



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 99 OF 2015**

**AGNES MUMBANU KINAKO .....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL .....1<sup>ST</sup> DEFENDANT**

**DISTRICT LANDS REGISTRAR KITUI .....2<sup>ND</sup> DEFENDANT**

**TIMOTHY MUIMI MUTEMI .....3<sup>RD</sup> DEFENDANT**

**ERIC JOHN MUTEMI .....4<sup>TH</sup> DEFENDANT**

**DOUGLAS KYALO MUTEMI .....5<sup>TH</sup> DEFENDANT**

**DATER ENTERPRISES LIMITED ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. In the Application dated 13<sup>th</sup> December, 2016, the Defendants are seeking for the striking out of the suit.
2. The Application is premised on the grounds that the suit is incompetent and unmaintainable in law because the Plaintiff lacks the capacity to institute a suit on behalf of the Estate of Paul Mutemi Kamwaki; that the suit is statutorily time barred and that the suit offends the general rules of pleadings due to the multiple causes of action and the two capacities of the Plaintiff.
3. In the Affidavit, the 4<sup>th</sup> Defendant, who is a brother to the Plaintiff, deponed that the Plaintiff obtained Letters of Administration of the Estate of the late Mutemi Kamwaki through misrepresentation and non-disclosure of material facts; that the said Letters of Administration were revoked by the High Court in Kitui Succession Cause No. 288 of 2015 and that the Plaintiff does not have the capacity to sustain the current suit.
4. The 4<sup>th</sup> Respondent further deponed that the offence of malicious damage to property is founded on tort and that the recovery of the alleged damages of Kshs. 1,578,168 should have been filed within three (3) years.
5. In reply, the Plaintiff deponed she has the capacity to sustain the suit because she has filed it in her dual capacity; that the court, alongside the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, appointed her as an administrator of the Estate of the late Peter Mutemi and that this suit involves multiple facts and complies with the provisions

of the law.

6. The parties filed brief submissions which I have considered.

7. In the Plaintiff, the Plaintiff described herself as the interim administrator of the Estate of the late Paul Mutemi Kamwaki who was the registered proprietor of land known as Nzambani/Maluma/838.

8. The Plaintiff further averred that in the year 1989, the late Paul Mutemi bequeathed to her the suit property as a gift pursuant to which she undertook major developments and improvements to the tune of Kshs. 10,000,000.

9. It is the Plaintiff's case that after being bequeathed with the suit land, she took possession of the same until July, 2011 when she received a letter from the 6<sup>th</sup> Defendant informing her that she should vacate the land.

10. According to the Plaintiff, on 17<sup>th</sup> September, 2011, several people invaded the suit land and maliciously damaged the property on the land; that the damage was assessed at Kshs. 1,578,168 and that the Defendants fraudulently had the suit land registered in favour of the 6<sup>th</sup> Defendant on 29<sup>th</sup> June, 2010.

11. The orders that the Plaintiff is seeking is for a declaration that she is the owner of the suit land by virtue of the bequest that was made by her late father and recovery of Kshs. 1,578,168 being the damage occasioned by the Defendants.

12. In the alternative, the Plaintiff wants the Title Deed in respect to the suit land issued to the 6<sup>th</sup> Defendant to revert to the late Mutemi Kamwaki to be dealt with through Succession proceedings.

13. It is obvious from the Plaintiff that the Plaintiff did not file the suit on behalf of the Estate of the late Mutemi. The Plaintiff's case is hinged on the fact that the suit land was bequeathed to her by her late father and that she is the one who is entitled to it, and not the 6<sup>th</sup> Defendant.

14. Indeed, the Plaintiff has further stated that if her claim for the suit land does not succeed, then the land should revert back to the late Mutemi so as to be administered in accordance with the Law of Succession Act.

15. The Defendants' contention that the Plaintiff does not have the *locus standi* to institute the suit does not therefore lie.

16. Indeed, the Plaintiff, being one of the administrators of the Estate of the late Mutemi, is entitled to show that the suit land cannot form part of the Estate of the late Mutemi and even if it does, it should not have been transferred to the 6<sup>th</sup> Defendant before the Succession proceedings have been finalized.

17. Having being in possession of the land, and having developed the same, the Plaintiff is seeking for damages to the crops that were allegedly destroyed by the Defendants.

18. Considering that the Plaintiff has the *locus standi* to institute this suit in the manner that she has done, I shall not delve into the issue of whether the claim for Kshs. 1,578,168 is statutorily time barred.

19. I say so because the question as to when time started to run from the time when the alleged damage occurred can only be dealt with at trial.

20. I do not see anything wrong with the Plaintiff claiming for the land and also for damages as pleaded in the Plaintiff.

21. The damages that the Plaintiff is claiming arise from the sale of land that she claims to be hers. The issue of the suit having multiple causes of action does not therefore arise.

22. For those reasons, I dismiss the Application dated 13<sup>th</sup> December, 2016 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2017.**

**O.A. ANGOTE**

**JUDGE**