



**Shikutwa v Mwashu & 4 others (Environment and Land Appeal
8 of 2023) [2024] KEELC 6165 (KLR) (19 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6165 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL 8 OF 2023
E ASATI, J
SEPTEMBER 19, 2024**

BETWEEN

TOM KHANYANGA SHIKUTWA APPELLANT

AND

RODGERS MWASHI 1ST RESPONDENT

DORCAS MUSONYE 2ND RESPONDENT

THOMAS MASAMBU AMUHAYA 3RD RESPONDENT

HESBON NATSE MAKANI 4TH RESPONDENT

KENNEDY SHUMA YAKUKULA 5TH RESPONDENT

JUDGMENT

1. The Appellant herein was the plaintiff in Vihiga pm elc case no. E035 of 2023 (herein referred to as the suit) wherein he sued the Respondents over a parcel of land known as Kakamega/Cheptulu/211 (the suit land) which he claimed belonged to him. Vide the plaint dated 7th June 2023 the appellant pleaded that the Respondents had interfered with the suit land and created illegal title deeds and illegal roads and refused to vacate the same. He therefore sought for a declaration that the contested land is an easement, a declaration that the plaintiff has a right to enjoy the easement, a declaration that the actions of the Respondents violates the rights of the appellant, an order of permanent injunction restraining the Respondents from interfering with the appellant’s right to enjoy, use and/or access the contested land and costs.
2. The Record of Appeal shows that in addition to filing the 1st, 2nd and 3rd Defendants’ Statement of Defence dated 4th July 2023, the Respondents also filed Notice of Preliminary Objection dated 4th July 2023 on the grounds that the plaintiff lacked locus standi to present the suit and the application, that the issues canvassed in support of the suit and the application were sub-judice under the provisions



of section 6 of the Civil Procedure Act, the Notice of Motion application was res judicata and that the plaintiff was a perjurious and vexatious litigant.

3. The record further shows that the Preliminary Objection was heard by the trial court which vide its Ruling delivered on the 5th October 2023 found that the appellant lacked locus standi as there was no evidence that the suit land belonged to him, that the suit was sub-judice in view of an existing Succession Cause and that the Preliminary Objection therefore had merit. The trial court then proceeded to uphold the preliminary objection and strike out both the application and the suit, with costs.
4. Dissatisfied with the Ruling, the Appellant filed the present appeal vide the Memorandum of Appeal dated 10th October 2023. The appellant seeks for orders that the appeal be allowed, the Ruling delivered on 5th October 2023 be set aside and costs be provided for. The grounds of appeal as set out in the Memorandum of Appeal are that:-
 - a. The Honourable Magistrate failed in law to consider the appellant had raised the issue of implication and forgery in the witness statement but failed to give time to interrogate and cross-examine the witness by failing to hear him before pronouncing itself.
 - b. The Honourable Magistrate failed even after the appellant had told the court that they hoodwink and were hiding behind Succession Cause No. 111 of 2021 as a scapegoat for there is a diary and cause-list on 19th December 2022 before Hon. Justice P.J Otieno court room No. 1 at 9.00 am and the ruling was delivered for they created false reality.
 - c. The Honourable Magistrate failed to consider the actual fact that they admitted that there was Criminal Case No. 173 of 2001 which was heard, determined and yielded orders included nullification of L.R No. 1005, 1006 and 1007 but still they engaged Ministry of Land and Physical Planning to do boundary confirmation illegally but the Honourable court ignored.
 - d. The Honourable Principal Magistrate at Vihiga Law Courts refused to recognize and acknowledge the Letters of Administration Grant as a valid document but when I was illegally arrested in Cr. Case No. 885 of 2018 the Principal Magistrate at Hamisi Hon. D. Ogal adopted the grant, it is on record.
4. Directions were given on 17/1/2024 that the appeal be canvassed by way of written submissions. The appellant filed written submissions dated 5th February 2024 wherein he submitted that the Magistrate failed to consider the actual fact that they had admitted that there was Criminal Case No. 173 of 2001 which was heard and determined and yielded orders including nullification of land parcel numbers 1005, 1006 and 1007. That the Magistrate failed to consider that the appellant had raised the issue of implication and forgery in the witness statement but failed to give him time to interrogate and cross-examine the witnesses by failing to hear him. The appellant invited this court to check and scrutinize the signature of Lona Shilwatso Kalia and the 1st, 3rd and 5th Respondents if they match. That the court refused to recognize the Letters of Administration. He relied on sections 80 (2), 82(a) and Section 79 of the Laws of Succession Act to submit that property of a deceased person vests in the personal representative.
5. Written submissions dated 9th April, 2024 were filed by Linet Shijedi Mayavi on behalf of the Respondents. Counsel submitted that as was held by the Court of Appeal in Trouistik Union International & Another- vrs Jane Mbeyu & Another (2008) 1 KLR 730 locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue renders the suit incompetent. That the suit was res-judicata to a Criminal case in which the land was reverted to the



original number Kakamega/Cheptulu/211 and that the appellant was estopped from re-litigating the matter.

6. Perusal of the Ruling appealed from shows that the application and the entire suit were struck out firstly for lack of locus standi on the part of the appellant/plaintiff and secondly, that the suit was sub-judice and res judicata.
7. I have considered the entire record of appeal and the submissions made. I am in agreement with the submission on behalf of the Respondents that locus standi is a fundamental and preliminary matter in respect of which the court must be satisfied that it exists before proceeding to entertain the matter.
8. The appellant described himself in the plaint dated 7th July 2023 as a “Proprietor of property known as Kakamega/Cheptulu/211” (the suit land herein) To prove the proprietorship he annexed to the plaint a copy of Grant of Letters of Administration Intestate dated 26th June 2020. Perusal of the said Grant shows that the same were issued in Kakamega High Court Succ. Cause No 87 of 2003 in respect of the estate of one Paul Shitogo Shikutwa alias Shitogo Shikutwa to the appellant herein and one Lona Shilwatso Kalia.
9. As an administrator of the estate of the registered owner of the suit land, the appellant could have the locus standi to bring the suit on behalf of the estate of the deceased. However firstly, it is not stated in the plaint that the suit was brought by the appellant in his capacity as the Administrator of the estate of the deceased, the appellant brought the suit in his capacity as the proprietor of the suit land. Secondly and more importantly, the Grant was made to two people yet the suit was filed by the appellant alone. There was no evidence that the other administrator, Lona Shilwatso Kalia, gave her consent or authority for the appellant to file the suit.
10. Order 1 rule 13 Civil Procedure Rules requires that where one party has to appear, act or plead for another or others that other or others shall give consent in writing. Section 82 of the Law of Succession Act envisages a situation where the Administrators as appointed in the Grant of Letters of Administration act as one or as a unit on behalf of the estate. In the case of Re estate of Makoha Idris (2029) eKLR the Court held that

“It must be stated that even though there are four administrators in places, in law there is only one administration or representation to the estate of the deceased. The four administrators hold one grant.....The powers conferred on the administrators by section 82 of the Law of Succession Act are exercisable by all of the administrators named in the grant and all the duties imposed on administrators by section 83 of the act fall on all four Administrators.
5. I find that the court rightly held that the appellant lacked locus standi to file the suit. I find no reason to interfere with the findings and decision of the trial court. I find no merit in the appeal which I hereby dismiss with costs to the Respondents.

Orders accordingly.

JUDGEMENT DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 19TH DAY OF SEPTEMBER, 2024 AND VIRTUALLY.

E. ASATI,

JUDGE.

In the presence of:

Ajevi Court Assistant.



Appellant present in person.

Mayavi for the 1st, 2nd, 4th and 5th Respondents.

