



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 32 OF 2016

JACOB NJERU NYAGA *suing as the Chairman of the family of*

JOHN NJIRU KINANI (Deceased).....PLAINTIFF

VERSUS

MUSA NYAGA NJERU.....1ST DEFENDANT

PETER RUTERE NJERU.....2ND DEFENDANT

RULING

1. By a plaint dated and filed on 9th May 2016, the Plaintiff filed suit as a legal representative of John Njiru Kinani (deceased) against the Defendants claiming the following reliefs;

- a. *A permanent injunction restraining the Defendants from interfering with the burial of John Njiru Kinani (deceased) on land parcel No. Ngandori/Nguviu/615.*
- b. *Costs of the suit and interest.*
- c. *Any other relief that the court may deem fit to grant.*

2. It was pleaded in the said plaint that the deceased was the registered and absolute owner of *Title No. Ngandori/Nguviu/615* (hereinafter referred to as the “suit property”) and that the Defendants together with their relatives, agents and servants had denied the deceaseds’ family members access to the suit property for the purpose of preparing the burial site and burying the body of the deceased.

3. The said plaint was amended on 26th May 2016 whereby the Plaintiff dropped his earlier capacity as legal representative and described himself as “chairman” of the family of the deceased. The relief of a permanent injunction against the Defendants was also dropped, and in its place, the Plaintiff sought a declaration that the deceased, John Njiru Kanani, be declared as absolute owner of the suit property.

4. On or about 24th May 2016, the Defendants filed a notice of preliminary objection in which they objected to the suit on, *inter alia*, the following grounds;

- a. The suit was *sub-judice*
- b. The Plaintiff lacked *locus standi* to file the suit.
- c. The suit was totally defective.
- d. The suit contravened mandatory provisions of the law.
- e. The suit was an abuse of the court process.

5. On 28th July 2017, the Defendant filed another notice of preliminary objection dated 26th July 2017 objecting to the suit on three grounds only, namely; that the suit was *sub-judice*; the Plaintiff had no *locus standi*, and that the suit was fatally defective for contravening mandatory provisions of the law.

6. When the matter was listed for hearing of the said preliminary objection on 3rd October 2017, the parties agreed to dispose of the same through written submissions. It was agreed that the Defendants' counsel was to file and serve written submissions within 7 days whereas the Plaintiff's counsel was to file and serve within 14 days upon service by the Defendants. According to the record, however, the Defendants filed their submissions on 10th October 2017 whereas the Plaintiff filed on 3rd November 2017.

7. The first preliminary objection relates to alleged violation of the *sub-judice* rule. It was submitted by the Defendants that there was another pending suit between the same parties on the same subject matter. The citation of the suit is Embu CMCC No. 5 of 2014. It was submitted that the instant suit contravened the provisions of **section 6 of the Civil Procedure Rules (Cap 21)**.

8. The Plaintiff submitted that the reliefs sought in the earlier suit i.e. Embu CMCC No. 5 of 2014 were different from the reliefs sought in the instant suit. She annexed a copy of the plaint in the earlier suit which indicated that the deceased had sued the current Defendants seeking the following reliefs;

a. *A permanent injunction restraining the Defendants from interfering with the burial of John Njiru Kinani (deceased) on land parcel No. Ngandori/Nguviu/615.*

b. *Costs of the suit and interest.*

c. *Any other relief that the court may deem fit to grant.*

9. The material provisions of **section 6 of the Civil Procedure Act (Cap 21)** state as follows;

“No court shall proceed with the trial of any suit or proceeding 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 any other court having jurisdiction in Kenya to grant the relief claimed.”

10. In my view, before the provisions of section 6 of the said Act can come into force, it must be established that the previously instituted suit is still pending. On the basis of the material on record, it is not clear whether or not such suit still is pending. The Plaintiff's counsel has provided a copy of the plaint in Embu CMCC No. 5 of 2014 which shows that the suit was filed by the deceased. There is no indication whether the deceased was ever substituted with his personal representative or whether the suit abated after one year upon the death of the deceased under the provisions of **Order 24 of the Civil Procedure Rules**.

11. As was stated in the case of **Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd [1969] EA 696**, a preliminary objection must consist of a pure point of law. It cannot be raised if any fact has to be ascertained or investigated. In the said case, **Sir Charles Newbold P.** stated as follows;

“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. The court is of the view that the issue of *sub-judice* in this suit cannot be conclusively resolved without investigation of some facts. It has to be ascertained whether or not the earlier suit is still pending or if it abated by operation of law. The first objection is, therefore, dismissed since it is not a preliminary objection as contemplated by law.

13. The 2nd issue relates to the Plaintiff's *locus standi* to file the instant suit. The 3rd issue states that the suit is fatally defective because the Plaintiff did not obtain a limited grant of letters of administration to enable him file suit. In my view, the 2nd and 3rd preliminary objections are very similar since they relate to the Plaintiff's right to institute or maintain the instant proceedings. The court shall consider and determine them as one issue.

14. It was the Defendant's submission that the only way in which the Plaintiff could file a competent suit on behalf of the estate of the deceased was by first obtaining letters of administration for that purpose. It was his submission that the chairman of the family of the deceased had no legal authority or *locus standi* to file suit. The Defendant's counsel relied upon the case of **Rajesh Pranjivan Chudasama Vs Sailesh Pranjivan Chudasama [2014] eKLR** in that regard.

15. The Plaintiff's counsel submitted that the Plaintiff did not file the suit as a legal representative of the deceased but as a “family member” in order to preserve the estate and ensure that the deceased was buried on his land. It was further submitted that the court may invoke the provisions of **sections 1A and 1B** of the **Civil Procedure Act (Cap 21)** and the inherent power of the court to sustain the suit. In the Plaintiff's view, it was still possible to amend the plaint to correct any defects.

16. The court is satisfied from a reading of the amended plaint that the instant suit was filed for the benefit of the estate of the deceased person. Paragraph 5 of the amended plaint states that all material times the deceased was the absolute registered owner of the suit property. The main relief sought in paragraph 14 of the amended plaint is a declaration that the deceased was the absolute owner of the suit property.

17. The Court of Appeal had occasion to consider the law relating to the legal right or standing to file suit on behalf of a deceased person in the case of **Trouistik**

18. International Union & Another Vs Jane Mbeyu & Another [1993] eKLR where the court held, *inter alia*, that;

“The common law rule on this matter is expressed in the Latin maxim “actio personalis moritur cum persona”, that is, a personal action dies with the person. This rule was, to a large extent, supplanted by the Law Reform Act. That Act keeps alive, with few exceptions, causes of action which vest in a person since deceased. Accordingly, to determine who is empowered to enforce that chose in action, for what purposes, and when in point of time, one must look at that Act and allied relevant legislation. One such enactment is the law of Succession Act (Cap 160).

19. The Court of Appeal went further with the enquiry as follows;

“...to determine who may agitate by suit any cause of action vested in him 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. As to who are personal representatives, within the contemplation of the Act, section 3, the interpretative section, provides an all-inclusive answer. It says “personal representative means executor or administrator of a deceased person...”

20. In the case of **Rajesh Pranjivan Chudasama** (supra) cited by the Defendants’ counsel, it was held that a litigant could only sue on behalf of the estate of a deceased person upon obtaining a grant of letters of administration. The court in the said case held, *inter alia*, that;

“We shall first deal with the issue of whether the Respondent has locus standi to institute the summons application dated 3rd May 2011 and filed in court on 4th May 2011. It is common ground that at the time of institution of the said summons, the Respondent was not in possession of a grant of letters of administration. The Respondent acknowledges that he may have known of the existence of a will, but according to him, he doubted the validity of the will. In his view therefore, the deceased died intestate. As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased’s estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in cases of intestate succession. In Otieno Vs Ougo (supra), this court differently constituted rendered itself thus:

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

21. The court is persuaded by the foregoing authorities. Although the Plaintiff may have had a noble intention of preserving the estate of the deceased, he did not have *locus standi* to institute the instant suit as “chairman” of the family of the deceased. The court, therefore, agrees with the Defendants’ submissions that in the absence of letters of administration, the instant suit was incompetent from inception. It cannot be cured by amendment, even though a new suit may be filed upon due compliance with the provisions of the Law of Succession Act.

22. The upshot of the foregoing is that the Defendants’ preliminary objection on the Plaintiff’s *locus standi* has merit and the same is hereby allowed. The consequence is that the Plaintiff’s suit is hereby struck out (not dismissed) for want of *locus standi*. There shall be no order as to costs since the parties herein appear to be close relatives.

23. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **15th** day of **FEBRUARY, 2018**

In the presence of Mr Guantai holding brief for Miss Ndorongo for the Plaintiff and Ms Muriuki holding for Mr Andande for the Defendants.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

15.02.18