



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 74 OF 2017

PARMENAS KAMAU MBURU.....PLAINTIFF

VERSUS

SUSAN WAITHERA KAMAU.....1ST DEFENDANT

MARTHA WANGUI MACHARIA.....2ND DEFENDANT

RULING

1. This ruling is in respect of Plaintiff's Notice of Motion dated 23rd February 2017 and defendants' Notice of Preliminary Objection dated 10th March 2017. The following orders are sought in the Notice of Motion:

1. Spent.

2. Spent.

3. That there be a temporary order of an injunction restraining the defendants/respondents, their agents, associates, employees, servants and or any other person from entering, remaining on, carrying on any activities and/or interfering in any manner with the plaintiffs parcel of land known as Naivasha/Maraigushu Block 9/267 (Kenton) pending the hearing and determination of this suit herein.

4. That cost of this application be provided for.

2. The application is supported by an affidavit sworn by the plaintiff. It is deposed in the affidavit that the plaintiff is a beneficiary of the parcel of land known as Naivasha/Maraigushu Block 9/267 (Kenton) (the suit property). According to the plaintiff the suit property belonged to his father Paul Mburu Mwangi (deceased). The plaintiff conducted a search on 21st November 2016 on the suit property and discovered that the defendants have subdivided it into several plots which are registered in the defendants' names. The defendants' action has led to the plaintiff being left destitute despite the fact that he lives on the suit property with his family.

3. In the plaint filed on 27th February 2018 the plaintiff averred that he is a beneficiary of the suit property and that the 1st defendant who is his grandmother was left to hold the property in trust for him after the demise of his father who was entitled to the property before his death.

4. The defendants responded to the suit and the Notice of Motion by filing Notice of Preliminary Objection dated 10th March 2017 and a replying affidavit. The objection is on the following grounds:

1. This honourable court lacks jurisdiction to hear the application and grant the injunction orders as sought.

2. The plaintiff does not have the requisite authority to file the application and suit on behalf of Paul Mburu Mwangi (now deceased) he claims to be a beneficiary of and has not taken/satisfied the necessary steps required by law to do so.

3. The application and suit as filed is an extreme abuse of the process of this honourable court.

5. I will consider the Preliminary Object first. If it is upheld the matter will rest there. If however it fails, I will consider the merits of the application.

6. The Notice of Motion and the Preliminary Objection were heard by way of written submissions. The plaintiff's submissions were filed on 6th June 2017 while the defendants' submissions were filed on 16th June 2017. The plaintiff said nothing about the Preliminary Objection in

his submissions. The defendants on the other hand submitted that the plaintiff has moved the court as beneficiary of the estate of Paul Mburu Mwangi (deceased) without first obtaining letters of administration. Accordingly, the defendants argued that the plaintiff does not have locus standi to move the court.

7. I have considered the preliminary objection. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the *locus classicus* on preliminary objections in this region, *Law JA* stated:

So far as I'm aware, a preliminary objection 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

8. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In view of the foregoing, while considering the preliminary objection I have assumed that all the facts pleaded by the plaintiff are correct. For the same reasons, I have not considered the replying affidavit filed by the defendants.

9. A perusal of the plaint herein as well as the affidavit in support of the Notice of Motion shows that the plaintiff's case is that the estate of his late father was entitled to the suit property and that he (the plaintiff) was entitled to a share of the suit property as an heir of his late father. The plaintiff has not exhibited any letters of administration in respect of the deceased's estate. He has not even stated that he has any letters of the estate.

10. The case of Appeal stated in **Trouistik Union International & another v Jane Mbeyu & another [1993] eKLR** as follows:

Simply put, the appellants complained that the respondents lacked standing to present and prosecute a suit for the benefit of the deceased's estate. The reason they say, is because the respondents did not obtain letters of administration before commencing the suit.

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). Section 2 of that Act provides in mandatory terms, that unless any other written law provides otherwise, the provisions of the Act "shall constitute the law in Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act".

.... To determine who may agitate by suit any cause of action vested in [a deceased person] 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". ... The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? Section 3 says "administrator means a person to whom a grant of letters of administration has been made under this Act".

11. In the absence of letters of administration, the plaintiff's case is totally untenable. It would be pointless to keep it alive. I am aware that striking out is a draconian remedy. However, I do not see how life can be injected into the plaintiff's case. In the circumstances, I strike out the suit.

12. The parties herein are related. The plaintiff is the grandson of the 1st defendant. So as not to strain family relations further, I order that each party to bear own costs.

Dated, signed and delivered in open court at Nakuru this 28th day of June 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Ndungu holding brief for Mr Wairegi for defendant/respondent

No appearance for plaintiff/applicant

Court Assistants: Gichaba & Lotkomoi