



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC CASE NO. 4 OF 2017**

**REUBEN KIPKOECH NGETICH.....PLAINTIFF**

**VERSUS**

**EUNICE CHEPKOSGEY NGETICH.....1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. What is before me for determination is the 1<sup>st</sup> Defendant's Preliminary objection dated 28<sup>th</sup> March, 2017. In the said Preliminary Objection, the 1<sup>st</sup> defendant seeks to have the Plaintiff's suit struck out on the following grounds:

- a. That the Plaintiff lacks the locus standi to institute this suit pursuant to the provisions of the relevant laws*
- b. That the Plaintiff's suit is an abuse of the process of the court*
- c. That the suit does not disclose any cause of action against the 1<sup>st</sup> defendant.*

2. The 1<sup>st</sup> defendant and plaintiff both filed their written submissions on the Preliminary objection.

A brief background of the facts is necessary in order to contextualize the Preliminary Objection. By a Plaint dated 19<sup>th</sup> January, 2017 the Plaintiff filed suit against the defendants seeking an order that the Land Registrar Bomet County cancels the defendant's registration as proprietor of land parcel number Kericho/Ndaraweta/901 and that the said title do revert to the estate of Kipsanga Arap Tuei Deceased. The Plaintiff claims that he is the beneficiary of the estate of Kipsanga Arap Tuwei Deceased by virtue of being his grandson. Nowhere in the Plaint does the Plaintiff mention whether he has taken out a Grant of Letters of Administration in respect of the estate of the said Kipsanga Arap Tuei Deceased.

3. In his defence dated 8<sup>th</sup> March, 2017 the 1<sup>st</sup> defendant states that the Plaintiff does not have any blood relationship with the late Kipsanga Arap Tuei under the meaning of the Law of Succession Act and therefore lacks the *locus standi* to institute this suit.

4. The Plaintiff filed a Reply to the 1<sup>st</sup> Defendant's defence dated 27<sup>th</sup> in which he re-asserts his claim that he is the grandson of the late Kipsanga Arap Tuei and still makes no mention of the fact that he has a Grant of the Letters of Administration in respect of the deceased's estate. It is at this point that the 1<sup>st</sup> defendant filed a Preliminary Objection which is the subject of this Ruling.

**Defendant's Submissions**

5. In his submissions, learned counsel for the 1<sup>st</sup> defendant argues that parties are bound by their pleadings and as far as the Plaintiff is concerned, there is no mention of the Plaintiff's legal status as far as the deceased Kipsanga Arap Tuei is concerned. He goes on to question the relationship between the plaintiff and the deceased as he does not state whose son he is in order to clarify his relationship as the deceased's grandson and beneficiary.

6. Secondly, he argues that the plaintiff does not demonstrate what right has been violated by the 1<sup>st</sup> defendant and as such his plaint does not disclose any cause of action.

7. Lastly, counsel submits that if the plaintiff obtained a Grant, the same was obtained fraudulently without the knowledge of the deceased's lawful beneficiaries. He therefore concludes that the plaintiff's suit is an abuse of the process of the court.

### **Plaintiff's Submissions**

8. On the other hand, learned counsel for the Plaintiff submits that the validity of the plaintiff's Grant of Letters of Administration cannot form the basis of a Preliminary objection. He argues that a Preliminary Objection can only be raised purely on a point of law not facts as per the case of **Mukisa Biscuits V West End Distributors Ltd (1969) E.A 696**.

9. Counsel for the plaintiff further argues that the plaintiff's Limited Grant of Letters of Administration is valid as it was issued after he satisfied the court about his suitability and that the said grant has not been challenged or revoked.

### **Issues for Determination**

10. The main issues for determination are as follows:

- i. Whether the plaintiff has locus standi to file this suit.
- ii. Whether the plaint should be struck out for being incompetent.

### **Analysis and Determination**

11. With regard to the first issue, let me first clear the air on what constitutes a preliminary objection. The case of **Mukisa Biscuit (supra)** held as follows:

*"A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.*

*Justice Newbold in the said suit argues that*

*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"*

12. In the instant case suit, the 1<sup>st</sup> defendant argues that the plaintiff lacks *locus standi*. *Locus standi* is the right to be heard or appear in court or other proceedings. This is a point of law.

13. In his Plaint, the plaintiff does not state what gives him the right to file the suit laying a claim to the estate of Kipsanga Arap Tuei deceased. It is trite law that a party is bound by his pleadings. Nowhere in the plaint does the plaintiff mention that he has obtained a Grant of Letters of Administration. Even when the 1<sup>st</sup> defendant raised this issue in his defence, the plaintiff did not deem it fit to respond to it until much later. It is only when the 1<sup>st</sup> defendant filed the Preliminary Objection that the plaintiff, mentioned in his submissions that he obtained a Limited Grant of Letters of Administration which he asserts is valid unless revoked. This amounts to introducing evidence from the bar by way of submissions.

14. In the case of **Independent and Boundaries Commission & Another V Mutinda Mule & 3 Others (2014) eKLR** the Court of Appeal relied on the case of **Adetoun Oladeji NIG Limited V Nigeria Breweries PLC SC 9 of 2002** where the court stated as follows:

*"It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded"*.

15. In **Mary Ngaru V Family Bank Ltd & 2 Others (2014) eKLR** the court took a similar view and observed as follows:

*"... The reason for this is clear, it is found in Order 2 rule 6 of the Civil Procedure Act of 2010. That no party may in any pleadings make an allegation of fact or raise any new ground or claim inconsistent with a previous pleading or claim in the same suit 6 (1) without first amending his pleadings; 6 (2) No party can depart from his pleadings whether in evidence or in an interlocutory application, to do so a party must first amend his pleadings"*.

From the foregoing, it is my finding that at the time the plaintiff instituted this suit he did not demonstrate that he had *locus standi* to do so.

16. The next question is whether based on the above finding, the plaintiff's suit should be struck out for being incompetent. This would have been a very easy question to decide had the plaintiff not seen the light and filed an application to amend his plaint. The provisions of Order 2 Rule 6 (2) of the Civil Procedure Rules provides a leeway for the plaintiff as it states that:

*“Subrule (1) shall not prejudice the right of any party to amend or apply for leave to amend his previous pleadings so as to plead the allegations or claims in the alternative”*

17. Since it has come to the to the court’s attention (albeit irregularly) that the plaintiff appears to have a Limited Grant of Letters of Administration (signifying *locus standi*), and without delving into the issue of its validity as this cannot be determined at this juncture, and also noting that the plaintiff has applied for leave to amend his Plaint, I am of the view that it would not serve the interests of justice to strike out the Plaint.

17. Accordingly, I disallow the application but make no order as to costs.

Dated, signed and delivered at Kericho this 24<sup>th</sup> day of January, 2018.

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Koko for the 1<sup>st</sup> Defendant/Applicant.
2. Mr. Miruka for Mr. Langat for the Plaintiff/Respondent
3. Court Assistant - Rotich