant;***

***(c) To assent, at any time after confirmation of the grant to the vesting of a specific legacy in the legatee thereof;***

***(d) .....***

Further the Court of Appeal in the case of **Trouistik Union International & Another...Vs...Jane Mbevu & Another (2008) IKLR (G&F) 730** cited with approval in **Nyahururu ELC Case No.265 of 2017, Beatrice Wambui Kiarie & 2 Others...Vs...Tabitha Wanjiku Ng'ang'a & 9 others**, where the Court held that:

***" To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the law of succession Act. That section confers that power on personal representatives and on them alone "***

**Section 82 (a) of the Law of Succession Act states that:-**

***"Personal representatives shall, subject only 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 his death for his personal representative,"***

**Section 3 of the Law of Succession Act defines a personal representative as;.....personal representative" means the executor or administrator, as the case may be, of a deceased person, "**

From the foregoing, it is not in doubt that a party cannot commence a suit on behalf of the estate of a deceased person without letters of administration. Though the Plaintiff/Applicant has alleged that he is the only son to the deceased Estate, it is also clear that he has failed to produce any evidence that he has taken out any letters of Administration to the Estate of his father. It is this Court's finding that where a suit is commenced without letters of administration in respect of a deceased estate, such a suit is **null** and **void ab initio** and cannot be cured.

The Upshot of the foregoing therefore *is* that the plaintiff has no **locus standi** to bring this suit without letters of administration and the same is struck out.

On the issue of costs, **Section 27** of the **Civil Procedure Act** gives the Court discretion to grant costs on a case to case basis. Though ignorance of the law is not a defence, this Court will consider that the Plaintiff/ Applicant was acting in person and therefore might have been ignorant and taking into account the circumstance of this case, the Court finds that each party should bear its own costs.

Once the Applicant has obtained the requisite **locus standi**, he is at liberty to choose which court to go to.

It is so ordered.

**Dated, Signed and Delivered at Thika this 18<sup>th</sup> day of October, 2019.**

**L. GACHERU**

**JUDGE**

**18/10/2019**

In the presence of

Applicant present in person

Mr. Gori holding brief Mr. Mr. Mungai for the 1<sup>st</sup> Respondent

No appearance for the 2<sup>nd</sup> Respondent

Lucy - Court Assistant

**Court** – Ruling read in open court.

**L. GACHERU**

**JUDGE**

**18/10/2019**