



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**E & L CASE NO. 27 OF 2018**

**PRISCILLA JESANG KOECH.....PLAINTIFF**

**VERSUS**

**REBECCA KOECH & 3 OTHERS.....DEFENDANTS**

**RULING**

This ruling is in respect of an application dated 2<sup>nd</sup> February 2018 brought by way of Notice of Motion by the plaintiff/applicant herein seeking for the following orders:

a) Spent

b) A temporary injunction be issued restraining the defendant/respondent either by themselves or their agents from trespassing into, Ploughing utilizing and alienating the Suit Parcel or otherwise interfering with land parcel number SOY/KIPSOMBA/BLOCK 8 (KOECH PARTNERS)/48 (also known as KAPSUMBEIWET FARM) Pending the hearing and determination of this application inter-Parties.

c) A temporary injunction be issued restraining the defendant/respondent either by themselves or their agents from trespassing into, Ploughing utilizing and alienating the Suit Parcel or otherwise interfering with land parcel number SOY/KIPSOMBA/BLOCK 8 (KOECH PARTNERS)/48 (also known as KAPSUMBEIWET FARM) Pending the hearing and determination of this suit.

d) Costs of this application be provided for.

Counsel agreed to canvass the application vide written submissions and before then Counsel for the defendant informed the court that he would be raising a preliminary objection on the issue of capacity and locus standi to file this suit. The court ordered that the preliminary objection be heard together with the application.

**Plaintiff's Submissions**

Counsel for the plaintiff gave a brief history of the case. He stated that the plaintiff is the widow of the deceased who is the registered owner of land parcel known as SOY/KIPSOMBA/BLOCK 8 (KOECH PARTNERS)/48 (also known as KAPSUMBEIWET FARM), the suit property herein. Counsel further submitted that the plaintiff and the deceased during their marriage had various matrimonial homes which they developed including the suit property herein in 1967.

Mr. Tororei submitted that the defendants have trespassed on the suit property the 1<sup>st</sup> defendant allegedly claiming to have purchased the portion measuring 20 acres from the deceased around 4 years ago with no proof of an agreement.

Counsel submitted the following issues for determination by the court,

a) Whether the plaintiff has locus standi to approach this court;

b) Whether this court has jurisdiction to handle this matter;

c) Whether the plaintiff has met the set down criteria to warrant the grant of the interim orders of injunction as set out in the infamous case of Gieila v Cassman Brown Ltd [19731 EA 358].

d) Who shall bear costs of this application?

On the issue of locus standi Counsel submitted that the plaintiff has locus standi to bring the suit as she produced a marriage certificate illustrating that she and the deceased were married sometime in 1963 and as such she acquired a life interest therein under the Law of Succession Act. He stated that the property is still in her deceased husband's name and no transfer has been registered against the title in favour of anyone or the defendants.

Counsel submitted that Section 28 of the Land Registration Act guarantees the plaintiff's interests in terms of spousal rights over the matrimonial property which is the suit property. It is the plaintiff's submission therefore that when the property became matrimonial property when she acquired a life interest when her husband died and that the property didn't become available for distribution as the deceased's property.

Counsel cited the case of **Bob Njoroge Ngarama v Mary Wanjiru Ngarama & another [2014] eKLR** where the court found that since the deceased and his widow had a home together which they had acquired during the subsistence of their marriage, and as long as the property wasn't disposed of to another person, the same wasn't up for distribution as the deceased's property as the widow had acquired an overriding life interest in the suit property. The court held that the same would only be distributed upon the demise of the widow.

On the issue of jurisdiction Counsel submitted that since the issue of locus standi has been dealt with above and since the dispute involves matrimonial property and trespass by the defendants then the court has jurisdiction to hear and determine the matter. Counsel also submitted that the plaintiff has proved that she has a prima facie case with a probability of success against the defendants. He therefore urged the court to allow the application with costs.

#### **Defendant's Submission**

Counsel for the defendants submitted that the plaintiff and the 5<sup>th</sup> defendant are both widows of the late Wilson Kiptanui Koech who is still the registered owner of the suit land being SOY/KIPSOMBA/BLOCK 8 (KOECH PARTNERS)/48 as confirmed from the official search.

It was further Counsel's submission that from the defendant's defence the defendants deny that the suit land is matrimonial property of the plaintiff as she stays in Trans Nzoia County where she settled with the deceased.

Mr. Ngigi Counsel for the defendants submitted that the main issue in the main suit is who among the plaintiff and the defendants is entitled to the suit land which is part of the estate of the late Wilson Kiptanui Koech and that this court has no jurisdiction to hear and determine this suit.

Counsel listed the following issues for determination

- a) Whether the plaintiff has locus standi to move this court
- b) Whether this court has jurisdiction over this matter
- c) Whether an injunction can issue in the circumstances

On the first issue of locus standi Counsel submitted that it is not in dispute that the suit land SOY/KIPSOMBA/BLOCK 8 (KOECH PARTNERS)/48 is still registered in the name of the late Wilson Kiptanui Koech who died on 28/2/16 and no succession cause for the distribution of his estate has been commenced. What is in contention is whether this court has jurisdiction to hear and determine this application.

It was the plaintiff's submission that she is entitled to a life interest in the suit land since it was her matrimonial home and as such the court should issue the orders as prayed for in the application which assertion has been denied by the defendants.

Counsel cited Sections 35, 37 & 40 of the Law of Succession Act which provides that matrimonial property is not open for distribution to other beneficiaries other than the widow of the deceased. The law of succession Act is clear that a widow is entitled to a life interest in the estate of the deceased where the property in question is matrimonial property.

Mr. Ngigi also cited succession cause of **Bob Njoroge Ngarama vs Mary Wanjiru Ngarama & Another [2014]eKLR** which was also cited by Counsel for the plaintiff where the court held that the life interest in the matrimonial property comprising of part of the estate of a deceased person remains with the widow of the deceased until her death from which the property will then become available for distribution to other beneficiaries.

It was Counsel's submission that the issues of who is entitled to a life interest in the estate of a deceased person and whether the orders prayed for by the Plaintiff can be granted are purely issues that can

adequately be dealt with under the Law of Succession Act and as such this court as constituted and by virtue of Article 162 (2) of the Constitution of Kenya does not have jurisdiction to entertain proceedings over and about the estate of a deceased person, whose exclusive jurisdiction is vested in the High Court as provided for by Section 47 of the Law of Succession Act. He relied on the case of PLR v JNR & another 120131 eKLR, where the court held that;

*"The Environment and Land Court is a special court established under Article*

*162 (2) (b) and Section 4 (1) of the Environment and Land Court Act No. 9 of 2011 and it is meant to deal with matters concerning the environment and the use and occupation of and title to land. However matters of ownership and entitlement to a deceased person's property, including land are governed by the Law of Succession Act and are to be determined by the Family Court. Thus by virtue of Section 2 (1) of the said Act, this court lacks jurisdiction to determine the same. "*

Counsel therefore urged the court to find that it does not have jurisdiction to here and determine the suit.

Further on the issue as to whether the plaintiff has locus standi to move this court Counsel cited the Court of Appeal case of Trouistik Union International & Another v Jane Mbevu & Another (2008) IKLR (G&F) 730 cited with approval in Nyahururu ELC Case No. 265 of 2017. Beatrice Wambui Kiarie & 2 Others vs Tabitha Wanjiku Ng'ang'a & 9 others that;

*" To determine who may agitate by suit any cause of action vested in the deceased 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"*

Section 82 (a) of the Law of Succession Act states that:-

"Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative,"

Section 3 of the Law of Succession Act defines a personal representative as;.....personal representative" means the executor or administrator, as the case may be, of a deceased person, "

Counsel submitted that the Plaintiff is not a personal representative of the Late Wilson Kiptanui Koech within the meaning of Section 3 of the Law of Succession Act as she has not exhibited a grant of letters of administration to allow her to pursue the suit and this application on behalf of the deceased's estate and therefore has no locus standi to move this court on behalf of the deceased's estate.

Counsel also cited the holding in the case of PLR v JNR & another [2013] eKLR where it was stated that;

*"Without jurisdiction, this court has nothing and cannot purport to make any other determinations in this matter including the question of locus standi of the Plaintiff to prosecute the suit. From the pleadings it emerged that the Plaintiff was concerned about wastage of the estate of the deceased. The Law of Succession Act at Section 45 prohibits intermeddling with the estate which includes taking possession of or disposing of the estate of the deceased. The Family Court is therefore empowered under Section 47 of the Act and Rule 73 of the Probate and Administration Rules to issue such orders as may be necessary to preserve the estate pending distribution of the same. "*

Counsel therefore urged the court to dismiss the application and strike out the whole suit for lack of jurisdiction.

### **Analysis and determination**

This is an application for temporary injunction by the plaintiff/applicant but before the matter could proceed, Counsel for the defendant raised a preliminary objection on the issue of the plaintiff's locus standi to bring this suit to court.

Counsel therefore agreed to canvass the preliminary objection and the application together vide their written submissions. I will therefore deal with the preliminary objection first before I handle the application but if the preliminary objection is upheld then I will down my tools and not deliberate on the application. The preliminary issue that I am dealing with is on locus standi and jurisdiction which are very important for a case to be sustained in a court of law.

It was the plaintiff's Counsel's submission that the plaintiff being a widow of the deceased husband who was a registered owner of the suit land and having acquired a life interest has overriding interest on the suit land and does not require any letters of administration to administer the property.

This assertion was opposed by Counsel for the defendant and elaborately submitted on the issue of locus standi and jurisdiction. Counsel for the plaintiff cited Section 28 of the Land Registration Act on the issue of spousal overriding interest. It is important to note that this provision was deleted vide the Land Laws (Amendment) Act 2016.

Section 11 of the Land Laws Amendment Act 2016 amended section 28 of the Land Registration Act by deleting subsections (a) and (f). This means that the following are no longer automatically deemed to be overriding interests over registered land without their being noted on

the register:-

- a) Spousal rights over matrimonial property;
- b) Leases or agreements for leases for a term not exceeding two years; and
- c) Periodic tenancies and indeterminate tenancies.

The other important issue to note is that Section 31 of the Land Laws (Amendment) Act, 2016 deleted section 93 of the Land Registration Act, 2012 (*Co-ownership and other relationships between spouses*) and replaced it with a single paragraph providing that if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act, 2013.

This section deals with situations where the spouses are still alive and would like to litigate on who is entitled to what share of the matrimonial property upon dissolution of the marriage. This cannot apply to a deceased spouse or to a spouse litigating with other third parties because what is to be determined is as to whether the property forms part of matrimonial property as defined under the Land Registration Act which means an interest in land or lease that is acquired by a spouse or spouses during the subsistence of a marriage. This is distinguishable from matrimonial home which is defined under the Act to mean “any interest in land that is owned or leased by one or both spouses and occupied by the spouses as their family home”

Does the plaintiff want the court to determine whether the suit land forms part of matrimonial property and if so, does she have the requisite capacity to institute this suit without letters of administration to clothe her with powers of a personal representative or an administrator or does she want to bar another widow who would be equally entitled to the suit property. Would this suit fall under the law of Succession Act where the High Court has jurisdiction to deal with issues of intermeddling with the estate of a deceased person? The other issue is if the plaintiff in her own right wanted to sell or dispose off the property, how would she transfer the land to the purchaser and the same is in the name of a deceased person? Would she require letters of administration to do so? These questions are food for thought which can either be answered in the affirmative or negative.

Locus standi is the cornerstone of any case. Before a party files a case, he or she must be certain that they are clothed with the requisite capacity to sue and be sued. In the case of **BV Law society of Kenya vs Commissioner of Lands and Others, Nakuru High Court, Civil Case No. 464 of 2000**. It was held that:

*If a party has no locus standi, then the said party cannot bring a suit to court. The issue of locus standi goes to the root of any suit and the said issue of locus standi is a point of law which is capable of disposing of a matter preliminarily.*

I am not persuaded that the plaintiff has locus standi by virtue of the life interest she acquired in the suit property. She could have sanitized her standing by obtaining a limited grant for purposes of instituting this suit.

The Law of Succession Act clearly allows a party to obtain a grant limited to a specific purpose. Section 67 of the Act provides that a limited grant need not be publicized for purposes of inviting objections. Rule 36(1) of the Probate and Administration Rules states as follows:

*Where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased.*

A limited grant can be obtained within a day under certificate of urgency if such urgency is established. Why did the plaintiff not take this route. The plaintiff annexed a copy of a marriage and death certificate of the deceased husband to prove the relationship. The mere fact that the plaintiff was a wife of the deceased does not give her the *locus standi* to file this current suit without obtaining limited grant. See the case of **Hawo Shanko v Mohamed Uta Shanko [2018] eKLR**

From the above analysis I find that the plaintiff has no locus standi to bring this suit without letters of administration and the same is struck out with costs to the defendants. She is at liberty to choose the relevant court to go to when she has obtained the requisite locus standi.

**Dated and Delivered at Eldoret this 19<sup>th</sup> day of December, 2018.**

**M. A. ODENY**

**JUDGE**

Ruling read in open court in the presence of Mr. Ngigi for Defendant/Respondent and in the presence of Mr. Mutei holding brief for Mr. Tororei for Plaintiff/Applicant

Mr. Koech: Court Clerk