



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 134 OF 2017

JANE WANJIRU NJANE.....PLAINTIFF

VERSUS

PETER NJENGA NJANEDEFENDANT

RULING

(An application seeking an injunction to restrain the defendant from interfering with the suit property; the defendant raised a Preliminary Objection to the effect that the suit is defective as the plaintiff has not obtained letters of administration in respect of the deceased's estate; objection upheld; suit struck out)

1. By plaint dated 27th March 2017 and filed in court on the same date, the plaintiff commenced these proceedings against the defendant who is her son. It is averred in the plaint that the plaintiff is the administrator of the estate of Joseph Njane Karuma (deceased) and that the plaintiff is in-charge of the parcel of land known as Mau Summit/Molo Block 15/81 (Ndungu), the suit property. The plaintiff accuses the defendant of entering the suit property and cultivating it and constructing a house on it despite warnings by the plaintiff.
2. Simultaneously with the plaint, the plaintiff filed Notice of Motion dated 27th March 2017 in which she seeks an injunction to restrain the defendant from interfering with the suit property. The application is supported by an affidavit sworn by the plaintiff on 27th March 2017. She deposes among others that the deceased is registered proprietor of the suit property. She annexed a copy of the title deed.
3. The defendant responded to the application through replying affidavit through replying affidavit sworn on 13th October 2017 in which he deposed that letters of administration in respect of the estate of the deceased have neither been sought nor issued. Prior to filing the replying affidavit, the defendant filed Notice of Preliminary Objection dated 25th July 2017 in which he stated that the suit is defective as the plaintiff has not taken out letter of administration in respect of the deceased's estate. He urged the court to strike out the suit.
4. Pursuant to the orders of the court made on 25th July 2017, Notice of Motion dated 27th March 2017 was argued by way of written submissions. The plaintiff filed submissions on 16th October 2017 while the defendant also filed submissions on 16th October 2017.
5. I have considered the application, affidavits and submissions. The defendant contends that the suit herein was filed without the plaintiff first obtaining letters of administration as such, the suit is incompetent and liable to being struck out. The defendant cited the case of **Teresia Wairimu Kirima –**

vs- Father Romeo & Another [2013] eKLR. Since the issue of whether or not the plaintiff has letters of administration is one that goes to the validity of the suit, I will consider it first.

6. A reading of the plaint and the affidavit in support of the application shows that the plaintiff has brought this suit seeking injunctive orders in respect of the parcel of land known as Mau Summit/Molo Block 15/81 (Ndungu), a property whose registered proprietor is the deceased. Indeed, both parties agree that the registered proprietor is the deceased. In such circumstances, a suit cannot be competently commenced by any person claiming ownership title or possession of the suit property if the person commencing the suit does not have letters of administration.

7. In **Trouistik Union International & another v Jane Mbeyu & another [1993] eKLR** the Court of Appeal stated:

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”.

The Act came into force on the 1st July, 1981. The person whose death and succession gave rise to this suit, namely, John Katembe, died on the 10th April, 1984. To determine who may agitate by suit any cause of action vested in him 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”. It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative, is the administrator of the estate of the deceased. 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”.

It is not in dispute that the two respondents who invoked the aid of the Court to agitate the cause of action which survived the deceased, were not persons to “whom a grant of letters of administration have been made under the Act” ie the Law of Succession Act. They did not even pretend to be such. The only capacity in which they sought to enforce the deceased’s chose in action, was as dependants. As the professed widows and dependants of the deceased, it was within their legal competence to claim damages for loss of dependency under the Fatal Accidents Act.

8. More recently, the Court of Appeal stated in **Kinyua Koech Ltd & 2 others v Nairobi Homes (Mombasa) Limited & 11 others [2015] eKLR** as follows:

There is on record a certificate of official search dated 7th September 2011 and a copy of the Certificate of Lease over the property both showing that the property is still registered in the name of the deceased. This is conclusive proof of ownership of the suit premises vesting in the estate. The beneficiaries' interest are yet to be enforced by registration although settled in the consent order before the succession court in Nairobi. On the strength of Trouistik Union International & Another vs Mbeyu & Another (supra) the court could not have exercised its jurisdiction with regard to any question of ownership, title or possession for the simple reason

that the parties in the capacities they appeared before the court lacked locus.

9. The plaintiff herein does not claim to bring the suit as an administrator of the deceased's estate. Faced with the defendant's protestations that she does not have any letters of administration, the plaintiff chose to remain mum on the matter. She did not even address it in her submissions. In the circumstances, I find that the plaintiff lacks the locus to bring this suit.

10. The defendant has invited the court to strike out the suit. That is a drastic remedy that should not be resorted to lightly. A suit should only be struck out if it cannot be injected with life through some other means such as an amendment. In the circumstances of this case, the defect in the case goes back to the date the suit was filed. The plaintiff's lack of letters of administration as at the date of filing the suit is a historical fact that cannot be changed. It cannot be cured by obtaining letters of administration later. I therefore do not think that the suit cannot be sustained in any way.

11. In the end, the suit herein is struck out. The litigation herein is regrettably between mother and son. I do not deem it fit to award costs. Each party to bear own costs.

Dated, signed and delivered in open court at Nakuru this 15th day of December 2017.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff

No appearance for the defendant

Court Assistant: Gichaba