



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 82 OF 2019

JOSEPHINE JEBITOK CHOGE, DEBORAH JERUTO, SILAS KIPKOSGEI SIRTUI & SUSAN JEMUTAI SIRTUI (Suing as the administrators of the Estate of the late

SIMON SIRTUI CHOGE.....PLAINTIFF/APPLICANT

VERSUS

SAMWEL CHOGE.....1ST DEFENDANT/RESPONDENT

ELIZABETH JERUTO.....2ND DEFENDANT/RESPONDENT

RULING

This Ruling is in respect of a notice of a preliminary objection by the defendants on the ground that the plaintiff/applicant does not have locus standi to sue.

The Plaintiff/Applicant filed these proceedings vide a Complaint dated 12th June 2019 together with a Notice of Motion Application filed on the same date seeking for orders inter alia that;

- a) That there be an order of temporary injunction issued against the Defendants by themselves, their servants agents and/or any other person claiming under themselves from adversely dealing and/or in anyway transacting, alienating, selling, charging or interfering with the peaceful occupation and ownership by the Plaintiffs with 19.6 & 22.4 acre portions of the suit parcels of land known as Sergoit/Karuna Block (Chepkoilel) 166 & 138 and/or an order of status quo pending the hearing and determination of this application and eventually the suit.
- b) That costs of this application be borne by the Defendants

The defendant/respondent filed a replying affidavit in opposition to the application and a notice of Preliminary Objection dated 28th June 2019 seeking that the application dated 12th June 2019 together with the entire suit be struck out on the following grounds:

- a) That the Plaintiff/Applicants do not have the locus standi/capacity to sue the Defendants herein.
- b) That the 1st Plaintiff/Applicant is a Daughter in law to the late Simon Sirtui Choge and wife to the 1st Defendant.
- c) That the subject matter of the property in contention is under intestate succession.
- d) That the suit offends section 6(1) and (2) of the Matrimonial Property Act.
- e) That the Honourable Court lacks the jurisdiction to hear and determine this matter.
- f) That the application and entire suit is *sub-judice* as similar issues are pending vide Eldoret CMCC No. 101/2018 and Eldoret HCC (OS) 84 of 2018.
- g) That the plaintiff/Applicants are guilty of material non-disclosure of crucial facts regarding this case therefore the suit is frivolous, vexatious and an abuse of court process.

Parties agreed to canvass the preliminary objection by way of written submissions.

Defendants Submissions

Counsel for the defendant listed the following issues for determination by the court.

- a) Whether the plaintiff applicant has locus standi to sue the defendants.
- b) Whether the court has jurisdiction to hear and determine this matter.
- c) Whether the suit is defective for misjoinder of parties.
- d) Whether the Plaintiff/Applicants are dependents/beneficiaries as per the provisions of Section 29 of the Law of Succession Act.
- e) Whether the suit offends the provisions of Section 6(1) and (2) of the Matrimonial Property Act?
- f) Whether the Plaintiff/Applicants are guilty of material non-disclosure of facts?
- g) Whether the suit ought to be struck out?

On the issue of locus standi Counsel submitted that the applicants admitted in paragraph 3 of the Supporting Affidavit that the two properties Sergoit/Karuna Block (Chepkoilel) 166 & 168 belong to the estate of the Late Simon Sirtui Choge. Further that the title deed is registered in the name of Simon Sirtui Choge (deceased)

It was Counsel's further submission that even though the applicants have listed a copy of Grant of Ad Litem in its documents filed in court the same has not been annexed to the present application. That as such there is no that the grant was ever obtained. Counsel relied on the case of **Hawo Shanko —vs Mohamed Uta Shanko (2018)** where Chitembwe J held as follows:

'...The general consensus is that a party lacks the locus standi to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the plaintiff or applicant has not been formally authorized by the court by way of a grant limited for that purpose, then it will be difficult to control the flow of court cases by those entitled to benefit from the estate it is the Limited Grant which gives the Plaintiff the locus to stand before the court and argue the case...one has to first obtain a limited grant that will give him/her the authority to file the suit she ought to have sought a limited grant before filing this suit. . .'

The court further stated that;

'...without a limited grant being issued, the Plaintiff allowing the filing of the suit, the Plaintiff would be like someone who has entered a closed room without opening the door. All what the court can tell someone who is before it without having obtained a grant limited to the filing of the suit is that despite the validity of the same or the strength of the case, the court cannot hear the suit as the initiator thereof lacks the capacity to file the suit. The correct procedure is not to allow the Plaintiff to go back and obtain the limited grant for that purpose then allow him to continue with the suit. The suit as initiated is void ab initio and cannot be resuscitated by the issuance of a subsequent limited grant.

if any relationship with the deceased does exist whether son, daughter, wife, widow is not sufficient. That relationship does not give the locus standi to any relative to obtain suit before obtaining limited grants. One's relationship to the deceased does not clothe such a party with the locus standi. It is the Limited Grant with does '

Counsel also relied on the case of Nairobi **Succession Cause No. 1731 of 2000 In the Matter of the Estate of Moraii Bhanii Dhanak where An'gawa J** noted that ' .a grant limited to the filing of a suit has to be issued before the suit is filed. '

Further that in the case of **Julian Adoyo Ongunga & Another —Vs- Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi (Deceased) eKLR** where Mrima J. described a party filing a suit without an Ad Litem as follows;

'...Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain the suit even where a valid cause of action exists. Locus standi relates mainly to the legal capacity or a party. The impact of a party in a suit locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is 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...'

Counsel therefore submitted that if any cause of action exists, which is denied, the Applicants ought to have obtained Ad Litem first before instituting the present suit, failure to which rendered the suit null and void ab initio.

On the second issue as to whether the Honourable Court has the requisite jurisdiction to determine this matter, Counsel submitted that it is not disputed that the suit properties are registered in the name of the deceased falls under intestate succession. That it is only the Magistrates Court and the High Court that are clothed with jurisdiction to handle succession matters subject to its pecuniary and territorial jurisdiction. Further that the properties in question must therefore undergo Succession proceedings first and a Certificate of Confirmation issued ascertaining the interest of each dependants/beneficiaries thereof. That this has not yet been done.

Counsel also submitted that the applicants are not dependants as per the provisions of Section 29 of the Law of Succession Act as daughter in laws are not recognized as dependants and that subject for determination at the high court would be whether the Applicants are

dependants/beneficiaries. Counsel relied on the case of **PLR -vs- JNR & Another (2013) eKLR** where Waithaka J. distinguished jurisdiction of the High Court and the EIC court as follows;

'...in addition, in order to determine the suit, this court would be required to determine...whether the Plaintiff is a beneficiary of the deceased's estate and therefore entitled to his estate. The property and the issues to be determined in the suit fall under the realm of the Law of Succession Act... However matters of ownership and entitlement to a deceased person's property including land are governed by the law of Succession Act and are to be determined by the Family court. Thus by virtue of Section 2 (1) of the said Act, this court lacks jurisdiction to determine the same...'

The Judge further noted that; *there being no other interest disclosed by the parties in the suit, other than by virtue of being beneficiaries, it follows that this court lacks jurisdiction to hear the matter or grant the orders sought..'*

Counsel therefore submitted that the properties herein being part of the deceased estate (Simon Sirtui Choge) are governed by Section 2(1) of the Law of Succession Act which applies to all cases testate and/or intestate. That until a Certificate for Confirmation of Grant is issued, this honourable court lacks the jurisdiction.

On the third issue as to whether the suit offends the provisions of Section 6(1) and (2) of the Matrimonial Property Act, counsel submitted that this section defines matrimonial property as 'any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.' That the applicants being the wife and children of the 1st Defendant herein cannot claim interest over the suit property as it is not matrimonial property. That the suit properties belong to the Estate of Simon Sirtui Choge.

Section 6(2) provides that;

.'Despite Section (1), trust property, including property held in trust under customary law, does not form part of matrimonial property'

That the suit properties are ancestral land not available to the Applicants. That having conceded that it belongs to the deceased, hence it cannot be matrimonial property.

Counsel also submitted that the suit properties are both registered in the name of Simon Sirtui Choge and as such the same cannot be sustained to the exclusion of the dependants/beneficiaries of the deceased estate. That the orders sought in the present application would adversely affect the rightful heirs/dependants of the deceased estate. That it would amount to entertaining parties who are strangers to the Estate of the deceased. Counsel cited the case of **Eldoret I-ICC No. 81 of 1992 In Re Estate of the late Chemweno Chebor Kibolot (Deceased)** where Omondi H. J held that ;

'...the orders sought would adversely affect two other persons who are named as joint registered owners to the property, yet they have not been enjoined to this suit. The effect would be to condemn them unheard. Which goes against the principles of natural justice. Due to the afore-going application is bad for non-joinder of parties and must fail...'

On the issue whether the Plaintiff/Applicants are guilty of material non-disclosure of material facts, Counsel submitted that the Applicants have failed to disclose that the deceased had dependants/beneficiaries surviving him (widow and children) and whom are the rightful heirs to his estate. That the Applicants have also failed to disclose that they are not dependants and are therefore undeserving of the orders sought. Counsel therefore urged the court dismiss the application and strike out the entire suit with costs to the defendants.

Plaintiff/Respondents Submissions.

Counsel submitted that the court has jurisdiction to hear and determine this suit. In opposition of the preliminary objection Counsel submitted that the same does not meet the threshold as per the case of Mukisa **Biscuits Manufacturing Co. Ltd -vs- West End Distributors Lt (1969) EA 696**

On the issue whether the plaintiff has locus standi to institute this suit Counsel distinguished the case of Hawo Shanko v Mohamed Uta Shanko 120181 eKLR where Chitembwe J dismissed the suit due to the fact that the plaintiff had not obtained grant of letters of administration. Counsel stated that the plaintiffs herein had obtained a grant of letters of administration ad litem pursuant to the court order by Hon. N. Moseti in Ad Litem Application No. 54 of 2019 issued on the 22nd March, 2019 and that the same forms part of record in the court as stated in the plaintiffs list of documents.

It was Counsel's submission that the Plaintiff/Applicants are therefore adequately protected by the provisions of the law and have locus Standi to institute this suit pursuant to provisions of Sections 54 and 67 of the Succession Act.

On the second issue as to whether the suit offends section 6(1) and (2) of the Matrimonial Property Act, Counsel submitted that whether the property has been or is matrimonial property is a question that needs to be proved by production of evidence, this is in total disregard of the function and purview of a Preliminary Objection. Counsel relied on the case of **Re Estate of Kabuthi Kithitu (Deceased) [2019/ eKLR Miscellaneous Probate Administration Application 87 of 2013,** where Gitari J. held that:

“It is only points of law and in undisputed facts that can be determined by a preliminary objection. However, if facts are disputed, as is the case here then evidence needs to be adduced and this calls for the matter to proceed for hearing.”

That proving that the suit land is matrimonial property or not is a question that the Preliminary Objection cannot address.

On the final issue whether the application is *sub judice* and similar to Eldoret CMC No. 101/2018 and Eldoret ICC (OKS) 84/18, counsel submitted that this suit has four plaintiffs who have letters of administration limited.

Counsel cited section 6 of the Civil Procedure Act which defines sub-judice as follows:-

"No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed"

Counsel submitted that the cases of Eldoret CMC No. 101/ 2018 and Eldoret I ICC (OS) 84/2018 are in existence between one of the plaintiffs/ applicants against the 1st defendant/ respondent. The other plaintiffs and the 2nd defendant are all but new parties to this suit but not parties in the said 101 of 2018 that the first case being Eldoret CMC No. 101 of 2018 is a Judicial Separation matter. As evidenced on the document attached, on the respondents replying affidavit dated 27th June, 2019 in annexure. It was Counsel's submission that the matter is therefore not sub judice.

Counsel relied on the case of Republic —V- Attorney General [sued for and on behalf of the Ministry of Lands 1 & 2 others Ex parte South and Central Thika Investments Limited & another (2016) eKLR where Odunga, J. held as follows:

'In my view, preliminary objections which have the effect of inviting the Court to make a determination on conflicting factual averments ought not to be entertained. Where a party intends to rely on certain documents, he can only be permitted to do so in arguing the preliminary objection where the factual contents of the said documents are not in dispute. However where the same are disputed, the application or the suit ought to be allowed to proceed in the usual manner as to raise a preliminary objection based thereon not only leads to confusion.'

Counsel therefore urged the court to find that the preliminary objection has no merit hence should be dismissed with costs to the plaintiff.

Analysis and determination

The threshold for preliminary objections is now well settled and there would be no reason to reinvent the wheel. The issue for determination is whether the preliminary objection as presented satisfies the threshold for grant of such an order for striking out a suit. Courts have held that a preliminary objection deals with purely points of law and where facts are not disputed. Where a court has to look outside the case for evidence to establish the facts presented, then this falls under a case where a full hearing has to be conducted to disprove certain facts. Unless parties enter into a consent compromising the case.

Striking out of a case is a draconian measure which should be exercised in very clear cut cases where whether evidence is tendered the result or outcome would be the same. This does not mean that parties can go ahead and abuse court processes with the hope that the court will turn a blind eye to such glaring abuse.

In the case of Lemitei Ole Koros & another v Attorney General & 3 others (2016) eKLR Munyao J. stated as follows:

'Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection.'

Further in the case of Muhu Holdings Limited v James Muhu Kangari /2017/ eKLR Environment and Land Court at Nakuru Case No. 112 Of 2017 the court dismissed a preliminary objection and stated as follows:

"I would need to receive evidence to enable me determine whether or not the matters in issue in this suit are also directly and substantially in issue in the previously instituted Nairobi High Court Succession Causes No. 1027 of 1989 and No. 226 of 2013 and whether or not parties in both matters are the same or litigate under the same title. Such evidence would include but not limited to copies of pleadings, proceedings, rulings and or judgment in the said cases. No such evidence had been placed on record by the plaintiff as at the date the preliminary objection was filed. Similarly, ground 4 of the preliminary objection seeks to show that the suit is brought in bad faith, is frivolous, vexatious and an abuse of the court process. All these allegations need to be established by way of evidence.

Evidence cannot be introduced later to prop up a preliminary objection. If the defendant wishes to have the plea of sub judice and the other issues raised by the preliminary objection properly adjudicated, the defendant may consider bringing an application to that effect with the appropriate supporting evidence. For now I have no hesitation in finding and holding, as I hereby do, that the preliminary objection has no merit. It is dismissed with costs."

I find that the Preliminary Objection lacks merit and is therefore dismissed with costs to the plaintiff.

DATED and DELIVERED at ELDORET this 10TH DAY OF DECEMBER, 2019.

M. A. ODENY

JUDGE

RULING read in open court in the presence of Mr.Aseso holding brief for Mr. Omusundi for Plaintiff/Respondent and Miss.Kuiyaki holding brief for Miss. Kibichy for Defendant/Applicant.

MS. Towett – Court Assistant