Kabiru v Industrial Commercial Development Authority & another (Civil Appeal 10 of 2019) [2023] KECA 363 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 363 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 10 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

MARCH 31, 2023

BETWEEN

OMARI KABIRU ..... APPELLANT

AND

INDUSTRIAL COMMERCIAL DEVELOPMENT AUTHORITY .... 1ST RESPONDENT

LAWRENCE SIFUNA ..... 2ND RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Bungoma (Ali-Aroni, J.) dated 8th November 2018, IN CIVIL SUIT NO. 19 OF 2000)

JUDGMENT

1. This appeal came before us for hearing and determination on November 22, 2022. The appellant Omari Kabiru, in his memorandum of appeal dated January 18, 2019, raised five grounds of appeal stating that:

    i) The trial judge scantly, narrowly and hesitantly analyzed or avoided concrete issues and instead dismissed the suit on a preliminary locus issue.

    ii. The trial judge erred in law and fact and made contradictory statements about interest in the loan agreement and his lack of capacity in bringing the suit.

    iii. The trial judge erred in law and fact by not acknowledging that his subsequent filing for and obtaining grant of letters of representation and amending the pleadings cured the locus defect.

    ii. The trial judge erred in law and fact by acknowledging the irregularities surrounding the transfer of the suit property and making no remedial orders or damages in his favor.

    iii. The trial judge erred in law and fact by failing to appreciate the evidence presented."

2. To contextualize the issues before us, we will give a brief background of the case. The appellant herein is the surviving widower of Rukia Nyakinywa (the deceased) who as at the material time the registered proprietor of land parcel number E.Bukusu/S.Kanduyi/4026 (hereinafter referred to as the suit property). The appellant entered an agreement with the 1st respondent on March 26, 1996 for a loan in the amount of Kshs 500,000/=, against the title of the suit property signed by the deceased, to be repaid at an interest rate of Kshs 24% per annum (Kshs 14,617.70/= monthly).

3. In the year 2000, the appellant came to court by way of plaint, seeking for the trial court to restrain the 1st respondent from auctioning the suit property, in his capacity as the holder of a power of attorney for the deceased. The court granted preliminary orders on January 4, 2002 in favor of the appellant, restraining the 1st respondent and their agents and or servants, from alienating or otherwise disposing of the suit property. A stay was issued against the sale of the suit property pending inter partes hearing.

4. In 2005, the appellant filed a notice of motion application in the trial court seeking temporary orders to restrain, the 1st respondent from disposing of the property and further vacate any purported sale of the land. In response to this application the 1st respondent raised a preliminary objection on the grounds that the appellant had no *locus standi* to prosecute the suit, because the power of attorney the appellant relied on to make the application was extinguished upon the death of the deceased. Further that, the appellant only possessed limited power of attorney to dispose of the property and not to sue. The preliminary objection was upheld and the application was dismissed on July 10, 2007.

5. The appellant filed an amended plaint on June 21, 2009 in his own capacity, against the 1st and 2nd respondents, alleging that he entered into a loan agreement with the 1st respondent at an agreed interest of 18% and that the 1st respondent had failed to serve him with statements of accounts and unilaterally adjusted the interest rate in breach of their initial agreement. He further alleged that the 1st respondent fraudulently transferred the title to the suit property in disregard of the stay orders granted earlier by the court. The elements of fraud enumerated were that; the 1st respondent auctioned the suit property without public advertisement or notification; failed to disclose the actual market value of the property and sold it at a significantly lower value; transferred the title five years after the purported auction and transferred title while the original chargee was deceased.

6. During the plenary hearing PW1, Omar Kabiru, testified that he had paid up most of the loan amount and had a balance of Kshs 120,000/= and that he only defaulted payment when he and his wife were arrested and remanded in a separate case. PW1 told the trial court that although the deceased was the registered owner of the suit property, they had both developed it and the loan he took helped furnish the developments. He asserted that soon after the deceased's death he obtained a limited grant to preserve the deceased's interests. He then obtained an injunction stopping the bank from disposing of the suit property, which the bank breached and failed to notify him of the auction.

7. PW1 further testified that he only found out that the bank had sold off the property in 2011 without valuing it. He estimated the value of the suit property to be between ksh.70 million and Ksh.100 million. He contended that he later obtained another injunction on 1st February 2013 restraining the 2nd respondent from disposing of the property, but the 2nd respondent breached the said orders and transferred the property on May 16, 2016.

8. PW1 also stated that the 1st respondent has no record of selling the property to the first alleged buyer in 2003, who bought the property for Kshs 800,000/= and instead, there is an agreement for sale between one Margaret and the 2nd respondent dated July 21, 2004, purporting to sell the suit property for Kshs 2,500,000/=. He asserted that he conducted a search in 2005, and found that the suit property was still registered in the name of the deceased. On cross examination, PW1 denied ever absconding and

going to live in Uganda and asserted that he did not repay the loan amount on time because he had financial difficulty.

9. DW1, Lawrence Sifuna stated that he did not know when the ownership of the suit property changed from the deceased to one Margaret Wanyonyi, but that the said woman approached him one day and notified him that she had bought the suit property and that henceforth, he was to make rental payments to her. Margaret Wanyonyi had receipts evincing the sale and he later bought the suit property from her at a price of Kshs 2,500,000/= in 2004. He denied being served with any injunction, or going to court in 2013 and stated that he later sold the suit property to the King Jesus Faith in 2016 for Kshs5,000,000/=.

10. Upon cross examination, he conceded that he received the court process documents in 2014. He urged that he does not have any evidence to show that there was a sale because he did not have a lawyer then and neither did he conduct a search of the suit property before he bought it from Margaret. He contended that the transfer of title to him was done at the request of Margaret, vide a letter addressed to the 1st respondent asking them to transfer the property in his favor. He also admitted that the 1st respondent was aware that the owner of the suit property had died prior to auctioning it.

11. DW2, Zephania Ronoh, a debt recovery officer for the 1st respondent testified on its behalf denying any claims of fraud. On cross examination, DW2 stated that the officials of Eshikholi were the auctioneers in this matter and that the 1st respondent served them with the statutory notice through registered mail. He however did not attach any receipt evincing this claim. He also stated that the borrower was given notice of three months but admitted that a copy of the notice was not part of his bundle of documents.

12. DW2 conceded that he was aware of an injunction in the matter, but claimed that the order was only applicable for one year. He did not know when the 1st respondent made an application to lift the injunction orders. He pointed out that in their letter to the auctioneers they indicated the price of the property to be Kshs1,940,003.35/=, pegged on valuation by one Mr. Owori, although no valuation report is on record. It was also his testimony that the suit property was auctioned on November 7, 2003 and sold for Kshs800,000/= to the highest bidder although, again, there are no documents on record to signify the sale. He denied that the 1st respondent directly sold the suit property to the 2nd respondent

13. The matter was heard and determined on November 8, 2018 before Ali-Aroni J (as she then was). The trial Judge found that the appellant had no locus to institute the case because he brought the case months before the power of attorney was donated and that he ought to have instituted the case as an administrator of the estate of his deceased wife. The court concluded that the suit was incompetent ab initio and dismissed it.

14. Being dissatisfied with the decision of the trial court, the appellant preferred this appeal predicated on the five grounds set out above. The appeal was canvassed by way of written submissions.

15. In the submissions dated December 21, 2021, Counsel for the appellant urged on the issue of locus, that the appellant was an administrator of the estate of the deceased at the time he filed the amended plaint dated June 21, 2009 and therefore, any previous anomalies in the initial plaint were cured. Counsel also contended that because the question of the appellant#s locus had already been dealt with earlier, the court should not have dealt with it a second time and that the decision of the court, was *res judicata#*. Counsel cited and relied on the cases of Nation Media Group Limited v Geofrey Maganya CA 149 of 2013 and Kenya Commercial Bank Ltd v Benjoh Amalgamated Limited CA Appeal No 107 of 2010 in support of this contention.

16. Regarding the sale of the charged property, Counsel contended that the sale was fraudulent because it was not done procedurally. Counsel cited the case of *Trust Bank Ltd v Okoth* CA No 177 of 1998 and submitted that the 1st respondent had not given any notices prior to and after the auction of the

suit property contrary to section 74(1) of the *Registered Land Act*. Counsel further submitted that no valuation report was filed prior to the auction and that the respondents had made contradictory statements regarding the sale amount. He urged that the actual value of the property is between ksh.70 million and Kshs 100 million.

17. The respondents did not file any submissions despite having taken directions to do so during case management. On November 15, 2022 when the matter came up for highlighting of the submissions, Mr. Khakula and Mr. Kituyi did not attend court. The hearing notice displayed in Court indicated that all three counsel on record had been served on November 1, 2022. Learned Counsel Mr. Sichangi appeared for the appellant and told the Court that he had served his submissions on both Mr. Khakula for the 1st respondent and Mr. Kituyi for the 2nd respondent. That Mr. Khakula had thereafter, served him with submissions dated December 8, 2022 in response, while Mr. Kituyi did not respond. However, the said submissions by Mr. Khakula are not in the record. The Court of Appeal Registry at Nakuru requested both the appellant#s and the 1st respondent#s counsel vide an email dated March 3, 2023 to avail the said submissions, but none responded. We therefore proceeded on the basis of the pleadings and the submissions that are on record.

18. We have carefully considered the grounds of appeal, the submission and authorities cited, the entire record of appeal and the law. This is the first appeal and our role as the first court of appeal is as was pronounced in the case of Abok James Odero T/A A.J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR that:

> " .....we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2 EA 212 wherein the Court of Appeal held inter alia that:
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> > "On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

19. The main question that begs to be answered in this matter is whether the amended plaint cured the issue of the lack of *locus standi* on the part of the appellant. Any other issues will be dependent on the finding on the question of locus.

20. The appellant filed the original plaint on February 12, 2000. It is not clear from his pleadings in what capacity he brought the suit in the first place. In April of the year 2000, the appellant showed up with a power of attorney said to have been donated by his wife (now deceased). We have however, not had the opportunity of going over this part of the record because it is not part of the record of appeal before us. However, the power of attorney is said to have been limited only to the disposal of the property. At the material time, the suit property was registered in the name of Rukiah Kinywa Mwangi (deceased). The record indicates that the deceased died on April 22, 2001 at the Provincial General Hospital, Kakamega.

21. This Court has on several instances discussed the issue of *locus standi*. In *Alfred Njau & Others v Nairobi City Council* (1983) eKLR the Court defined the term *locus standi* as:

> " The term *locus standi* means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such a proceeding. Therefore, the effect of the judge's finding here, which was made after hearing the evidence, and not treated as an isolated issue, the latter course being disapproved in the particular circumstances of that case by the House of Lords in IRC v National Federation of Self Employed and Small Businesses Ltd (supra), was that the appellant had no right to bring or to appear in this suit against the Council"

22. At the time of bringing the initial suit, the appellant had neither the power of attorney, nor had he obtained the letter of administration for the estate of the deceased. He therefore lacked capacity because the suit was in relation to property, to which he was a stranger, even if he was the husband to its owner.

23. The appellant took issue with the trial judge for re- evaluating his *locus standi* even though he had already been adjudged incapable of bringing the suit in the first place. He also alleged that the trial judge failed to consider his amended plaint which he contends rectified his status to that of an administrator of the estate of the deceased. The appellant filed the amended plaint on June 21, 2009 amending his advocates for the suit as well as that of the 1st respondent. The appellant also added the 2nd respondent to the suit and laid down particulars of the alleged fraud committed by the 1st respondent.

24. Amendment of pleadings is contemplated under Order 8 of the *Civil Procedure Rules*. Rule 1 provides that:

> " A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed".
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> Rule 3 provides that:
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> > "Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings".

Further, on Order 8 Rule 3 provides that:

> " An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under sub rule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued"

25. Amendment of a pleading does not cure the locus of a party. The wording of Order 8 is clear on the intention of the provision, which to our mind is that, it is meant to correct errors within the pleadings. The appellant cannot therefore claim to have cured locus in his original plaint by amending the initial plaint upon acquiring the status of an administrator in the estate of the deceased. The appellant had no capacity to bring the initial suit and he cannot purport to amend it and acquire capacity in retrospect in the same suit.

26. Furthermore, in as much as the appellant submitted that he indicated that he was amending the plaint and intended to pursue it in his capacity as an administrator in the estate of the deceased, nowhere in

the amended plaint did he indicate this. Nowhere in his amended plaint or the verifying affidavit did the appellant state that the plaint was in his capacity as an administrator of the estate of the deceased. Instead, the plaintiff seems to infer that the suit property belongs to him. Paragraph 5 of the amended plaint reads as follows;

> " That the 1st defendant is in breach of the agreement since they are threatening to sell the security without giving him notice of intention to sell the Plaintiff's property."

27. The appellant is represented by an advocate who is conversant with the ordinary filing of pleadings and their structure. The Amended plaint cannot be said to have been filed in the appellant#s capacity as an administrator of the estate of the deceased, because the filing cannot be anticipatory. We are guided by this court#s decision in *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR where the Court rendered itself as following:

> " It is common ground that at the time of institution of the said summons, the respondent was not in possession of a grant of letters of administration. The respondent acknowledges that he may have known of the existence of a Will, but according to him he doubted the validity of the Will. In his view therefore, the deceased died intestate. As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased's estate. That may well be the case, but in our view the position in law as regards *locus standi* in succession matters is well settled. A litigant is clothed with *locus standi* upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In Otieno v Ougo (*supra*) this Court differently constituted rendered itself thus:
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> > "... 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."
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> Besides, the respondent seemed to have confused the issue of *locus standi* and a cause of action. In *Alfred Njau & Others v City Council of Nairobi* (*supra*) this Court had occasion to discuss the two.

28. The appellant also takes issue with the court noting that he has a right of action by denying him audience based on his lack of capacity in the suit. It is apparent to this Court that the appellant has misapprehended the place of *locus standi* and that of cause of action. The two though qualifying each other are not entirely interdependent. The right cause of action is dependent on *locus standi*. The Court in the case of *Alfred Njau & others vs Nairobi City Council* (*supra*), distinguished these two terms as follows;

> " Lack of *locus standi* and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas *locus standi* is the right to appear or be heard, in court or other proceedings; ...
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> To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no *locus standi* means he cannot be heard, even on whether or not he has a case worth listening to."

29. It therefore matters not that the appellant had a cause of action or not, but that the appellant lacked the requisite *locus standi* to seek the relief from the court without first obtaining the correct power of attorney, that is when the deceased was still alive and after the death of the deceased making the application in the correct capacity. The appellant rightly obtained the letters of administration in the

estate of the deceased but neglected to institute a suit in that capacity before the court. That is the only way in which the appellant could challenge the alleged fraud over the deceased#s property.

30. Having found that the appellant lacked the capacity to be heard before the court in the suit before the trial court, there would be no point of looking into the other issues raised because, the trial court rested its decision on the appellant#s lack of locus.

31. From our analysis of the law and the conclusion arrived at we find no basis for upsetting the impugned judgment. Consequently, we hold that this appeal lacks merit and accordingly it is dismissed with no orders as to costs.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF MARCH, 2023

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR