



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 216 OF 2017

CELESTINE I. MUSIMBI.....PLAINTIFF

VERSUS

ATETWE O. THOMAS.....DEFENDANT

RULING

The respondent raised a preliminary objection on a point of law of the application and the suit generally on the following grounds:

1. That the application and suit are incompetent since the registered proprietor of land parcel Butso/Indangalasia/223 is deceased.
2. That the respondent is not the legal representative of the deceased as a grant of letter of administration has been granted to someone else.
3. That the suit is bad in law and an abuse of the court process.

The respondent submitted that, a prima facie case has not been demonstrated in view of the fact that the registered owner of title number Butso/Indangalasia/223 is deceased and yet the applicant has sued Atetwe Thomas who is not the legal representative of the deceased. The question of *locus standi* arises here. They submit that the applicant cannot maintain a claim against a stranger. The respondent is a stranger in the sense that he has no legal interest in the dispute before court. The prayers sought if granted will amount to final orders. Such orders would be given in exceptional circumstances. The arguments being put forward by counsel for the applicant over overriding interest should be spared for the substantive hearing. The court should pronounce itself on this in its final determination of the case. Whether the alleged access road existed before the commencement of this suit is also an issue for the trial. The applicant acquired interest in Butso/Indangalasia/6937 in 2015. He has concealed the mutation form that created 6937 because it would clearly show that his access road is actually elsewhere. Back to the question a prima facie case, the applicant has not demonstrated that, if the orders of injunction are not granted he will suffer irreparable loss. They have to quarrel about the condition for grant of injunction as judicially construed in the celebrated case of *Giella vs. Casman Brown*. They submit that the authority substantially supports the respondent's position in the application. They finally submit that the application has no merit, it is incompetent and the same should be struck out together with the entire suit, with costs to the respondent.

The applicant submitted that the preliminary objection is opposed as it is not on any point of law the defendant has closed the access road and locus standi is a matter of fact. The objection should be dismissed.

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 a 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 respondent's locus standi to be sued in this therefore properly raised as a Preliminary Objection.

It is not disputed that the registered proprietor of land parcel Butso/Indangalasia/223 is deceased. That the respondent is not the legal representative of the deceased as a grant of letter of administration has been granted to someone else. It appears from the pleadings that he is the caretaker of the said parcel of land. I find that he has no locus to be sued in this matter. 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”.

Same also goes for a party which is to be sued. Evidently, the respondent herein does not have the locus standi to be sued in this suit. Ultimately therefore, the respondent/defendant's Preliminary Objection questioning the defendant's locus standi/legal capacity has merit and is hereby upheld. This suit and application is struck out with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE