



**Gump v Otieno (Environment & Land Case E028 of 2024)
[2024] KEELC 13589 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13589 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E028 OF 2024
FO NYAGAKA, J
NOVEMBER 28, 2024**

BETWEEN

LUCY EVELYN GUMO PLAINTIFF

AND

PAUL ROBERT OTIENP DEFENDANT

RULING

(On preliminary objection to a suit, on lack of capacity - Letters of Administration)

1. The plaintiff filed this suit through a Plaint dated 23/07/2024. She sought a number of reliefs against the Defendant, amongst which were, that a permanent injunction be issued restraining the defendant by himself, through his agents from selling, transferring or otherwise disposing of property number Kimondo/Kimondo Block 14/Kimiso “B”/5 (herein referred to as “the suit property”) and an order directing the Registrar of Titles title to rectify the Register by cancelling the entry transferring the suit property to the Defendant and reinstate the registrations of the suit property to the plaintiff’s late father’s Estate. She also sought costs of the suit and interest thereof. She pleaded that she had, since her childhood, resided in the United Kingdom where she now had acquired British citizenship. Further, the defendant is a close relative of hers by virtue of being first cousins as both their fathers were brothers.
2. She averred that the suit property was registered in her late father’s name up to and including the time of his passing. After his demise the suit property automatically vested in her late father’s Estate. Unknown to the Plaintiff, the defendant caused the title of the suit property to be transferred to his own name in a process conducted in an opaque and patently fraudulent manner.
3. Further, after the death of her father the property was to devolve to her late father’s Estate for distribution either vide probate or intestacy. The Plaintiff had since established that not only had the Defendant acquired illegal registration of the property in his own name but has in addition commenced the process of alienating suit property to other persons who have no familiar relations with her and siblings. The sale by the Defendant was at an advanced stage in conjunction with other members of



- the family and at this point was awaiting completion. She strongly believed the defendant not only lacked any color or right to dispose of the suit property as he was neither appointed by any testamentary instrument nor court as the administrator. The purported sale had no backing of the members of the family. The defendant, in receiving part of the proceeds of the sale, had not only failed to account for the money but also failed to disclose to the members of the family his activities for fear of being taken to task.
4. She prayed for the intervention of the court stating that there was no suit pending between them or any previous one. She verified the Plaint through an Affidavit she swore on 25/07/2024. To the plaint she annexed copies of three documents. This was a correspondence, dated 02/05/2024 between a company known as Cloud It Limited and Oloch and Company Advocates and a response to the said letter, from Njoki Mwani & Company Advocates. It was dated 15/05/2024. She referred to a Valuation Report on the same property.
 5. Upon Service of the summons to enter appearance the Defendant entered appearance and raised immediately a Preliminary Objection dated 12/08/2024. The objection was to be effective that the Plaintiff lacked capacity to institute a suit on behalf of the estate of her deceased father as she was not an administrator legally appointed by the court to administer the Estate hence the suit was misconceived, bad in law and fatally defective.
 6. When the preliminary objection was served upon the plaintiff, she filed a document titled “The Reply to Notice of Preliminary Objection dated 12/08/2024” and a Further Affidavit. The document was notarized in the United Kingdom by Peter J Harrison, Notary Public on 27/08/2024. This Court shall not summarize the contents of the document, for reasons to be given in the determination below. Suffice it to say that after the Plaintiff served the document on the defendant, he too filed a document titled “Further Affidavit in Support of the Respondent’s Preliminary Objection.” This court will not take its precious time to summarize the contents of the document for similar reasons to be given below, as stated above, in respect of the document filed by the plaintiff in response to the Preliminary Objection.
 7. The Preliminary Objection was disposed of by way of written submissions. The defendant filed his submissions dated 02/09/2024. He began by restating the contents of the Preliminary Objection and giving issues to be determined. He also summarized the prayers in the Application that accompanied the Plaint and the facts of the case. Then he cited verbatim Sections 3 and 82 of the [Law of Succession Act](#).
 8. He argued that Margaret Sikokuu Gumo and Oliver Magero Gumo were the two Administrators of the Estate of the Plaintiff’s deceased father, having been appointed in the year 2020. They were the people with legal capacity to institute the suit. Therefore, the plaintiff had no locus standi to institute the suit on behalf of the Estate of the deceased.
 9. They relied on Kipngetich Kalya Kones (suing as the administrator of the Estate of Kipkalya Kiprono Kones (deceased) versus Wilson Kiplagat Kones [2021] eKLR where the learned judge held that locus standi is a primary issue such as jurisdiction The judge then found that since the Plaintiff was not an administrator of the Estate of the deceased he lacked capacity hence the suit was incompetent. He also cited the case of Hassan Idi Malambu (suing as the administrator of the Estate of Amina Naanyu Malambu) v. Bestel Agencies Company Ltd and another [2015] eKLR, and Julian Adoyo Ongunga & another versus Francis Kiberenge Bondeva (suing as the administrator of the Estate of Fanuel Evans Amudavi, deceased [2016]). He prayed for the dismissal of the suit.
 10. Learned counsel for the Plaintiff submitted that the plaintiff had not at any one instance claimed nor alleged to clothe herself as an Administrator of the Estate of her late father Pius Magero Gumo and



neither was she suing on behalf of the estate of her late father. He summarized her pleadings regarding her relationship with the deceased. He relied on the case of Mukisa Biscuits Manufacturing Co. Ltd - vs - West End Distributors (1959) EA 696 which defined a preliminary objection. He argued that the preliminary point raised was completely made up because the Plaintiff's pleadings did not give it a clear implication, from the facts pleaded. She argued that the Defendant did not assert the correctness of what the plaintiff had pleaded.

11. Learned counsel submitted further that the Respondent raised matters not pleaded to by the plaintiff. He then argued that the Respondent had caused to be entered into evidence by way of sworn affidavits sworn on 02/09/2024 by Margaret Sikuku Gumo and Oliver Magero Gumo, the two court appointed administrators of the estate of the late Pius Magero Gumo. Further, that these two deposed on evidentiary matters. She summed it that it would be a grave miscarriage of justice to strike out the "suit for lack of standing when the legal representatives of the estate of Pius Magero Gumo have already taken the liberty to participate in the present proceedings by having their evidence entered into the record." She prayed that the two legal representatives be enjoined in the suit as co-defendants.

Analysis and Discussion and Determination

12. The preliminary point of law raises one issue to determine, which is whether the plaintiff has legal capacity to institute the suit or not. The contention on the issue of capacity or incapacity arises out of a challenge regarding the Plaintiff's pleadings that the dispute over the suit land is that the parcel belonged to and was registered, at the time of her father's death, in his name. Further, that upon his death the property in the suit land passed onto his Estate. Therefore, the question is whether a person who did not have a Grant of Letters of Administration of his Estate either by way of a confirmed Grant or a Limited one, in case the deceased died intestate, or an executor of his will by appointment in the will, had the capacity to institute proceedings in relation to the Estate.
13. A preliminary objection is always grounded solely on points of law, raised by either a Defendant or Plaintiff. It arises from pleadings. It does not touch on any facts at all, otherwise it would go to the merits of a dispute, which would call for adduction of evidence, a clarification of the same by way of testimony in chief or deposition testing its veracity, weight or proof by way of cross-examination. Thus, where a party purports to raise a point that calls for clarification by way of evidence or a rebuttal by way of evidence, that is not a point of law raised. Such a 'preliminary objection' will not succeed on that account.
14. This was held in the case of Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, where Sir Charles Newbold defined a Preliminary objection 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”



15. Also, in *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] eKLR, the same Court held that,

“We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”

16. Similarly, in *Susan Wairimu Ndiangui V Pauline W. Thuo & Another* [2005] eKLR, Musinga J. as he then was held as follows:-

“a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

17. Given the reasoning of the courts, as flows from the decisions above, this Court ought to base its determination on a preliminary objection on pleadings only. It ought not and will not venture into the facts of this case. It will analyze the Plaintiff vis-a-vis the law.

18. It then follows that from the analysis of the Plaintiff’s pleadings she did not plead at all she had a Grant of Letters of Administration to the Estate of the deceased Pius Magero Gumo. Put in another way, the Plaintiff does not deny, by way of a Reply to Defence or allege by way of an Amended Plaintiff, that she is not or is a legal representative of the Estate respectively.

19. I have no hesitation whatsoever in finding that a person or individual who does not have a grant of letters of administration or appointment as executor by will has no capacity to either sue or be sued on behalf of person who has died intestate or left a will respectively. Only personal representatives appointed through a full Grant of Letters of Administration or a Limited Grant specific to bringing or defending an action have the power to sue or be sued respectively on matters of a person who has died intestate. Absent of that capacity the suit is incompetent and must be struck out as against that purported party.

20. Under Section 82 of the *Law of Succession Act*, it is provided:

“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 arising out of his death for his personal representative;”

21. In *Attorney General (Suing on behalf of Permanent Secretary Ministry of Special Programmes) & another v Odeny (Suing as the legal representative of the estate of the late Andrew Agunda Odeny (Deceased))* (Civil Appeal E22 of 2021) [2022] KEHC 15707 (KLR) (29 November 2022) (Judgment), the learned Judge held:

“Indeed, it is settled law that a person cannot sue on behalf of the estate of the deceased unless he has first obtained a grant of letters of administration either limited or full. The respondent



had no capacity to sue ab initio. She lacked the locus standi to institute the suit in the lower court. The suit that was filed in the lower court was thus a nullity from inception.”

22. In *Hawo Shako vs Mohamed Uta Shanko* (2018) eKLR, the learned judge held:

“This legal position is quite reasonable in that if the Plaintiff or applicant has not been formally authorized by the court by way of a grant limited for that purpose, then it will be difficult to control the flow of court cases by those entitled to benefit from if each beneficiary is allowed to file a suit touching on a deceased’s estate without first obtaining a limited grant, then several suits will be filed by the beneficiaries. It is the limited grant which gives the plaintiff the locus to stand before the court and argue the case. It does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same. One has to first obtain a limited grant that will give him or her the authority to file the suit. The leave of the court is not required before one seeks a grant limited to the filing of the suit. The orders granted to the Plaintiff herein authorizing her to seek letters of administration are superfluous and cannot assist her. She ought to have sought a limited grant first before filing this suit. The Judgment by Justice M. A. Angawa (as she then was) in Nairobi Session Cause No. 171 of 2000 in the matter of the estate of Moraji Bhanji Dhanak (Deceased) delivered on 30th November 2000 is to the effect that a grant limited to the filing of a suit has to be issued before the suit is filed.”

23. It is for those reasons above as elucidated in the provision cited and the authorities quoted that I find that, sad as it may be, the Plaintiff had not legal capacity to sue on behalf of the Estate of her late father since she did not have a grant of letters of administration to his Estate. The suit is incompetent for that matter.

24. As I pen off, the filing of this suit shows a lot happening in the Estate of the deceased father to the plaintiff but the beneficiaries seem not to be getting along. For instance, this Court wonders why, if indeed the two legal representatives of the Estate of Pius Magero Gumo were properly appointed, the Plaintiff could not be complaining to this Court yet she participated in, if taken to have been procedurally properly, the succession proceedings that led their confirmation as such, and if the Succession proceedings excluded why she has not taken the step to objection to their appointment and ask for preservation in the said proceedings rather than moving this Court when she knows clearly that she has no legal capacity to do so, thereby expensing herself and the estate in defending unnecessary suits.

25. Be that as it may, the preliminary objection succeeds in entirety. It is allowed. The suit is struck out. As this dispute involves persons with familial ties, the order of inhibition granted earlier shall remain in force until the end of twenty-one (21) days of this ruling to allow parties to negotiate the issues that bedevil the Estate of the late parent to the Plaintiff. Also, each party shall bear their own costs. Thereafter, this file shall be closed.

26. Orders accordingly

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM THIS 28TH DAY OF NOVEMBER, 2024

HON. DR. IUR F. NYAGAKA

JUDGE, ELC KITALE.

In the presence of:



Otudo Advocate.....for the Plaintiff

MS Ochieng Advocate.....for the Defendant

