



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 29 OF 2016

LUCY WAMUYU MARUBU.....PLAINTIFF

-VERSUS-

MERCY NJOKI IRUNGU.....DEFENDANT

RULING

Introduction

1. The plaintiff, Lucy Wamuyu Marubu filed the suit herein vide a plaint dated 1st March, 2016 seeking orders for vacant possession of **Loc 7/Gakoigo/ 783**, eviction of the defendant therefrom, a permanent injunction restraining the defendant from remaining, trespassing on the suit property, general damages and costs of the suit.
2. Simultaneously with the plaint, the plaintiff filed a notice of motion seeking both temporary and permanent injunctive orders against the defendant to restrain them from further interfering with and carrying out construction works on the suit property pending the hearing and determination of the suit. She also prayed that the existing structures erected by the defendant be demolished.
3. The application is premised on the grounds on its face and is supported by the affidavit sworn by the defendant on **3rd March, 2016**. In that affidavit, she depones that the defendant wrongfully entered and took possession of the suit property despite the plaintiff being rightfully entitled to the same by transmission following succession proceedings in Nyeri High Court Succession Cause No. 1042 of 2012.
4. The defendant opposed the motion vide detailed grounds of opposition dated **7th March, 2016** and a replying affidavit sworn on **8th March, 2016**. She also filed a notice of preliminary objection on **10th November, 2016** on the grounds that the grant of letters of administration issued to the plaintiff in Nyeri High Court Succession Cause No 1042 of 2012 had been revoked by **Mativo J** on **22nd September, 2016**; that this decision had not been appealed against and for this reason the plaintiff lacked *locus standi* to maintain this suit as the same had been initiated on the basis of her acquisition of the suit property by way of succession from the late Wanjiku Mbiru alias Wanjiku Ndegwa.
5. The preliminary objection is the subject of this Ruling and was disposed of by way of written submissions.
6. In the submissions filed on behalf of the defendant, reference is made to the ruling by **Mativo J** in Nyeri High Court Succession Cause No 1042 of 2012 – which revoked the plaintiff's grant and therefore,

her standing. Counsel also relied on the case of **Njoya v Attorney General & Another** [2002] 1 KLR 232.

7. On behalf of the plaintiff, it is submitted that the plaintiff had locus when she filed the suit in March 2016 and if this matter is summarily dismissed and the plaintiff later obtains letters of administration for the estate of Wanjiku Mbiru, then her suit will be rendered *res judicata*. She prays that these proceedings be stayed pending the outcome of the succession matter. Finally, it is submitted that a preliminary objection is not a matter where facts are to be determined or where the court is invited to exercise its discretion.

Analysis and determination

8. A preliminary objection was defined in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** [1969] EA 696 by **Sir Charles Newbold** thus;

“...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.”

The court further stated;

“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...”

9. Applying the principles laid down in the Mukisa Biscuits case to the circumstances of this case, I find that what has been raised in this objection to be pure points of law.

10. In his ruling delivered on 22nd September, 2016 **Mativo J**, revoked the grant of letters of administration on the grounds that the plaintiff obtained the said grant by concealment of material facts (i.e. she failed to disclose other beneficiaries to the estate. She also did not disclose that the defendant herein was an interested party by virtue of her possession of one of the properties forming the estate of the deceased).

11. There being no dispute that the grant of letters of administration have been revoked and that these letters are what had given the plaintiff locus to institute this suit, the question to answer is whether, the revocation of that grant has now deprived her the *locus standi* to maintain this suit.

12. **Mutungi J** in the case of **Irine Mwangi Anasi v Jared Tom Ngiti Opande & 4 others** [2016] eKLR stated as follows regarding failure to obtain grant of letters of administration;

“I agree that a party cannot initiate a suit on behalf of a deceased person’s estate unless such party has obtained grant of letters of administration to the estate of the deceased. It is the grant that confers authority on the appointed administrator to represent the estate and without the grant of letters of administration the person lacks the *locus standi* to sue for and on behalf of the estate.”

13. **Gacheru J** in the case of **Teresia Waithira K Njuguna v John Otieno Nyandew & another** [2015] eKLR addressed the same issue and held as follows;

“Again, the 1st Defendant submitted that on 29th November 2013, he filed an application to revoke the Grant obtained by the Plaintiff in Succession Cause No. 2166 of 2009. Though the 1st Defendant has a right to file the said application as provided by Section 76 of Cap 160 Laws of Kenya, there is no evidence that the said Grant has been revoked. Since the Grant has not been revoked, the Plaintiff is still the administratrix of the Estate of the deceased and

as I stated earlier she has the power and duties bestowed on her by Sections 82 and 83 of the Cap 160 Laws of Kenya. The Plaintiff therefore has capacity on locus stand to bring this suit.”

14. Although the facts of this case are not similar to those in the aforesaid cases, the holdings in these cases are applicable to the instant case. I say this because as it stands now, the plaintiff does not have any grant of letters of administration to enable her administer the estate of the deceased. The plaintiff having been stripped of her rights as administrator of the estate of Wanjiku Mbiru, now lacks the *locus standi* to maintain this suit as there is no guarantee that when the succession matter is finally determined, the plaintiff will again be appointed administrator of that estate or at least as one of the administrators to that estate.

15. For the reasons stated above, I uphold the preliminary objection which in effect strikes out the suit.

Each party to bear their own costs.

Dated, signed and delivered in open court at Nyeri this 7th day of March, 2017.

L N WAITHAKA

JUDGE

In the presence of:

N/A for the plaintiff

N/A for the defendant

Court clerk – Esther