



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO.877 OF 2014**

**HASSAN IDDI MALAMBU**

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF**

**AMINA NAANYU MALAMBU.....PLAINTIFF**

**VERSUS**

**BESTEL AGENCIES COMPANY LTD.....1<sup>ST</sup> DEFENDANT**

**AZELLA INVESTMENTS LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 1<sup>st</sup> July 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the 2<sup>nd</sup> Defendant/Respondent from dealing and/or interfering with the parcel of land identified as Ngong/Ngong/5048 (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for an order of inhibition against the 2<sup>nd</sup> Defendant/Respondent from registering any further dealings with the suit property.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Hassan Iddi Malambu, sworn on 1<sup>st</sup> July 2014 in which he averred that he is the administrator of the estate of his late sister Amina Naanyu Malambu (herein referred to as the “Deceased”) who at the time of her demise on 21<sup>st</sup> November 1986 was the registered proprietor of the suit property. He produced the Grant of Letters of Administration issued on 15<sup>th</sup> May 2014 and a copy of the Land Certificate issued on 1<sup>st</sup> October 1981. He further averred that on 25<sup>th</sup> October 2007, the 1<sup>st</sup> Defendant without any colour of right caused the title to the suit property to be transferred to it from the Deceased and later on purported to transfer the said title to the 2<sup>nd</sup> Defendant vide a sale agreement dated 9<sup>th</sup> August 2010. He further averred that the alleged transfer of the suit property from the Deceased to the 1<sup>st</sup> Defendant was fraudulently carried out as the same was effected in the year 2007, almost 21 years after the Deceased had passed on, yet no administrator had been appointed by then to administer the Deceased’s estate, he having been appointed as such on 15<sup>th</sup> May 2014. He confirmed that all this while, he held custody of the original Land Certificate for the suit property in the name of the Deceased. He further stated that he reported the fraudulent dealings of the Defendants to the police and lodged a

complaint with the Chief Land Registrar that a fake title deed had been issued to the 1<sup>st</sup> Defendant. He disclosed that the 2<sup>nd</sup> Defendant is the one in possession of the suit property and carries on the business of cabro works and feared that the 2<sup>nd</sup> Defendant may dispose the suit property to a third party. He also stated that unless this court issues an order of inhibition, the 2<sup>nd</sup> Defendant may proceed to register further dealings on the suit property to the detriment of the Deceased's estate.

The Application is contested. The 2<sup>nd</sup> Defendant filed its Notice of Preliminary Objection dated 14<sup>th</sup> July 2014 and Replying Affidavit sworn by Philip John Ransley on 14<sup>th</sup> July 2014. In the Preliminary Objection, the 2<sup>nd</sup> Defendant raised the following grounds of objection:

1. That the suit filed by the Plaintiff was time barred by virtue of section 26 of the Limitation of Actions Act Cap 22 Laws of Kenya and,
2. That the Plaintiff has no *locus standi* to institute this suit on behalf of the Deceased.

In the Replying Affidavit, Philip John Ransley averred that he is a shareholder and Director of the 2<sup>nd</sup> Defendant. He further averred that sometime in July 2010, the 2<sup>nd</sup> Defendant came to learn that the 1<sup>st</sup> Respondent was looking to dispose of the suit property. He further averred that the law firm of Ransley McVicker & Shaw conducted an official search on the suit property and verified that the title was not encumbered. He then stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered into an Agreement for Sale of the suit property, the 1<sup>st</sup> Defendant obtained consent of the land control board in order to transfer the suit property to the 2<sup>nd</sup> Defendant and executed a transfer in favor of the 2<sup>nd</sup> Defendant which was lodged at the Ngong Lands Registry for registration. He confirmed that the transfer was successfully registered and a title deed was issued to the 2<sup>nd</sup> Defendant on 19<sup>th</sup> October 2010. He annexed a copy of the title deed. He further stated that the 2<sup>nd</sup> Defendant took possession of the suit property and enlisted the services of a physical planner to obtain a change of user in order for them to commence development on the property. He then stated that on 19<sup>th</sup> June 2012, the 2<sup>nd</sup> Defendant received a letter dated 17<sup>th</sup> May 2010 addressed to the Chief Land Registrar by the Plaintiff claiming that the title document issued to the 1<sup>st</sup> Respondent was not genuine. He stated further that the 2<sup>nd</sup> Respondent responded to that letter through its said advocates by way of a letter addressed to the Chief Land Registrar informing him that the 2<sup>nd</sup> Defendant was an innocent purchase for value without notice. He further disclosed that on 10<sup>th</sup> January 2013 the 2<sup>nd</sup> Defendant came to learn that the Plaintiff/Applicant had colluded with the Land Registrar to register a restriction on the suit property without notice to them. He indicated further that the Land Registrar summoned them to his office for a meeting on 5<sup>th</sup> June 2013 but that the same did not take off owing to the non-attendance of the Plaintiff/Applicant. Further, he indicated that a further meeting was called on 17<sup>th</sup> July 2013 where it was noted that in the year 2007, the 1<sup>st</sup> Respondent had been called to the Land Registry on allegations that its title deed was fake, that upon investigations the Police cleared the 1<sup>st</sup> Respondent and that the transactions of the 1<sup>st</sup> Respondent were supported by the green card. He disclosed that at a further meeting with the Land Registrar on 2<sup>nd</sup> August 2013, the Land Registrar refused to remove the restriction prompting the 2<sup>nd</sup> Defendant to file ELC Misc. Application No. 87 of 2013 which is before Honourable Justice Nyamweya. He stated further that the 2<sup>nd</sup> Defendant is in possession of the suit property and this Application if allowed is tantamount to seeking final eviction orders at an interim stage.

The Application is further contested by the 1<sup>st</sup> Defendant which filed the Replying Affidavit of Dr. Daniel Kiaraho, a shareholder and director, sworn on 8<sup>th</sup> September 2014 where he averred that on 25<sup>th</sup> June 2007, the Daily Nation newspaper carried an advertisement offering for sale a piece of land in Ongata Rongai off Magadi Road. He attached a copy of the advertisement. He further averred that on the same day, he called the phone number indicated and sought an appointment with the advertiser to view the property. He confirmed having viewed the property and perused the copy of title that was availed to him. He also confirmed having conducted due diligence on the title with a view to purchasing the property at a purchase price of Kshs. 4 million. He averred further that the Advertiser informed him that the seller is

called Amina Naanyu Malambu whose lawyers were M/S Mokono Ondieki & Co Advocates and that he gave his advocates as M/s Kimani Kairu & Co. Advocates. He further stated that he conducted an official search of the property at the Kajiado Land Registry and received the confirmation that the property belonged to Amina Naanyu Malambu. He further stated that upon confirmation that the property had a clean title and was unencumbered, he instructed the 1<sup>st</sup> Defendant's advocates to liaise with the sellers advocates for the purchase of the property. He further stated that the law firm of Mokono Ondieki & Co. Advocates drew the Agreement for sale which was executed by the said Amina Naanyu Malambu and forwarded to the 1<sup>st</sup> Defendant's lawyers for execution by the 1<sup>st</sup> Defendant. He confirmed that the 1<sup>st</sup> Defendant executed the Agreement for sale and remitted the purchase price to its lawyer for onward transmission to the vendor's advocates. He confirmed that consent to transfer from the land control board was obtained from the said Amina Naanyu Malambu after which her advocates forwarded all the completion documents to the firm of Kimani Kairu & Co. Advocates for registration. He confirmed that the completion documents were lodged for registration at the Kajiado Lands Registry where a transfer in favour of the 1st Defendant was registered and a new title issued in its name. He further confirmed that the 1<sup>st</sup> Defendant was thereafter granted vacant possession of the suit property in December 2007 by the vendor, Amina Naanyu Malambu upon which the 1<sup>st</sup> Defendant proceeded to fence it and erect a caretaker's house. He asserted that the 1<sup>st</sup> Defendant was a bona fide purchaser for value without notice and that it was issued with a title by the Land Registrar. He further added that in July 2010 the 1<sup>st</sup> Defendant lawfully sold the suit property to the 2<sup>nd</sup> Defendant for value and the Land Registry accepted their title and proceeded to register the transfer in favour of the 2<sup>nd</sup> Defendant and issued a fresh title to the 2<sup>nd</sup> Defendant. He pointed out the fact that from the time the suit property was sold and given to the 1<sup>st</sup> Defendant up to the time of sale to the 2<sup>nd</sup> Defendant, the Plaintiff never took any step to challenge the entries made in the register nor inhibition or caution against further dealings with the land and further that from 1986 to 2014, a period of 28 years the Plaintiff did not take any step to assert and /or enforce his purported claim by processing and completing the success, if indeed there previously existed a different Amina Naanyu Malambu.

All the parties filed their respective written submissions.

Before I determine whether or not to grant the temporary injunction, I will first determine the Preliminary Objection raised by the 2<sup>nd</sup> Defendant on the following grounds:

1. That the suit filed by the Plaintiff was time barred by virtue of **section 26 of the Limitation of Actions Act Cap 22 Laws of Kenya** and,
2. That the Plaintiff has no *locus standi* to institute this suit on behalf of the Deceased

On the first issue that this suit is time barred by virtue of section 26 of the Limitations of Actions Act, this is what that provision provides:

**“Where, in the case of an action for which a period of limitation is prescribed, either-**

**a. The action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;**

**b. –**

**c. –**

**the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:**

**Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which –**

i. In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

ii. –“

The point that the 2<sup>nd</sup> Defendant is trying to make is that the Plaintiff is estopped from bringing this action against the 2<sup>nd</sup> Defendants because the 2<sup>nd</sup> Defendant falls in the category of a purchaser for valuable consideration with no part in the alleged fraud. In the Plaintiff, the Plaintiff has listed particulars of fraud of both the Defendants. At this point in time, it is not known whether or not the Defendants were guilty of fraud as alleged by the Plaintiff. This is therefore not a point which the 2<sup>nd</sup> Defendant can raise as a Preliminary Objection as it will require evidence to be produced and a full hearing to be conducted to determine it. This was enunciated in the case of **Mukisa Biscuit Manufacturing Co Ltd –vs- West Ed Distributors (1969) EA 696** where the court held that:

*“....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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....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 has to be ascertained or if what is sought is the exercise of judicial discretion”.*

The second Preliminary Objection I have to address is the question whether the Plaintiff had the authority of his co-administrator and therefore the *locus standi* to file this suit. Under **section 82** of the *Law of Succession Act (Cap 160 Laws of Kenya)* provides 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 arise out of his death for his estate .....*”

The extent of the powers of an administrator were described by Musyoka J., in *Re the Estate of Thiong'o Nginyayu Muthiora (Deceased) Succession Cause Number 2131 of 2011* as follows,

*“..... He is the person to be sued by third parties over the estate or to sue such third parties to protect the estate. He is the person with power to enter into contracts on behalf of the estate and to enforce contracts that exist between the estate and third parties. He has the power to sell assets, to convert them into money, to invest estate funds, to compromise suits on behalf of the estate, among others. He has these powers, given to him by Section 79 and 82 of the Law of Succession Act, and by various provisions of the Trustee Act, Cap 167 Laws of Kenya.”*  
[Emphasis mine]

The Plaintiff was jointly appointed with one Ali Kalela Montet as the administrators of the estate of the late Amina Naanyu Malambu. However, this suit has been brought by only the Plaintiff and no authority to sue on behalf of Ali Kalela Montet has been produced to this court. To that issue, I wish to rely on the decision of Majanja, J in **Misc. Civil Application No. 103B of 2013 Republic versus Nairobi City Council** where he stated as follows:

*“The capacity to agitate any suit on behalf of the estate of the deceased inheres in the administrators duly appointed by the court. They act jointly at all times...One administrator out of the others lacks the capacity to bind the estate or any of the administrators or file suit alone on behalf of the estate.”*

On that issue, I find that the Plaintiff lacks capacity to file suit on behalf of the estate of the deceased in the absence of his co-administrator, Ali Kalela Montet. Arising from the foregoing, I uphold the

Preliminary Objection on the ground that the Plaintiff lacks capacity to sue on behalf of the estate of Amina Naanyu Malambu in the absence of his co-administrator, Ali Kalela Montet. Accordingly, I hereby dismiss this suit. Each party shall bear his own costs.

**DELIVERED AND DATED IN NAIROBI THIS 15<sup>TH</sup> DAY OF MAY 2015.**

**MARY M. GITUMBI**

**JUDGE**