



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 4 OF 2019

ELIJAH NDERITU GACHAGA.....PLAINTIFF

VERSUS

FRANCIS GAKUU GACHAGA.....1ST DEFENDANT

STEPHEN KARIUKI GACHAGA.....2ND DEFENDANT

SAMSON JAMES GACHAGA.....3RD DEFENDANT

RULING

1. Before me is a Preliminary Objection filed on the 27/6/19 by the Defendant and is expressed in the following terms;

“Take notice that the Defendant herein shall raise a Preliminary Objection in point of law that the suit before the Court is incompetent in that the Plaintiff did not obtain a full grant before filing the suit but only obtained a limited grant which does not entitle him to bring an action in respect of the deceased property and consequently it ought to be dismissed and struck out.”

2. The background of the case is that the Plaintiff and the 1st and 2nd Defendants are sons of the late Samson Gachaga Gakuu who died on the 11/9/90. The 3rd Defendant is the grandson of Gakuu, deceased.

3. It is to be noted from the record that the Plaintiff obtained a grant of administration ad colligenda on the 6/12/1995 in the estate of the late Samson Gachaga Gakuu. It is this grant which is subject to the Preliminary Objection aforesated.

4. Armed with the said grant of administration, the Plaintiff filed suit against the Defendants on the 20/2/1996. The plaint was amended on 21/12/18. He avers that the Defendants have through fraud transferred the suit properties of the deceased estate to wit; LOC14/GAKURWE/359 and LOC14/GAKURWE/930 and that interalia they hold the suit lands in trust for the family of the late Gachaga Gakuu.

5. Consequently he has sought interalia orders that the titles issued to the Defendants be cancelled and the register rectified so as to share the land among the 3 houses (read wives) of the late Gachaga Gakuu; declaration that the Defendants are holding the suit lands under constructive trust in his favour and other beneficiaries of the estate.

6. The Defendants resisted the Plaintiff's claim and stated in their amended defence that the suit lands were transferred to them by their father during his lifetime. They denied any constructive trust and sought to put the Plaintiffs to the strictest proof.

7. Under para 11c of the defence, the Defendants had hinted to the Preliminary Objection when it pleaded that;

“the Defendants shall at first hearing of this suit contended that the Plaintiffs suit is bad in law and should be struck out from the record in that he has claimed what he alleged was deceased's property without first petitioning and obtaining a grant of letters of administration before filing the suit herein.”

8. Parties elected to prosecute the Preliminary Objection through written submissions which I have read and considered.

9. Whilst citing the provisions of section 54, 67 of the Succession Act Cap 160 read together with Rule 36 of the Probate and administration rules, the Defendants submitted that a grant of administration ad colligenda cannot be used to institute a suit. Consequently, a person who obtains such a grant has no power or locus standi to institute a suit as the purpose of such a grant is limited to collect get in and receive the estate of the deceased. They contend that one has to have either a full grant or a grant of letters of administration ad litem specifically stated

for purposes of filing suit.

10. To buttress the point that the Plaintiff is not clothed with locus standi to file this suit based on a grant ad colligenda, the Defendants relied on the following decided cases; **Morjaria Vs Abdalla (1982-84) ECLR and Julian Adoyo Ongunga & Anor Vs Francis Kiberenge Bondeva CA 119 of 2015.**

11. In the case of **Morjaria Vs Abdalla (1982-84) ECLR** the Court of Appeal determined that a grant ad colligenda is inappropriate to bring a suit. The Appellate Justices gave the purpose of the grant as to collect the property of a deceased person where it is of a perishable or precarious nature and where regular probate or administration cannot be granted at once. The Court further held that;

“However we do not think that the appointment of a person ad colligenda can possibly include the right to stand in the shoes of the deceased for the purpose of instituting an action, or indeed, an appeal, especially where there is a specific provision, paragraph 14 of the 5th schedule, designed for this purpose.

The latin verb *colligere* means to collect bring together or assemble and are satisfied that this form of grant is only to be used for the purpose we have indicated and not for purpose of representation in a suit or an appeal.”

12. The second case adverted by the Defendants in support of their objection is; **Julian Adoyo Ongunga & Anor Vs Francis Kiberenge Bondeva CA 119 of 2015.** The High Court citing the Court of Appeal case of **Morjaria** above held that a grant ad colligenda cannot be used to institute an action in a suit.

13. In further response to the Plaintiff’s submissions the Defendants further argued that there is no conflict in the decision of the Court of Appeal in the **Morjaria case** and the Court of Appeal bench that decided the case in **Owade Ogwang Vs Jared Obiero Ouya (2014) KLR.** That both benches were in agreement that ad colligenda is not the appropriate grant to bring suit. Both Courts allowed the use of ad colligenda for difference reasons indicated therein none of which relates to the case at hand.

14. The Defendants urged the Court to strike out the Plaintiffs suit for failing to obtain the appropriate grant to enable him bring the suit.

15. The Plaintiff on the other hand argued that the decision of the Court of Appeal in **Morjaria** and **Peter Owade Ogwang** are in conflict and it is up to this Court to elect which one to follow.

16. Relying on Section 54 of the Succession Act read together with Rule 36 of the Probate and Administration Rules, the Plaintiff submitted that the limited grant was issued to preserve the estate of the Plaintiff’s father.

17. Maintaining that a limited grant is a device to enable a party to obtain justice, he cited the case of **Trouistick Union International Vs Jane Mbeyu (1993) KLR 230** where the Court held that it is only a holder of a grant who has a right to sue. He opined that the Court of Appeal decision that a holder of limited grant cannot sue is wrong and flies in the face of the provisions of Art 48 of the Constitution which guarantees every person a right to access the Courts.

18. The Plaintiff faulted the Defendants for pleading under para 11c that the Plaintiff did not obtain a grant of letters of administration before filing the suit herein. That to the extent that they are challenging the grant ad colligenda, the Defendants are deviating from their pleadings which they are bound by.

19. Further the Plaintiff argued that the ELC Court is the wrong forum to challenge the grant. Quoting Section 47 and 48 of the Succession Act, the Plaintiff submitted that the right forum is the High Court. He relied on the case of **Mary Wangui Karanja & Anor Vs John Kioi ELC 83 of 2010** where the judge referred the matter to the Family division of the High Court to resolve the issue involving the confirmation of grant which was in dispute. He further alluded to an application filed by the Defendants 22 years ago in the Succession Court seeking to revoke and or nullify the said grant which remains unresolved. In that regard he termed the Defendants’ current objection as casual. Further he termed the objection as an abuse of the process of the Court as it is not filed in good faith or for proper purpose. He termed the objection misconceived and filed for the sole purpose to vex the Plaintiff.

20. Quoting Rule 10 of the fifth schedule of the Probate and Administration Rules the Plaintiff further submitted that to the contrary he has not distributed the estate as he is under the control of the probate Court. That the Plaintiff is exercising his powers under the law of succession to enforce a cause of action that survived the death of his late father. That there is no law that provides that a full grant needs to be issued before one files suit. He urged the Court to sustain the suit rather than strike it out. He cited the case of **D T Dobie & Co Kenya Limited Vs Muchina (19820 KLR1)** to buttress the point.

21. The key issue for determination is whether the Preliminary Objection is merited.

22. What then is a Preliminary Objection? As to whether the Preliminary Objection as raised is a pure point of law, the Court in the case of **Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, 91969) EA 696,** defined a Preliminary Objection as follows;

“.....a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be

tested by normal rules of evidence...”

23. In the case of **Oraro vs. Mbaja (2005) I KLR 141** Ojwang, J (as he then was) held as follows:-

“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary pointAnything that purports to be a Preliminary Objection must not deal with disputed facts, and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence”

24. Further in the case of **Nitia Properties Limited – v- Jagjit Singh Kalsi & Another, C.A. No. 132 of 1937**, it must be borne in mind that for a preliminary point to succeed, the facts as alleged in the plaint are deemed to be correct. In the instant case, the facts as alleged in the plaint and defence are disputed and prima facie the claim in this suit cannot be deemed to be incontestably hopeless and be summarily dismissed by way of Preliminary Objection.

25. The effect of the case law cited above means for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

26. The point of contention in this objection is the grant obtained by the Plaintiff on the 6/12/95 vide Nairobi High Court Succession Cause No 2719/95 . It reads as follows;

“ be it known that letters of administration ad colligenda bona of all the estate of SAMSON GACHAGA GAKUO late of Mairi Kamacharia in Kenya who died domiciled in the Republic of Kenya on the 11/9/90 which by law devolves to and vests in his personal representative but limited to the purpose only of collecting and getting in and receiving the state and doing such things as may be necessary for the preservation of the same and until further representation be granted were granted to ELIJAH NDERITU GACHAGA of P.O BOX 74111 Nairobi he having undertaken to faithfully to administer such estate according to law (limited as aforesaid) and until further representation be granted and render a true and just account thereof whenever required by law to do so”. [emphasis is mine].

27. This suit was filed in 1996 and amended in 2018 and the Plaintiff described himself as the administrator of the estate of the deceased Samson Gachaga Gakuo. As stated before the suit was filed to recover portions of land from the Defendants that are alleged to belong to the estate of the said deceased.

28. The Defendants’ objection is that the Plaintiff does not have locus to file the suit based on a grant ad colligenda whose purpose is specific and limited to collection receiving and preservation of the estate. The Plaintiff on the other hand has defended the grant ad colligenda as being the right grant and that preservation of the estate includes filing of the current suit. He contends that he has locus and is properly before Court.

29. The point of law underpinning the objection is therefore whether the Plaintiff has locus standi to file suit.

Black’s law dictionary defines locus standi as the right to bring an action or to be heard in a given forum. The forum includes a Court of law. In **Rajesh Pranjivan Chudasama vs. Sailesh Pranjivan Chudasama [2014] eKLR** the Court of Appeal held that;

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

31. The Judges in the **Rajesh Pranjivan Chudasama** (above) case underscored the need to determine an issue of locus standi first hand .In their words the justices of the appellate Court had this to say;

“ In our view issues of *locus standi* and jurisdiction are critical preliminary issues which ought to have been settled before dwelling on other substantive issues. Thus in our view, the learned Judge erred when she refused to determine the issues raised in the Preliminary Objection on the basis that there were other pending applications on the same issues. The Judge should have determined the Preliminary Objection on its merits. We agree with the Appellant’s position that a Preliminary Objection, if upheld, serves the interest of justice by saving time and costs by expeditiously disposing off matters in their entirety. In this case the Preliminary Objection dated 8th February, 2012 questioned the respondent’s *locus standi* and the Court’s jurisdiction. The issues for determination before the learned Judge should have been whether the Preliminary Objection was purely on a point(s) of law? If the answer to that question was in the affirmative, were the points properly raised or merited so as to dispose off the suit and any other pending applications? If she then upheld the objection it would have saved the parties herein both time, costs and served the interest of justice by disposing off all other pending applications raising the same issues. “

In **Julian Adoyo Ongunga v Francis Kiberenge Abano CA No.119 of 2015**, the Court had this to say on the issue of a party filing a suit without having obtained a limited grant.

“Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action

subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

33. It is trite that the estate of the deceased vests in the personal representatives who then have capacity to file or defend suit. Such persons must be appointed by the Court either through probate or grant in the case of intestate succession.

34. It is to be noted that in the instant case the Plaintiff obtained letters of grant of administration ad colligenda. The point is whether this kind of grant gave him locus to file the instant suit.

35. Section 54 of the Law of Succession Act which states that:

“A Court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any forms described in the Fifth Schedule.”

36. A grant ad colligenda is provided for under section 67(1) of the Succession Act as follows;

“No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the Court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.”

37. It is clear from the above section that the grant is specifically meant for collection and preservation of the deceased assets. Filing suit is not one of them.

38. Rule 36 of the Probate and Administration Rules provides as follows;

(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.

(2) Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made”.

39. The purpose of limited grant ad colligenda bona as stated in the afore cited provisions is the collection the property of a deceased person’s estate where it is of a perishable or precarious nature, and where regular probate or administration cannot be granted at once. - See also Jowitt’s *Law Dictionary*, Volume 1 at page 45.

40. In the case of **Morjaria v Abdalla [1984] eKLR** the Court of appeal held that the appointment of a person “*ad colligenda bona*” ...” cannot possibly include the right to stand in the shoes of the deceased for the purpose of instituting an action, or, indeed, an appeal, especially where there is a specific provision, paragraph 14 of the fifth schedule, designed for this purpose. The Latin verb “colligere” means to collect, bring together or assemble, and we are satisfied that this form of grant is only to be used for the purpose we have indicated, and not for purpose of representation in a suit or in an appeal.”

41. Thus, if parties intend to file suit to recover assets or liabilities for the estate then the right grant is the limited grant ad litem under para 14 of Schedule 5 of the Act as thus;

“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”

43. I have looked at the decisions of the Court of Appeal in **Morjaria** and **Peter Owade Ogwang** and with tremendous respect to the Plaintiff’s Counsel I do not find any conflict in the two decisions to warrant me to elect which one to be bound by and which one I should reject as suggested by the Counsel. The appellate judges in both benches were in agreement that the purpose of a grant ad colligenda is not the appropriate one to file suit. In **Morjaria** they allowed the substitution of the parties nevertheless after the death of a party in an ongoing case. In any event the ad colligenda in this case specifically stated that it was for purposes of filing an appeal. Similarly, in the case of **Peter Owade Ogwang** the Court was of the view that an application had been granted by the High Court judge and therefore another judge of concurrent jurisdiction could not overturn the decision. These two decisions are distinguishable to the extent of the circumstances that were allowed. That notwithstanding it is my considered view that both decisions reiterated the point of law which is that ad colligenda is not the appropriate grant to clothe a party with locus to file a suit unless it is specifically stated in the grant.

44. In the case of **Julian Adoyo Ongunga & another –Vs- Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi , Deceased) [2016] Eklr** the Court citing with the approval the dictum in **Peter Owade** (ibid), noted that the wording of the grant has to be considered.

The Court noted that:

“..... there are instances where such a Limited Grant of Letters of Administration Ad Colligenda Bona is tailored in a manner as to allow for the institution of an action or where the record expressly provides for such. In such cases the focus will no doubt shift to the contents and wording of the grant or the record as opposed to the type of the grant. That scenario arose in the Court of Appeal case of **Peter Owade Ogwang v. Jared Obiero Ouya (2014) eKLR** where upon the demise of a party before the High Court the party which came in to represent the deceased party obtained a limited grant ad colligenda bona. The High Court found that the party had no locus standi and as such that party inter alia lost the matter. On appeal, the Court of Appeal on 19/09/2014 at Kisumu readily agreed with the High Court’s position on the essence and purport of a limited grant ad colligenda bona but went further into the record and found that the party had further moved the High Court by way of a Chamber Summons which was allowed as prayed”.

45. In the case of **Jonathan Wafula Mbinga –vs- Kabaka Wabwile Wekesa [2004] eKLR** Serгон J dismissed a Preliminary Objection whilst citing the **Morjaria** (supra) case and noted that the operative part of the impugned grant ad colligenda bona provided that : “

“Grant Limited only to purposes of filing an appeal against the findings of the Tribunal in respect of case No. Bungoma/C.M.C.C. LDT. 32 OF 2002.”

46. There being no conflict and interpretation of the provisions of Section 69 and Rule 35, the Court may not depart from the decisions of the Court of Appeal aforesaid.

47. My respectful and considered view is that the decision in **Morjaria** Case (supra) was not been made per in curiam or in ignorance of the law, instead that interpretation continues to be applied to different facts depending on the case .For instance in the case of **Martha Ndiro Odera (suing as the administrator and personal representative of the estate of Willy Patrick Ochieng Ndiro (Deceased) –Vs- Come Cons Africa Limited (2015)eKLR** the Court of Appeal, differently constituted and sitting at Nairobi upheld that a party had the requisite locus standi to institute a suit in a matter where the grant of letters of administration ad colligenda bona was for 'the collection of the assets of the estate of the deceased including the filing of suit to claim the deceased's properties. [emphasis is mine].

48. I have looked at the wording of the grant in issue and I find that it does not include filing of suit as the Plaintiff has done in this case. Clearly, the said grant, in addition to being inappropriate, had also not been tailored to include institution and maintenance of a suit, at least going by its contents and wording. Similarly, there is no evidence that the grant was ever rectified in order to give locus to the Plaintiff.

49. It is the finding of the Court that the Plaintiff having filed suit on the basis of a grant ad colligenda is not clothe with locus to file suit. The Court finds that the cause of action is incontestably wrong noting that locus is an issue that goes to the root of the case and that all proceedings here are a nullity since the Plaintiff did not have locus standi to file the suit . I can do no better than to cite Denning, L.J. in **Macfoy v United Africa Co. Ltd. [1961] 3 ALL ER 1169 at 1172** who stated that;

“If an act is void, it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.”

50. In other words the issue of locus is not a technicality but it goes to the root of the case.

51. As to whether the Environment and Land Court has jurisdiction over grant of letters of administration, my answer to this is that the issue at hand is best interpreted as one on locus to bring suit before the Environment and Land Court as opposed to seeking to strike out and /or impunge or revoke a grant which is purely in the province of the Succession Court. To that extent I find that the jurisdiction of the Court has not been ousted.

52. It is the finding of the Court that the Preliminary Objection is a pure point of law. It is not a matter that requires exercise of my discretion. The issue is clear from the pleadings and the record does not require the Court to investigate by way of evidence.

53. In the upshot, the Preliminary Objection is merited. It is allowed.

54. The suit herein is incompetent and is hereby dismissed.

55. The Plaintiff had been put on notice by the Defendant in respect to the issue of (then) absence of grant of letters of administration. It is on record that the Plaintiff filed a grant ad colligenda bona instead of the requisite proper grant. In the circumstances I shall award the Defendants costs of the suit.

56 . **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 14TH NOVEMBER 2019

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Munyori for the Plaintiff/Respondent

Chege for the 1st – 3rd Defendants/Applicants

Ms Irene and Ms Njeri, Court Assistant