



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. NO 23 OF 2016**

**CHARITY NGIO NYAGA.....PLAINTIFF**

**VERSUS**

**ZUHURA JUMA KAVUTO.....1<sup>ST</sup> DEFENDANT**

**JOSEPHINE WANJA MURIUKI.....2<sup>ND</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR EMBU.....3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants (hereinafter the Defendants) herein filed a notice of preliminary objection dated 10<sup>th</sup> October 2017 raising the following objections to the Plaintiff's suit;
  - a. That the Plaintiff lacks the locus standi to bring the suit herein.
  - b. That the suit as filed herein is fatally defective and thus ought to be struck out with costs.
2. When the said preliminary objection was fixed for hearing on 7<sup>th</sup> February 2018, the advocates for the parties agreed to dispose of it through written submissions. The Defendants consequently filed their written submissions on 7<sup>th</sup> March 2018 whereas the Plaintiff filed hers on 12<sup>th</sup> July 2018.
3. The Defendants submitted that the Plaintiff lacked *locus standi* to institute the suit because the parcel of land in dispute i.e. *Title No. Gatari/Weru/4546* (hereinafter the suit property) belonged to the late Nyaga Kibande (hereinafter the deceased) and that the suit was based on her claim as a wife or beneficiary of the estate of the deceased.
4. It was further submitted that the Plaintiff had not tendered any evidence that she had obtained any letters of administration under the **Law of Succession Act (Cap 160)**. It was, therefore, contended that in the absence of a grant, the instant suit was a non-starter. The Defendants relied upon the cases of **Rajesh P. Chudasama Vs Sailesh P. Chudasama Mombasa Civil Appeal No. 30 of 2013 [2014] eKLR** and **Nakuru ELC No. 134 of 2017 Jane Wanjiru Njane Vs Peter Njenga Njane [2017] eKLR** in support of their submissions.
5. The Plaintiff's response to the said preliminary objection was twofold. First, it was contended that she was not acting on behalf of the estate of the deceased and had not even described herself as such in the

plaint. It was her case that she simply wanted some illegal and fraudulent dealings to be nullified before the issue of succession could be dealt with at the opportune time. Second, she contended that the objections taken could not be properly raised as preliminary objections as enunciated in the case of **Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd [1969] EA 696**.

6. It was the Plaintiff's contention that the preliminary objection raised required determination of factual matters or matters of "mixed" law and fact hence not suitable for determination as a preliminary objection. It was submitted that a preliminary objection should raise a pure point of law in relation to a matter where the facts are not in dispute. The Plaintiff, therefore, urged the court to dismiss the preliminary objection with costs.

7. The court has considered the Defendants' preliminary objection, their submissions thereon as well as the Plaintiff's submissions in response thereto. The court has also considered the pleadings of the parties herein i.e. the plaint, defence and counterclaim as well as the reply to defence and defence to counterclaim.

9. The court has noted that the capacity of the Plaintiff to file suit was not challenged in the defence and counterclaim. In fact, the issue of *locus standi* was not canvassed by any of the parties in their respective pleadings. It was raised for the first time in the notice of preliminary objection dated 10<sup>th</sup> October 2017.

9. So, assuming that the Plaintiff was actually suing on behalf of the estate of the deceased, how was she supposed to prove her legal capacity upon being served with a notice of preliminary objection? The issue would obviously call for a factual investigation because the existence or otherwise of a grant under the **Law of Succession Act** is a factual question. In the court's opinion, the Plaintiff was not accorded a fair opportunity to meet the objection through the preliminary objection. She was not accorded an opportunity to meet such objection through either the pleadings or affidavits.

10. The court is of the view that the preliminary objection raised does not constitute a proper preliminary objection as enunciated in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd** (supra). A determination of some factual issues would require additional evidence to be tendered which cannot be done at this stage.

11. The upshot of the foregoing is that the court finds no merit in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' notice of preliminary objection dated 10<sup>th</sup> October 2017. The same is consequently dismissed with costs to the Plaintiff.

12. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **19<sup>th</sup>** day of **JULY, 2018**.

In the presence of Mr Okwaro for the Plaintiff, Ms Mbogo holding brief for Mr Andande for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Mr Siro for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

Court clerk Mr Muinde.

**Y.M. ANGIMA**

**JUDGE**

**19.07.18**