



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 2 OF 2016

ERNEST CHABA AMBASA

SHEM ENGAIZA AMBASA.....PLAINTIFFS

VERSUS

JANE MBOGA ANIALE.....DEFENDANT

RULING

The defendant Jane Mboga Aniale having been enjoined to these proceedings in that capacity gave notice of preliminary objection to be argued before the hearing of the plaintiff's application and or suit seeking orders to strike out the applications and the orders on the grounds that;

1. The plaintiffs' lack the necessary locus standi in the suit, as they are not legal representatives of the deceased Philemona Ayuya Kamadi and Jenniffer Andeyo Ayuya or any of them being the original registered proprietors of the land in dispute and have legally recognized proprietary interest in the suit land which they can advance through the instant suit.
2. To the extent that the plaintiffs want to pursue through this suit the perceived rights of a deceased person without legal authority, this court is bereft of the required jurisdiction to entertain the application and the suit.
3. The plaintiffs remain total strangers to the suit land and are estopped.
4. Failure or omission by the plaintiffs to seek the legal capacity before instituting the suit is fatal to the cause and cannot be cured through any form of amendment or legalization process.
5. The entire suit in effect amounts to gross abuse of the process of the court and is unsustainable.

The defendant submitted that, the plaintiffs filed this suit by way of originating summons on the 5th day of January, 2016 seeking title to land parcel No. KAKAMEGA/VIGULU/959 through adverse possession. The land is registered in the name of the defendant having obtained title on the 19th August, 2004. On the same date the plaintiffs filed chamber summons dated 4th January, 2016 seeking temporary injunction to restrain the defendant from using the land while the suit is pending. The court ordered status quo to be maintained. On the 23rd February, 2016, the defendant filed notice of preliminary objection founded on five grounds contained in the objection dated the same day.

In substance, the defendant has raised two main legal issues;

1. Whether the plaintiffs are possessed of the necessary locus standi to prosecute the claim before this court.
2. Whether the court will be seized of the required jurisdiction to entertain the dispute and grant the remedies sought?

On locus standi the defendant submitted that, it is settled principle of the law that a litigant must first establish his or her legal capacity to engage the court in the particular claim before he/she can proceed. Otherwise the courts would waste a lot of time on idlers and deviate from its noble course of dispensation of justice. On keen perusal of the plaintiffs pleadings, the court will note that even though the plaintiffs claim title to the disputed land by adverse possession, there is almost nothing pleaded or in the statements of the witnesses about when, who and how they occupied and used the land in dispute and the duration. The vagueness of the pleading on adverse possession is evident from paragraph 4 of the supporting affidavit of Ernest Chaba Ambasa sworn on 4th January, 2016 where he deposed as follows:-

“4. That our said uncle had no children and during his old age times, he allowed us to use the land.”

Compare the following averment in paragraph 14 of the same affidavit;

“14. That I verily believe to be true that upon the extinguishing of the defendant’s title to the land aforesaid and as long as Philemona Ayuya Kamadi and Jennifer Andeyo Ayuya held the land in trust for Shem Engaiza Ambasa, the defendant or any other person was incapacitated to deal with the land aforesaid as hers.”

What Ernest Chaba Ambasa is saying is that he has no claim to the land and that the rightful claimant is Shem Engaiza Ambasa being the one who bought the land from Jennifer Andeyo Ayuya. In their statements which are on the file none of the plaintiffs states to have been in possession and or use of the land prior to the alleged sale to the 2nd plaintiff in 1999. He has not explained whether the 2nd plaintiff was under any disability as to require him to be enjoined to litigate on his behalf and or through him.

With regard to both plaintiffs, it has come out clearly that what they are both pursuing through these proceedings is an answer as to how the defendant transferred the land to herself by way of a gift from the original deceased owners when she was not a relative (see paragraph 10 of the supporting affidavit of Ernest Chaba Ambasa). They even went ahead to disclose that there was a case before a tribunal while the seller was alive and she denied having given the land to the defendant. Despite having referred to the minutes of the tribunal, no copy was filed and or served upon the defendant. In the end, the plaintiffs want this court to conclude that the defendant used fraud to transfer the land to herself from the late Jennifer Andeyo Ayuya and declare a trust of Shem Engaiza Ambasa together with his family over the land. In their statements two of the plaintiffs’ witnesses namely Eside Ambasa and Hellen Chaba have repeatedly stated that when the late Jennifer was on her death bed she tried to reach the defendant to return the title but she failed. According to the two witnesses, the plaintiffs sued the defendant to recover the land after they discovered that she fraudulently transferred the same.

The foregoing confirms that the instant suit is not about adverse possession but about fraud allegedly, not against the plaintiffs, but against one Jennifer Andeyo Ayuya whose burial permit which is filed by the plaintiffs confirms she died on 29th May, 2011. The question that sets in is can the plaintiffs lawfully pursue recovery of land from a present owner based on alleged fraud from the previous deceased owner without letters of administration or legal representation? The answer is in the negative. They totally lack the legal capacity to do so and the court should not entertain them.

On the issue of lack of jurisdiction the defendant submitted that, ordinarily a court of law can only claim jurisdiction in a matter where it is satisfied the plaintiff has a claim recognized by law to the subject matter in dispute. If the plaintiffs are bereft of the necessary locus standi then the jurisdiction of the court is ousted. Jurisdiction must be determined at the first instance so that where it is found wanting, the court downs its tools without much ado. In the pleadings, the plaintiffs have repeatedly referred to tribunal proceedings where the late Jennifer Andeyo Ayuya allegedly disowned the claim of sale of the subject land to the defendant. See paragraph 7 of the supporting affidavit of the 1st plaintiff sworn on 4th January, 2016 and also paragraph 5 of his statement dated 4th January 2016. The proceedings were not availed but even if they were, that would only be confirming that the dispute involved both parties directly or indirectly while Jennifer was alive and before she died in the year 2011, six years before filing of the suit. The court should avoid wading into matters where its jurisdiction is in doubt and the proceedings would result in judicial embarrassment. It will be less costly and just and in accordance with the overriding objective principle to terminate the proceedings at this juncture.

On the abuse of court’s process, if as pleaded by the plaintiffs and explained in their statements and statements of their witnesses, Jennifer had a tribunal case over the same land where she denied selling the land to the defendant and even called the defendant before she died trying to recover the title, why would the plaintiffs take six years to bring the suit and do so without the required letters of administration if not to abuse the process of the court? The plaintiffs are not in genuine search for justice but on a mission to harass the defendant on the ownership of the land on no other ground other than that she is not of their clan. This is abuse of the court’s process. They pray that the preliminary objection be upheld. The plaintiff chose not to submit or oppose the preliminary objection.

This court has considered the preliminary objection and the defendant’s submissions. A Preliminary Objection, as stated in the case of **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696**,

“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

In the same case, Sir Charles Newbold said:

“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 had to be ascertained or if what is sought is the exercise of judicial discretion”.

Locus standi, is defined in **Black’s Law Dictionary 9th Edition** as the right to bring an action or to be heard in a given forum. Therefore the issue of locus standi and/or legal capacity raises points of law and is therefore proper to raise it as a Preliminary Objection and should be raised at the earliest opportunity as was held in the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & Others 2014 e K.L.R.** The issue of the plaintiff’s locus standi to sue in this suit is therefore properly raised as a Preliminary Objection.

On perusal of the supporting affidavit filed by the 1st plaintiff dated 4th January 2016 and filed in court on the 5th January 2016, he stated as follows;

Paragraph 3

“That land parcel number Kakamega/Vigulu/959 originally belonged to our paternal aunty one Philomena Ayuya Kamadi who died on the 28th of January, 1997 leaving behind a widow one Jennifer Andeyo Ayuya”

Paragraph 6

“That on the 20th November 1999 my brother Shem Engaiza Ambasa entered into a land sale agreement with one Jennifer Andeyo Ayuya where she agreed to sell land parcel number Kakamega/Vigulu/959 at a consideration of Ksh. 300,000/-.”

Paragraph 9

“That Defendant at the time of fraudulently transferring land parcel number Kakamega/Vigulu/959 to herself knew that the land belonged to Shem Engaiza Ambasa and the transfer and subsequent registration to the defendant herein was fraudulent.”

It appears from the pleadings that the plaintiffs are suing on behalf of the late Shem Engaiza Ambasa. This would mean that they would have to be the administrators of the estate of the said Shem Engaiza Ambasa. As was held in the case of **Otieno vs Ougo 1986-1989 E.A.L.R 486:**

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

Evidently, the plaintiffs herein do not have the locus standi to file this suit. Ultimately therefore, the defendant's Preliminary Objection questioning the plaintiff's locus standi/legal capacity has merit and is hereby upheld. This suit and any applications therein are struck out with costs to the defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 8TH DAY OF MARCH 2018.

N.A. MATHEKA

JUDGE