



Abdallah v Realty Brokers Limited & another (Environment & Land Case E048 of 2023) [2024] KEELC 7046 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7046 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E048 OF 2023
EK MAKORI, J
OCTOBER 24, 2024**

BETWEEN

MWANAMWINYI NASORO ABDALLAH PLAINTIFF

AND

REALTY BROKERS LIMITED 1ST DEFENDANT

THE CHIEF LAND REGISTRAR MOMBASA 2ND DEFENDANT

RULING

1. The Plaintiff filed a plaint dated 14th November 2023 alleging that she is the personal representative of the Estate of one Mwanatumu Riziki Mwinyi, who she alleges is the beneficial and registered owner jointly with others of the parcel of land being plot No. 30/IV/MN, CR, Number 7234, measuring approximately 185 Acres – the suit property.
2. The Plaintiff alleges that she retained proprietary rights to the suit property until she noted some activity on the property on or around September 2023, thus prompting her to apply for a search at the land registry through her lawyers. She states that the search revealed that the 1st Defendant was the registered proprietor of the suit property allegedly concerning 5 acres of land. This prompted her to file the instant suit seeking the following orders:
 - a. A declaration that the purported transfer dated 17th January 1995 registered at the Lands Registry in Mombasa on the 24th January 1995 as entry number 22 concerning Plot Number 30/IV/MN, CR. Number 7234, measuring approximately 185 acres, is irregular, illegal, and fraudulent and a violation of the Plaintiff's Proprietary Rights, and the same is void ab initio and is hereby revoked.
 - b. An order directing the 2nd Defendant to rectify the register by cancelling the purported registration of the transfer with respect to Plot Number 30/IV/MN, CR. Number 7234,



measuring approximately 185 acres, and to revert the apportioned 5 acres to the Plaintiff's property.

- c. A permanent injunction restraining the Defendants, whether by themselves, their agents and employees and servants, from dividing, selling, transferring, interfering, alienating, entering, remaining on, or in any manner whatsoever dealing with the property Plot Number 30/IV/MN, CR. Number 7234, measuring approximately 185 acres.
 - d. Any relief this Court may deem fit to grant.
 - e. Cost of the suit.
3. The Plaintiff contemporaneously filed a Notice of Motion application dated 14th November 2023 seeking the following orders:
- a. Spent
 - b. That a temporary injunction is issued against the 1st Defendant restraining it, whether by themselves, their agents, employees, and servants, not to divide, sell, transfer, and interfere, alienate, or in any manner whatsoever deal with the suit property being Plot Number 30/IV/MN, CR. Number 7234, measuring approximately 185 acres, is pending the hearing of this application.
 - c. That the Court be pleased to grant a temporary injunction against the Defendants, whether by themselves, their agents, and employees and servants, from dividing, selling, transferring, interfering, alienating, or in any manner whatsoever dealing with the suit property being Plot Number 30/IV/MN, CR. Number 7234, measuring approximately 185 acres, pending the hearing of this suit herein.
 - d. That costs of the application be provided.
4. The 1st Defendant, for its part, filed a Notice of Preliminary Objection dated 13th May 2024 and a Notice of Motion Application on the even date.
5. The 1st Defendant's Preliminary Objection is predicated on the following grounds:
- a. The Plaintiff lacks the locus standi and capacity to file the suit, having failed to establish that she is the duly registered proprietor and that her beneficial interest has not been registered over the suit property, Plot Number 30/IV/MN, CR. Number 7234, which measures approximately 185 acres.
 - b. The suit in its entirety is frivolous, vexatious, and an abuse of the Court process since it fails to disclose a reasonable cause of action against the 1st Defendant since the Plaintiff does not have any registrable interest over the suit property Plot Number 30/IV/MN—CR NUMBER 7234, measuring approximately 185 acres.
 - c. The Plaintiff failed to effect service of the summons to enter appearance contrary to Order 5 Rules 1 and 3 of the Civil Procedure Rules.
 - d. The jurisdiction of this Court concerning the 1st Defendant has not been adequately invoked since the Plaintiff failed to effect service on either the secretary, director, or principal officer of the corporation or the registered office of the corporation, contrary to Order 5 Rule 3 of the Civil Procedure Rules.



- e. Three law firms have drawn the Plaintiff's pleadings, affidavits, and notices. It is unclear which firm is properly on record with instructions to represent the Plaintiff contrary to Order 9 of the Civil Procedure Rules.
6. The 1st Defendant's Notice of Motion application seeks the following prayers:
 - a. Spent
 - b. That the Court be pleased to strike out the Plaintiff's pleadings dated 14th November 2023, as against the 1st Defendant.
 - c. That the Court be pleased to strike out the Notice of Motion Application dated 14th November 2023, which is grounded on a fatally and incurably defective pleading.
 - d. The Plaintiff bears the costs of the application and the suit against the 1st Defendant.
 7. The Court directed that all the Motions be heard simultaneously and that parties file written submissions on the same. There was compliance. I frame the issues for the determination of this Court as follows:
 - a. Should the 1st Defendant's Notice of Preliminary Objection be upheld?
 - b. Should the 1st Defendant's Notice of Motion Application dated 13th May 2024 seeking striking out the suit and the application by the Plaintiff be allowed as prayed?
 - c. Is Plaintiff entitled to the reliefs sought, in the nature of an injunction in her Notice of Motion application dated 14th November 2023?
 - d. Who should bear the costs?
 8. The Preliminary Objection, being the first to be addressed, holds significant weight as it has the potential to determine the outcome of the entire suit. Therefore, it will be the starting point of our discourse.
 9. The parties cited relevant judicial precedents on what a Preliminary Objection entails. A preliminary Objection rests on the proposition that when raised, its fundamental achievement will have a bearing on disposing of a matter because it raises pure points of law. It also underscores the crucial role of the Court in managing time and resources, as it summarily flags out a frail and hopeless suit that, if admitted to full trial, will be a waste of judicial time and will not serve the interest of justice. The Court's commitment to managing time and resources efficiently is germane in handling the business before it.
 10. When a Preliminary Objection is raised, one will not be required to look elsewhere to find an answer as to whether it is sustainable or not but look at the pleadings and discover that the suit is either a non-starter or is fit for a full trial on its merits - see the works of Ogola J. in *DJC v BKL (Civil Suit E021 of 2021)* [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling):

“The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

“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”.

8. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

11. The parties also cited various judicial precedents and provisions of the law regarding what constitutes locus standi, provisions on recognized agents and legal representations in a suit, acquisition of proprietary rights, and service on corporations and how it should be reckoned. I will revert to the same below if necessary.
12. The Preliminary Objection raised issues that different law firms drafted the pleadings and averments for the Plaintiff, and who should legally represent the Plaintiff in this suit cannot be deduced from the record. The Plaintiff is not the registered owner of the suit property and has no proprietary rights to propagate here as she is not the registered owner based on the history disclosed by the green card. She has no locus standi to file the suit. The special limited grant (ad colligenda bona) does not give her the right to bring and sustain the current suit or replace the deceased. The summons taken out was never served on the Director, Secretary, or Principal Officers of the 1st Defendant as required by law.
13. I will start with the issue of locus standi since it goes to the root of the case, particularly on the special limited grant ad colligenda bona.
14. The 1st Defendant avers that it is trite law that if a party lacks the locus standi to file a suit, then the Court is divested of jurisdiction to determine the same. This point of law should be resolved at the earliest possible opportunity.
15. The 1st Defendant believes that Plaintiff has no locus standi, defined as the right to be heard. The Courts have held that a person must have sufficient interest to sustain his standing to sue in a Court of Law. This was the position articulated in *Law Society of Kenya v Commissioner of Lands & 2 others* [2001] eKLR.
16. According to the 1st Defendant, as indicated in the pleadings, Plaintiff expressly admitted that she is not the registered proprietor of the suit property. She further failed to express in her pleadings what registrable interest she has over the suit property. She just alleged that she is the great-granddaughter of someone who allegedly has a beneficial interest in the suit property but has not indicated in the pleadings what specific beneficial interest this alleged person holds. Furthermore, nothing in the pleadings demonstrates that the alleged great-grandmother holds a beneficial interest in the suit property.
17. The 1st Defendant asserts that it should be noted from the pleadings, specifically paragraph 4 of the plaint, that Plaintiff is relying on the special limited grant of letters of administration ad colligenda



bona procured in respect of the estate of her deceased great-grandmother to institute the suit against the Defendants. Under Section 67 of the *Law of Succession Act* and Rules 36 and 37 of the Probate and Administration Rules, the purpose of a special limited grant ad colligenda bona is purely for the collection and preservation of the deceased's estate. It cannot be used to institute or defend a suit – see *Elijah Nderitu Gachaga v Francis Gakuu Gachaga & 2 others* [2019] eKLR as reinforced in *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva* (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR, where the Court affirmed the position as enunciated by the Court of Appeal in *Morjaria v Abdalla* [1984] eKLR, that if the special grant of letters of administration ad colligenda bona does not include the words ‘to institute a suit,’ then the same cannot be used to bring a suit and the purpose is only limited as indicated in the grant.

18. The plaintiff, on the other hand, states that the special limited grant ad colligenda bona held by the Plaintiff on the face of it is for - “Collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate without the power of distribution.” The plaintiff states that during the administration of the estate in September 2023, she noted activities on the suit property wherein unknown persons claimed that they owned a part of the property aggregating to 5 acres forming part of the estate. The grant possessed by Plaintiff is sufficient to allow Plaintiff to propagate the current suit as part of the 5 acres allegedly registered in the name of the 1st Defendant form part of the estate, which needs to be collected and preserved. The decisions in *Kikaya v Mango & 2 Others* [2023] KEHC 23205(KLR) (Civ) (5 October) (Ruling) and *Martha Ndiro Odero* (Suing as the administrator and personal Representative of the estate of Willy Patrick Ochieng Ndiro (Deceased) v Come cons Africa Limited [2015] eKLR are cited to support the Plaintiff’s contention that the Court needs to read the wording of the special limited grant and discover the purpose. In this case, the wording – “and doing such acts as may be necessary for the preservation of the estate - includes the filing of suit.
19. I have considered the wording of the special limited grant ad colligenda bona and the authorities cited by the 1st defendant. I believe the same did not confer powers on the Plaintiff to sue and act as the deceased. I agree with the submissions by the 1st Defendant that - locus standi has been defined as a right to be heard before a Court of law. The Courts have further held that a person must have sufficient interest to sustain his standing to sue in a Court of Law. This was the position as pronounced in *Law Society of Kenya v Commissioner of Lands & 2 others* [2001] eKLR, where the Court held thus:

“The first point to be decided is whether the plaintiff has the necessary locus- standi to file and prosecute the suit. Locus-standi signified a right to be heard. A person must have a sufficiency of interest to sustain his standing to sue in a Court of law. That was the holding in *BV Narayana Reddy –vs- State of Kamataka* Air (1985) Kan 99, 106 (*The Constitution of India*, ARD 226). I adopt the same as a correct proposition of the law, and I so hold.”
20. From the pleadings, the Plaintiff expressly admitted that she is not the registered proprietor of the suit property. She has further failed to express in her pleadings what registrable interest she has over the suit property. She has just alleged that she is the great-granddaughter of someone who allegedly has a beneficial interest in the suit property but has not indicated in the pleadings what specific beneficial interest this alleged person holds. Furthermore, nothing in the pleadings demonstrates that the alleged great-grandmother holds a beneficial interest in the suit property.
21. Paragraph 4 of the plaint states that Plaintiff relies on the special limited grant of letters of administration ad colligenda bona procured regarding the estate of her deceased great-grandmother to institute the suit against the Defendants. Under Section 67 of the *Law of Succession Act* and Rules 36 and 37 of the Probate and Administration Rules, the purpose of a special limited grant ad colligenda bona is purely for the collection and preservation of the deceased's estate. It cannot be used to institute



or defend a suit. See the holding in *Elijah Nderitu Gachaga v Francis Gakuu Gachaga & 2 others* [2019] eKLR where the Court held as follows:

“It is the finding of the Court that the Plaintiff, having filed suit on the basis of a grant ad colligenda, is not clothed with locus to file suit. The Court finds that the cause of action is incontestably wrong noting that locus is an issue that goes to the root of the case and that all proceedings here are a nullity since the Plaintiff did not have locus standi to file the suit. I can do no better than to cite Denning, L.J. in *Macfoy v United Africa Co. Ltd.* [1961] 3 ALL ER 1169 at 1172, who stated that:

“If an act is void, it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.”

In other words, the issue of locus is not a technicality, but it goes to the root of the case.

As to whether the Environment and Land Court has jurisdiction over grant of letters of administration, my answer to this is that the issue at hand is best interpreted as one on locus to bring suit before the Environment and Land Court as opposed to seeking to strike out and /or impugn or revoke a grant which is purely in the province of the Succession Court. To that extent, I find that the jurisdiction of the Court has not been ousted.

It is the finding of the Court that the Preliminary Objection is a pure point of law. It is not a matter that requires exercise of my discretion. The issue is clear from the pleadings, and the record does not require the Court to investigate by way of evidence.

In the upshot, the Preliminary Objection is merited. It is allowed.”

22. This position was further bolstered in *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva* (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR, where the Court followed the position as voiced by the Court of Appeal in *Morjaria v Abdalla* [1984] eKLR, that if the special grant of letters ad colligenda bona does not include the words to institute a suit, then the same cannot be used to institute a suit and is only limited to the purpose indicated in the grant the Court held thus:

“Our courts have also dealt with the above issue. In the case of *Morjaria vs. Abdallah* (supra), the Court of Appeal expressed itself in the fifth and sixth holdings as follows: -

“The purpose of a grant of letters of administration ad colligenda bona is to collect the property of the deceased person where it is of a perishable or precarious nature and where regular probate and administration cannot be granted at once.

The appointment of a person as an administrator ad colligenda bona in respect of a deceased person cannot include the right to take the place of the deceased for the purpose of instituting an action or appeal, especially where there is a specific provision for that purpose in paragraph 14 of the Fifth Schedule to the *Law of Succession Act*.”

The above is the prevailing general position in law. However, there are instances where such a Limited Grant of Letters of Administration Ad Colligenda Bona is tailored in a manner as to allow for the institution of an action or where the record expressly provides for such. In such cases, the focus will no doubt shift to the contents and wording of the grant or the record as opposed to the type of the grant.



I believe I have said enough on the issue. Back to the matter at hand, I have already reproduced the wording of the limited grant of letters of administration ad colligenda bona above. I have also carefully gone through both the typed and the handwritten record before the trial court. Looking at the grant and the record, it is clear that the limited grant of letters of administration ad colligenda bona issued to and produced in evidence by the Respondent herein does not benefit from the above exceptions. The same was issued for the specific purpose “... only of collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the same and until further representation be granted.

The argument by the Respondent that the word ‘collecting’ in the limited grant of letters of administration ad colligenda bona gave power to the Respondent to institute a suit for compensation as the award would form part of the estate of the deceased can, with respect to the Learned Counsel, only be described as ‘misplaced if not misconceived.’ To me, due to the limited nature of the grant of letters of administration ad colligenda bona, if a party in the process of collecting the estate is faced with the need to institute a suit arising from any cause of action, then that becomes the realm of another type of a grant unless the exceptions seen above come to play. The Respondent’s argument is hence for rejection and hereby fails. On an equal footing, the argument that the issue of locus standi was not raised before the trial court in the first instance cannot stand. I take that position since the issue was raised in the Memorandum of Appeal and both parties responded to it in their respective submissions and made references to judicial decisions on the same. The failure to raise the matter before the trial court, although inappropriate, does not, therefore, amount to a bar against the same being raised on appeal, especially when the same was raised timeously and with liberty to all parties to respond to it. Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.

In this matter, therefore, the Respondent lacked the requisite locus standi to institute and/or maintain the suit. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked the legal capacity to do so. They are indeed a nullity and, as such, lack the legal leg to stand on.”

23. When raised, a Preliminary Objection aims to determine a matter in limine. It is based on a pure point of law. The Court must only look at the pleading; no other evidence is required. The special grant of administration ad colligenda bona issued to the Plaintiff dated 6th June 2023 was limited to:

“Collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate without power of distribution.”

24. According to the authorities cited by the 1st Defendant, the grant did not empower the Plaintiff to file suit. If that was the intention, the grant should have disclosed the same. By the Plaintiff’s invitation, the words – “such other acts as may be necessary for the preservation of the estate” as to -including filing suit, with due respect, is erroneous. The Plaintiff needed to obtain a specific grant tailored to file suit.



25. To the extent, and without considering the other Objections raised here and since locus standi goes to the root of the matter, the Preliminary Objection succeeds, the Court downs tools to the extent that the entire suit and the application for an injunction are struck out with costs to the 1st Defendant.
26. The Plaintiff will be at liberty, subject to the limitation of actions, to bring fresh suit when clothed adequately with the necessary locus standi.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 24TH DAY OF OCTOBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Gathu, for the Plaintiff

Mr. Isika, for the 1st Defendant

Happy: Court Assistant

In the absence of:

2nd defendant.

