



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HCA 164 OF 2014

NANCY WAMAITHA MURIITHI & PATRICK NYAGA MUITAH (suing as administrators of
the estate of

MARY WAMURINGO NYAGA (deceased).....**APPELLANTS**

VERSUS

LOISE WANJIRU**1ST RESPONDENT**

KAGUMO MUNYAKA LIMITED.....**2ND RESPONDENT**

JUDGMENT ON APPEAL

(Appeal against Magistrate's order in refusing to grant an injunction; trial magistrate inter alia being of the view that the appellants lacked locus standi; appellants describing themselves as administrators of the estate of a deceased person; no letters of administration at time of filing suit; letters ad litem obtained after filing suit; whether plaintiffs had locus; held that there was no locus when suit was filed; trial magistrate was correct in her finding; appeal dismissed with costs; suit in Magistrate's court not tenable for want of locus; suit ordered to be struck out with costs)

1. This appeal arises from the refusal by the Chief Magistrate's Court to allow an application for injunction, which application was made in the suit Nakuru CMCC No. 578 of 2014.

2. The plaintiffs filed the said suit, Nakuru CMCC No. 578 of 2014 on 18 June 2014. In the plaint, the plaintiffs described themselves as administrators of the estate of Mary Wamuringo Nyaga (deceased). It was pleaded that the deceased was a shareholder of the Kagumo Munyaka Limited, the 2nd defendant, and that she was issued with a share certificate No. 99 issued in 1983. It was pleaded that each member was to be allocated two portions of land on a temporary basis before the final sub-division. It was averred that the deceased was allocated the two portions, one approximately 1/4 acre for residential purposes, and another approximately 1 acre for farming purposes. It was stated that the 1 acre is plot No. 681 and that the deceased and her family have been in possession and use since its allocation. The first plaintiff is daughter in law to the deceased and it was averred that she was the one in possession of the land. It was pleaded that the deceased was later allocated this plot but that the defendants have without any colour of right interfered with the plaintiff's possession of it and trespassed into it and proceeded to fence it. In the plaint, the plaintiffs asked for a perpetual injunction to restrain the defendants from any further interference with the suit land and a declaration that the plaintiffs are the legal and rightful owners of the plot. They also asked for general damages against the defendants together with costs.

3. Alongside the plaint, the plaintiffs filed an application for injunction. It was averred that the defendants have forced themselves into the land and have fenced it. In the supporting affidavit, sworn by Nancy Wamaitha Muriithi, it was deposed that she has taken out letters of administration ad litem for purposes of prosecuting the suit; that the deceased was allotted the plot; that her family have been resident on the land; that in March 2014, she was asked to pay survey fees for the land; that later she was asked to pay an additional Kshs. 5,000/= which she construed to be a bribe and she refused to pay it; that it was then that the Chairman said that he was going to get back the ballot papers for the land; that on 13 April 2013, the Chief and Chairman of the 2nd defendant company came with the daughter of the 1st defendant and alleged that there is a new allottee for the suit land; that she was later summoned by the OCS Subukia Police Station on charges of forceful entry into the land; and that she has been threatened with eviction. She also stated that she has been denied access to the land to harvest her passion fruits.

4. The defendants filed a joint defence and a replying affidavit to the application for injunction. In the defence, it was pleaded that neither the plaintiffs nor their mother were ever allocated the plot No. 681 as alleged. It was averred that allocations were made on a temporary basis until the court, through a decree issued in Nakuru HCCC No. 561 of 1996, ordered that members be settled as per their shareholding. It was averred that the defendants are only executing the decree of the court and that the settlement exercise is nearly complete. It was further pleaded that the plaintiffs have been allocated a portion of land where their homesteads are and that they have not been moved from their original positions. It was contended that the plaintiffs are only demanding portions of other members. It was further averred that the ballot paper to the plot was actually stolen and the matter reported to the police.

5. In the Replying Affidavit, it was stated that the 2nd defendant company has about 560 members and that the plaintiffs are among those who have been causing trouble over the years. It was averred that the land was being distributed as per the Management Committee's decision appointed by the court. It was stated that 99% of the members have been given land and are happy. It was contended that the ballot No. 681 was never issued to the plaintiffs but was stolen and that it belongs to somebody else. It was stated that nevertheless, the plaintiffs have been settled where they have been occupying. It was denied that Kshs. 5,000/= was demanded. It was further stated that the plaintiffs are not members of the company and that they have been allocated a plot of 1/4 acre and another of 1 acre. The one acre plot was said to be where their houses are situated, which is parcel No. 679, and not parcel No. 681.

6. The application for injunction was heard by Honourable J. Komongoi Senior Principal Magistrate. She found no merit in the application. This ruling is what has provoked this appeal. The Memorandum of Appeal has cited 9 grounds. Inter alia, it is averred that the magistrate took into account technicalities in form and procedure as opposed to the interests of justice; that the magistrate visited the mistakes of counsel on the appellants; that the evidence of the appellant was disregarded; that the learned magistrate erred in finding that the plaintiffs have no locus standi while they had letters of administration ad litem; and that her findings are totally unsupported by the law.

7. In his submissions, Mr. D.M. Gatonye for the appellant, submitted that the application for letters of administration ad litem was argued on 10th June 2014 and that it was the conviction of counsel that letters of administration were issued on that date and that the plaintiffs therefore had capacity when the suit was filed on 18 June 2014. It was his view that there is an error in the letters of administration as issued. The same show that they were issued on 27 June 2014. He also submitted that the learned trial magistrate was wrong in dismissing the application for the reason that the provisions of the law under which it was brought were not cited. He cited Order 51 Rule 1. He was of the view that from the material tendered, the appellants were entitled to the injunction.

8. Mr. Machage for the respondents submitted inter alia that the plaintiffs had no locus standi and that there was no evidence of dispossession of the appellants. He submitted that it was incumbent upon the plaintiffs to demonstrate that they hold letters of administration which was not done. He submitted that the pleadings did not demonstrate a prima facie case, as without locus standi, it could not be said that the plaintiffs have any case.

9. I have considered the matter. This is an appeal against the refusal to grant an order of injunction. I need

to be satisfied that from the material tendered, the trial Magistrate was wrong in dismissing the application. I have noted that one of the reasons that the trial Magistrate dismissed the application was because the plaintiffs did not demonstrate that they had locus standi. I have noted that the grant of letters of administration ad litem was issued on 27 June 2014. The suit itself was filed on 18 June 2014. From the title of the suit, the plaintiffs were not filing the suit on their own behalf, but on behalf of the Estate of Mary Wamuringo Nyaga (deceased). It is as clear as day that when they filed suit, they did not have locus standi. In other words, they were not the administrators of the Estate of the deceased at the time the suit was filed. Mr. Gatonye attempted to argue that there was a mistake in the dates noted in the grant of letters of administration ad litem but I have no evidence of such mistake.

10. The trial magistrate was correct in refusing to allow the application for injunction for the reason that the plaintiffs had not demonstrated that they have locus to file the suit. I agree that the trial magistrate appears to have gone into other technicalities of procedure, which probably was not necessary, but she cannot be faulted for holding that the appellants did not have locus when they filed suit. That in my view was the main reason why the application failed. The trial magistrate was correct. As was stated in the case of **Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama (2014) e KLR**, quoting the case of **Otieno v Ougo (1986-1989) EALR 468**, "...an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception."

11. Clearly the appellant had no locus when they filed the suit. The trial Magistrate was not wrong in holding that no prima facie case was established and was correct in dismissing the application. I am not therefore persuaded that this appeal has merit. This appeal is hereby dismissed with costs.

12. But I will go further. Order 42 Rule 32 gives the appellate court power to pass any decree or make any order which ought to have been passed or made. That provision is drawn as follows :-

Power of appellate court on appeal [Order 42, rule 32.]

The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.

13. In my view, the suit Nakuru CMCC No. 580 of 2014 is untenable for it was filed when the plaintiffs did not have locus standi. That suit serves no purpose at all. In exercise of the powers above, I hereby order that the said suit be struck out with costs.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 10th day of March 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of :-

Mr D. M Gatonye of M/s Mirugi Kariuki & Co advocates for appellant.

Mr Aim Yoni for Mr R M Machage for respondent

Emmanuel Maelo : Court Assistant

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

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