



Chirea & 4 others v National Land Commission & 2 others (Environment & Land Case 218 of 2021) [2024] KEELC 13845 (KLR) (16 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13845 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 218 OF 2021**

AE DENA, J

DECEMBER 16, 2024

BETWEEN

OMAR JUMA CHIREA & 4 OTHERS & 4 OTHERS PLAINTIFF

AND

THE NATIONAL LAND COMMISSION 1ST DEFENDANT

THE DISTRICT REGISTRAR KWALE 2ND DEFENDANT

CATHERINE WANGUI KURIA 3RD DEFENDANT

JUDGMENT

Introduction

1. This suit was commenced vide a plaint dated 20th December 2017 by the Plaintiffs who aver that their deceased father the late Juma Ali Chirea was allocated property being LR No Diani Settlement Scheme 360 in the year 1991 (hereinafter referred to as the suit property). It is the Plaintiffs case that the deceased was issued with a copy of letter of offer from the Land Adjudication Settlement reference number DLAS/EST/Diani Vol 111/83 dated 27/3/1999 informing him that his application had been successful. The letter was executed by E M Karagania AG. director of Land Adjudication and Settlement.
2. That the offer was valid for 90 days and the same was to be accepted in writing with a 10% deposit for the plot which the deceased complied with by payment of Kshs 525 to the Settlement Fund Trust as evidenced by receipt no AQ065766 dated 24/6/1991. The Plaintiffs aver that by a letter dated 15/11/1994 they informed the Land Adjudication and Settlement Officer that the late Juma Ali Chirea had passed on and in the year 1992 made full payment for the suit property with the aim of collecting the tile deed. That they were however surprised to learn that the land had a new owner Catherine Kuria while they had at all times been residing on the suit property. That a complaint was made with the 1st Defendant over the alleged illegal title issued to Catherine Kuria but the said person did not appear



before the Commission. That on 23/11/2017 the 1st Defendant made a determination that the title held by Catherine Kuria be revoked and reverted back to the Plaintiffs and further directed the Chief Land Registrar to issue title to the estate of the deceased as reflected in the original allocation records.

Plaint

3. The Plaintiffs prayed for judgement against the Defendants jointly and severally that; -
 1. That the honourable court do adopt the determination by the National Land Commission dated 23rd November 2017
 2. An order and/or declaration that the Plaintiffs herein are the joint legal /beneficial /registered owners of the property known as LR No Diani Settlement Scheme 360.
 3. An order and/or declaration that the Plaintiffs are the joint legal/beneficial/registered owners by the property known as LR No Diani settlement scheme 360 and thereafter be issued with a title without gazettment.
 4. An order declaring that the Plaintiffs herein have acquired proprietary interest in the property known as LR No Diani Settlement scheme 360.
 5. An order directing the Land Registrar Kwale to proceed and reconstruct and/or reopen a new file and/or green card and record or register and thereafter proceed and cause an entry and register the Plaintiffs as joint legal owners without gazettment
 6. An order directing the Land Registrar Kwale to dispense with the production of the original title document and all other legal documents to be produced by the Plaintiffs herein in compliance with the orders herein
 7. Costs of this suit and interest at court rates.
4. At the time of filing the plaint, the Plaintiffs simultaneously filed an application dated 20/12/2017 under Certificate of Urgency. The prayers sought were as follows;
 1. That this honourable court do adopt the determination of the 1st Defendant issued on 23/11/2017
 2. That this honourable court be pleased to order the 2nd defendant to comply with the orders of the 1st Defendant issued on 23/11/2017
 3. That costs of this application be provided for

Consent

5. The application was brought before Justice Yano on 9/4/2018 where it was ordered by consent of the Plaintiffs' Counsel and the 1st Defendant that; -
 1. That this honourable court do and hereby adopt the determination of the 1st Defendant issued on 23rd November 2017
 2. That this honourable court be and is hereby pleased to order the 2nd Defendant to comply with the orders of the 1st Defendant issued on 23rd November 2017
 3. That each party to bear their own cost



6. Sometime in June 2022, the 3rd Defendant made an application seeking to set aside the *ex parte* consent judgement and to be enjoined as a defendant. The application was opposed by a Notice of Preliminary Objection filed by the firm of Marende Necheza & Co Advocates for the Plaintiffs/Respondents. The same raised the doctrine of *res judicata* and *subjudice* and pleaded that the 3rd Defendant lacked locus to make the application to set aside the *ex parte* consent judgement. The 1st and 2nd Defendants did not participate in this application. In its ruling delivered on 13/2/2023, this court allowed the application and set aside the consent *ex parte* judgement. The intended 3rd Defendant was confirmed as a 3rd Defendant in the instant proceedings.

Defence

7. The 3rd Defendant then filed a defence before court on 30/3/2023. The Defendant denies the averments raised in the plaint and stated that at all material times relevant to this suit, she is the legal and absolute registered owner of the suit property. That the property was acquired as a first registration from the adjudication officer and has been in her legal and actual possession since then. At paragraph 7 of the defence, the 3rd Defendant avers that in the event that the Plaintiffs are in possession of any letter of offer or receipt then the same are forgeries. It is further averred that the proceedings and subsequent determination on 23/11/2017 by the 1st Defendant were illegal null and void *ab initio* and that any subsequent actions made by the 2nd Defendant in enforcing them are null and void. It is stated that the 1st Defendant acted *ultra vires* and outside its constitutional scope and mandate in making a determination over the matter. At paragraph 16 of the defence, the 3rd Defendant states that she was denied information on the proceedings before it despite the fact that the suit property belonged to her. She further listed the particulars of fraud under the said paragraph.
8. The 3rd Defendant sought for the following orders before court; -
 - a. A declaration that Catherine Wangui Kuria is the registered owner of all that parcel of land registered as KWALE/DIANI S. S/360
 - b. A declaration that the title deed for KWALE/DIANI S.S/360 issued to the plaintiffs is illegal, null and void *ab initio*
 - c. An order directing Land Registrar Kwale to cancel entries 4 and 5 in the land register
 - d. That the suit herein be dismissed with costs to the 3rd Defendant.
9. The 2nd Defendant filed a defence in court on 15/6/2023. It is stated that the records at the land registry showed that the Plaintiff and the 3rd Defendant have an interest in the property. That the 3rd Defendant was issued with a title deed on 25/1/2017 and was further issued with the necessary documents from the Settlement Fund Trustee from the adjudication settlement office to enable a title being issued in her favour. It is averred that the registration of the Plaintiffs as the owners of the suit property was as a result of the Plaintiffs filing the application dated 19/12/2017 to compel the 2nd Defendant register the determination by the 1st Defendant. The particulars of fraud on the part of the 2nd Defendant are denied and stated to be misconceived. The court is invited to make an appropriate decision as regards ownership of the suit property.

Reply to the 3rd Defendants Statement Of Defence

10. The Plaintiffs filed a reply dated 17/11/2023 to the 3rd Defendant's statement of defence on 20/11/2023. The Plaintiffs reiterate the averments raised in the plaint and state that the 3rd Defendants defence was a mere sham, comprised of mere denials, bad in law, incurably defective and an abuse of



the court process. The Plaintiffs pray that the defence is struck out and judgement entered as prayed in the plaint.

11. The 1st Defendant did not participate in these proceedings.

Hearing

12. The case proceeded for hearing on 19/3/2024 and 27/5/24. PW1 Mwapesa Juma Juma of ID No 10954661 testified that the suit property belongs to his family comprising Omar Juma Chirea, Ali Juma Mwapesa, Said Juma Mwapesa [Deceased] Juma Juma Wa Hamisi and Juma Mwapesa, children of Juma Ali Chirea and his siblings. The witness adopted his statement filed before court on 20/11/2023 as evidence in chief and the list of documents filed on 16/6/2023 as evidence in court (PEXH 1-11).
13. From the statement filed before court, the witness stated that the suit property is ancestral land having been acquired by their late father from his mother one Fatuma Omar Muhanje. That in the year 1978 and later in the year 1991 the government initiated the Diani Settlement Scheme and his late father Juma Ali Chirea was among the beneficiaries of the same. That the deceased paid the requisite fees and was issued with a receipt. At the time there was no indication that the land had been allocated to another person. That later they visited the lands office and were shocked to find that the land was registered to the 3rd Defendant. That they lodged a complaint with the 1st Defendant and a decision was made in their favour. The 3rd Defendant failed to attend the public hearings by the 1st Defendant and in the year 2017 the court adopted the determination of the 1st Defendant as an order of the court.
14. The witness testified that the 3rd Defendant was not known to him and that his family was in occupation of the suit property. That they further had a title to the property which was issued to them through a court order.
15. On cross examination by Ms Kiti the witness testified that the title was issued to them pursuant to a court order after they followed up ownership of the land with the National Land Commission. The Commission determined them as the rightful owners of the land. That the 3rd Defendant had not attended the hearings before the National Land Commission.
16. On cross examination by Mr Mungai the witness stated that the letter of offer of 27/3/1991 confirmed Juma Ali Chirea was allocated the land. That he was however deceased. That a grant was obtained but the same was not among the Plaintiffs list of documents. He confirmed that he had the authority of the rest of the Plaintiffs to proceed with the suit on their behalf. That the root of the proceedings before court was the proceedings before the National Land Commission. He stated that he had presented his complaint at the NLC offices in Kwale in June 2016. That NLC communicated to them that they were the owners of the shamba vide the letter dated 23/11/2017. That he attended sittings before the NLC in 2016 July, they were two in number. The sittings were at the NLC offices in Kwale and in Matuga. That it was indicated the Respondents had been served but failed to attend the hearings before the NLC.
17. The witness stated he had received the notices to attend the meetings through his lawyer. The notice was PEXH7. On examination of the notice, the witness confirmed that the same was addressed to the office of the Land Adjudication and Settlement Officer and did not indicate that the same was for hearing of the matter. That their letters of complaint did not mention the 3rd Defendant as she was not known to them by then. They only knew of her after the search. That the adjudication records however had the names of his late father. That the Plaintiffs had filed another suit suing the NLC and the Land Registrar where the 3rd Defendant was not a party. The said suit was concluded by a consent and the witness never testified therein.



18. On re-examination the witness testified that it was the NLC to explain the contents of their letter of 23/11/2017. That it was not his responsibility to notify people of the NLC sittings. He however stated that the notices indicated at the bottom the names of the respective parties contesting over the suit property. That the Plaintiffs have been the ones using the suit property and that necessitated their complaint to the National Land Commission. He stated that the title held by the 3rd Defendant was not valid, on the 12-year limitation period, the witness stated that the same did not bar the Plaintiffs from pursuing their claim. That there was no legal requirement for them to inform the 3rd Defendant before entering a consent as she was by then not a party to the suit.
19. With the above evidence the Plaintiffs case was marked as closed.
20. DW1 Catherine Wangui Kuria ID No 4439311 the 3rd Defendant. This witness gave evidence ahead of the 2nd Defendant for the reason that the Land Registrar was not available on that day. The witness adopted her statement filed before court on 9/4/2023 as her evidence in chief. The witness further referred to the list of documents dated 30/3/2023 and produced the documents as DExh 1-5. She further produced annexure "CWKI" in the Notice of Motion dated 27/6/22 as DExh 6 and the discharge dated 4/8/2016 as DExh7.
21. In her filed statement, it is averred that she is the bonafide and legal registered owner of the suit property having acquired the same from SFT. The rest of the averments were reiterated in her testimony before court as below.
22. The witness testified that she was allocated the suit property by the government of Kenya. That she paid the requisite fees before being issued with a title deed. That the title was issued on 25/1/2017 and the same was the first in line before the plaintiff's title was issued. The witness stated that she visited the lands registry in Kwale in company of her advocate and a cousin of hers who was looking after the property. That she established that a title deed to the land had been issued to the Plaintiffs. That she also learnt of the court case that had allegedly quashed her title, she denied having been served with any notices with regards to the proceedings before cancellation of her title. That she wrote a letter to the 1st defendant on 6/3/2019 but the same was never responded to. That the 3rd defendant stated that there was fraud in the registration of the Plaintiffs as the owners of the suit property. She prayed that the title be quashed and that she be paid costs. That further there has been no occupation of the suit property from the time of adjudication until 2017 as her cousin used to reside on the same and was chased away in 2017. The witness further stated that she had been awarded the land by the government after her service of 45 years.
23. On cross examination the witness testified that in the year 1992 she was 54 years. That she used to work for the ministry of tourism and the lands office for two months at Ardhi House. That the land adjudication was done in the 1970s and 1980s. The witness stated that she got information about the settlement scheme while working for the ministry of tourism. That she was then working in Lungalunga and was there for 10 years. The witness maintained that she bought the suit property from the government.
24. The witness stated she did not have an agreement for the purchase of the property. When referred to DExh6 the witness pointed it indicated the parcel as Kwale/Diani/360 though at its page 2 the property was stated as SS/360 and dated 12/8/2016 with no signature thereon. That there was also no signature beside her name but the same was signed on 5/10/2016. The witness noted the date of certification was 5/11/2016 DW1 testified that the letter dated 4/8/2016 referring to the suit property was also not signed. That the letter dated 12/8/2016 was a discharge of charge and transfer, refers to the suit



- property, the search of 4/2/2019 was in reference to the suit property and indicates C W Kuria as the owner. It only shows the current owner and has no record of the previous owner.
- 25 . On being referred to the green card the witness conceded it did not indicate the payment receipt and she did not have a copy owing to passage of time. hat she was also not given the beacon receipt, that she was only given a diagram and had her plot marked. That she did not remember any of her neighbours as she could not go to the property after 2017. That she blamed the 1st Defendant for not informing her of the proceedings before it. When referred to the letter dated 6/3/2019 the witness agreed it did not bear a receiving stamp. Further that the NLC was not served with a notice to produce the documents listed in the said letter. That she was not the one who had put up the structures on the suit property. That the property measures 2.0Ha.
 - 26 . On cross examination by Ms Kiti the witness stated that she had been allocated the suit property on 10/3/1992. That her cousin used to look after the property in her absence until 2017. That he lives in Mombasa but would visit.
 - 27 . On re-examination DW1 clarified that the property is government land and during allocation it does not depend on where a person comes from. That it is not a legal requirement to know your neighbours for you to assert ownership rights on land. On the letter dated 6/3/2019 it is stated that the same had the NLC address for postage, further that she was not the one who brought the said party to court and was therefore not obliged to serve the notice to produce. That the letter dated 4/8/2016 is not signed but has a GOK letter head and looks official. That in allocation of land there is no sale agreement.
 - 28 . With the above the 3rd Defendants case was marked as closed.
 - 29 . DW2 Denise Mtana a registrar deployed at the Kwale Land Registry. Based on the parcel file the witness told the court that title to the suit property was in the names of the 3rd Defendant issued on 25/1/2017. That the 3rd Respondent acquired the land from the SFT which is recorded under entry No. 1 made on 10/3/1992 of the green card. Thereafter the 2nd entry is Catherine Wangui Kuria the 3rd Defendant. That there is a court order enforced on 26/4/2018 in respect of the Plaintiffs and a title deed issued on 26/4/2018. That pursuant to the said order, the 2nd Defendant was not served with any other order from NLC. The witness produced the documents in the list of documents dated 24/5/2023 as DW2Exh 1-6.
 - 30 . On cross examination by Mr Lisanza holding brief for Mr Shimaka for the Plaintiff, the witness testified that the title deed was issued on 26/4/2018 to the Plaintiffs as confirmed by the green card record.
 - 31 . On cross examination by Mr Mungai for the 3rd Defendant the witness confirmed that the title deed issued to the Plaintiffs was pursuant to a court order. That the 3rd Defendant was not a party to the proceedings that generated the court order. That the authenticity of the order was verified by the letter of 3/11/2021, three years after the order was lodged. The witness conceded it was not the normal procedure. That the 3rd Defendant was not informed about the cancellation before it was effected which was not fair administrative action as expected. DW2 lastly stated that the title issued to the Plaintiff was in her opinion issued procedurally.
 - 32 . The witness was not re-examined and with the above evidence the 2nd Defendants case was marked as closed.



Submissions

Plaintiffs Submissions

33. The Plaintiffs submissions are dated 2/8/2024 and discussed the two competing interests over the suit property by both the Plaintiffs and the 3rd Defendant herein. The court is urged to approach the situation with guidance from the case of *Hubert L Martin & 2 Others Versus Margaret J Kamar & 5 Others* [2016] eKLR and probe the entire history of the title from its roots to its current status. That an instrument of title is never an absolute proof of title but a rebuttable one. That where there are two or more competing interests there can only be one title. Reference is made to section 26 of the *Land Registration Act* and the holding in *WW Verses Severin Kinyanjui Njoroge & Another* [2021] eKLR.
34. Based on the above authority, the Plaintiffs submit that the parties must show that the right procedure was followed to issue title and that the same was not flawed. That the 3rd Defendant cannot show the root of her title as the process which she acquired the same was flawed twofold. Firstly, the Plaintiffs are in actual possession of the property and were the first to be allocated the land. To buttress this the court holding in *M'ikiria M' Rikanya & Another Versus Gilbert Kabeere M'mbijiwe* [1982-1988] IKAR 196 and the maxim of equity that states when two equities are equal the first in time prevails and further in *Kamau James Njendu Verses Serah Wanjiru & Another* [2018] eKLR
35. On actual possession of the suit property, it is submitted that the Plaintiffs have been in actual possession of the suit property and even made an application to court for a site visit on 4/7/2019. The Plaintiffs maintain that they proved their case on a balance of probability and place reliance on the case of *David Kiptugen V Commissioner of Lands & 4 Others* [2015] eKLR.
36. The 3rd Defendants submissions highlighted four issues for determination namely; -
1. Whether the Plaintiffs had locus standi to file complaint with the 1st Defendant and file ELC suit no 465 of 2017
 2. Whether the 1st Respondent had jurisdiction to entertain, hear and determine complaint by the Plaintiffs
 3. Whether the proceedings by the 1st Defendant and in ELC Cause No 465 of 2017 Mombasa specifically on 9/4/2018 were regular fair and procedural.
 4. Whether the 3rd Defendants title was acquired lawfully and procedurally.
37. On the first issue for determination, it is submitted that the Plaintiffs admitted to have never obtained any grant whether limited or full to give them the legal powers to lay any claim on behalf of the estate of their deceased father. That the issue of locus as provided for under Order 4 Rule 4 of the Civil Procedure Rules locus touches on the jurisdiction of the court and should be dealt with at the earliest opportune time. That it is only a grant of letters of administration that gives a person the mandate to deal with the property of a deceased person, that the proceedings by the 1st Defendant and the subsequent proceedings herein are therefore illegal, null and void ab initio and should be set aside for lack of capacity to sue.
38. On whether the proceedings by the 1st Defendant and in ELC Cause No 465 of 2017 Mombasa specifically on 9/4/2018 were regular fair and procedural. It is submitted that as per the provisions of Article 67 of *the Constitution*, the *National Land Commission Act*, the powers and functions of the 1st Defendant are only limited to public land. That the 1st Defendant therefore had no jurisdiction to revoke the 3rd Defendants title.



39. It is emphasised that the 3rd Respondent was never served with any documentation inviting her to participate in the public hearings held by the 1st Defendant and which included issues pertaining ownership of the suit property. That the 3rd Defendants' rights to fair administrative actions, fair trial and natural justice were thus violated. Further that the 1st Defendant acted illegally, ultra viresly and unconstitutionally by revoking the title deed to the suit property.
40. On whether the 3rd Defendants title was acquired lawfully and procedurally it is submitted that the 3rd Defendant has produced evidence confirming she was the 1st government allottee of the suit property. That she was further issued with a title deed and at the time of such issuance no adverse claim was made by anyone. That records at the adjudication office indicate the 3rd Defendant as the allottee of the suit property as well as the records at the lands office. The allotment letter by the Plaintiffs and the receipt are termed as forgeries. That the same have further not been authenticated by a witness from the land adjudication office. That it is trite under the *evidence Act*, whoever alleges must prove. That the Plaintiffs have not pleaded any particulars of fraud in their plaint which is mandatory requirement for the court to consider given the nature of the prayers sought. The court is urged to strike out the Plaintiff's suit and to allow the 3rd Defendants prayers.
41. The 3rd Defendant relied on the following authorities in her submissions;
1. Mumo Matemu Versus Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR
 2. Alfred Njau Versus City Council of Nairobi [1983] KLR 625
 3. Peter Kauai Asituha & 3 Others Versus Olekia Mahindu Makunga & Another [2021] eKLR
 4. Ridge Versus Baldin [1964]AC [1963] 2 ALL ER 66
 5. Robert Mutiso Leli and Cabin Crew Investments Ltd Versus National Land Commission and 3 Others [2017] eKLR
 6. Sceneries Limited Versus National Land Commission [2017] eKLR
 7. Stephen Muriithi M'ngaruthi Versus George Muthinja[2018]Eklr
 8. Vijay Morjaria Versus Nasingh Madhusingh Darbar & Another [2000] eKLR
42. The 2nd Defendants submissions were dated 14th September 2024. It is submitted that the 2nd Defendant acted in line of its duties in obeying the court orders vesting the suit property to the Plaintiffs. That it could not act in disregard of the court issued. To buttress this point reliance was placed on the case of Moses P.N. Njoroge & Others Vs Reverend Musa Njuguna & Another Reviewing the documentary evidence of both parties as to their root of the titles the 2nd Defendant submitted that where there are two competing titles the first in time should prevail. Reliance was placed in the case of Getwany Investment Limited Vs. Tajmal Limited (2006) eKLR. It was further urged that the Plaintiff and 3rd Defendant did not prove any cause of action against the 2nd Defendant. The 2nd Defendant prayed that the suit against it is dismissed.

Analysis And Determination

43. I have keenly assessed all the pleadings as filed by the parties herein, the written submissions on the subject matter and the cited authorities together with the relevant provisions of the law hereof. I have framed the following salient issues for determination: -
1. Whether the Plaintiffs herein had the locus standi to file the present suit.



2. Whether the Plaintiffs upon allocation of the suit property complied with the required terms and conditions
3. Whether the registration of the suit property to the 3rd Defendant was lawful
4. Whether the registration of the Plaintiffs as owners of the suit property was lawful, legal and procedurally done
5. Who is the lawful and legal owner of the suit property?
6. Whether the Plaintiffs are entitled to the reliefs sought
7. Who pays the costs of the suit.

Whether the Plaintiffs herein had the locus standi to file the present suit

- 44 . I must note that the determination of the rest of the issues herein is hinged upon a positive court verdict on locus standi. This will become clearer in my discussion of the same. But first it is imperative to consider the definition of locus standi.
- 45 . The term locus standi was defined in the case of Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, as follows: -
- "the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".
- 46 . The 3rd Defendant contends that the Plaintiffs do not have the locus standi to institute the suit herein based on the fact that they failed to attach a copy of grant of letters of administration over the estate of the deceased. It was further stated that during the hearing PW1 admitted to having not filed a succession cause over the estate of his deceased father. It is noteworthy that the Plaintiffs have not presented any arguments in their submissions with regards to the issue of locus standi.
- 47 . Be that as it may I must still pronounce myself on the issue. It is not in dispute that the Plaintiffs have filed this suit in their capacity as the estate of Juma Ali Chirea (deceased). This is depicted in the title of the Plaint. It is also seen in paragraph four (4) and five (5) of the Plaint that the court has been approached on the basis of alleged allocation of the suit property to the deceased.
- 48 . What was the Plaintiffs position on the issue of succession? Upon re-examination, on this issue of succession, PW1 stated that by the time the plaintiffs filed the complaint at NLC the deceased (their father) was already dead. PW1 reiterated that the chiefs letter recognised them as legitimate beneficiaries including the letter dated 2nd May 2023. Whether this will withstand the legal test will become apparent shortly.
- 49 . The court in Trouistik Union International & Another v Jane Mbeyu & Another (2008) IKLR (G&F) 730 stipulated thus’;
- "To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the [law of succession Act](#). That section confers that power on personal representatives and on them alone"



- 50 . In Pravinchandra Jamnadas Kakad v Estate of Lucas Oluoch Mumia & 2 others [2022] eKLR Justice Mogeni persuasively stated thus; -

‘There is no dispute that the plaintiff did not obtain a limited grant allowing them to file this application. Such a grant is the key which allows the plaintiff access to the Court. Without a limited grant being issued allowing the filing of the application, the plaintiff would be like someone who has entered a closed room without opening the door. All what the court can tell someone who is before it without having obtained a grant limited to the filing of the application is that despite the validity of the application or the strength of the case, the court cannot hear the application as the initiator thereof lacks the capacity to bring that application to court. The correct procedure is not to allow the plaintiff to go back and obtain a limited grant for that purpose and then allow him to continue with the application. The application as initiated becomes void ab initio and cannot be resuscitated by the issuance of a subsequent limited grant.’

- 51 . The court above further cited the case of Julian Adoyo Ongunga V Francis Kiberenge Abano Migori Civil Appeal No.119 of 2015, where Justice Mrima had this to say on the issue of a party filing a suit without having obtained a limited grant.

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.”

- 52 . My attention has been drawn to the Plaintiffs list of documents, copies of which documents were produced as exhibits before court. Pexh4 is the chief’s letter dated 20/1/2016, the same is addressed to the Chief Kadhi, Kadhis Court Msambweni County. The reference of the letter is a succession cause over the estate of the late Juma Ali Chirea. The letter has listed the beneficiaries to the deceased Juma Ali Chirea. This is the only piece of evidence from the Plaintiffs on efforts made to file a succession cause over the estate of the deceased. What did PW1 have to say about this on behalf of the rest of the Plaintiffs? From the oral testimony PW1 upon being cross examined by Mr. Mungai was referred to the said letter from the Chief. It was his testimony that the same confirmed that Juma Ali Chirea who was his father was deceased. He told the court they had obtained succession letter (grant) but conceded the grant was not part of his list of documents. He emphasised that to him the said letter from the chief would suffice. The witness further conceded he did not have court documents authorising him to sue for the estate. That during the proceedings at the NLC he also did not have court documents authoring him to sue. I must observe that the letters dated 15/11/94, 20/01/2016 and 2nd May 2023 do not constitute a grant even under Islamic law. In any event it appeared to me like a letter of introduction of the beneficiaries.

- 53 . The issue on locus *standi* is a primary point of law almost similar to that of jurisdiction. It is clear that the plaintiffs are not the administrators of the estate of their late father having not tendered any evidence of a succession cause having been concluded in their favor and or limited grant for purposes of filing the proceedings herein. Indeed, the Court of Appeal authoritatively delivered itself on the issue of locus standi in Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1 KAR, to the effect that the lack of capacity to sue or be sued renders the suit incompetent.



54. Based on this courts analysis foregoing the Plaintiffs clearly lacked the capacity to sue on behalf of the deceased's estate which renders the suit incompetent. This court does not wish to circumvent the laid down law on the issue of locus standi and must make a finding that the Plaintiffs did not have the capacity to sue. The court makes a finding that the Plaintiffs suit herein is incompetent for lack of locus standi on the part of the Plaintiffs.
55. Having made the above finding on the Plaintiffs capacity, a pertinent issue arises, should the court proceed and apply itself on the rest of the issues curved out for determination. It is clear that there has been protracted litigation over the suit property. To date, no conclusive decision has been made as to who is the rightful owner of the property. To have the same still pending will in my opinion be an injustice and a clear waste of judicial time and resources for the reason that the court has already taken time to hear the witnesses herein and has on several occasions been able to make rulings over the matter. It would be in my opinion proper to proceed and make determination on the rest of the issues. However, with the parties instituting the suit herein having been confirmed as lacking in capacity, the courts hands are tied. The suit cannot be salvaged under any circumstances.
56. The court has noted the prayers sought by the 3rd Defendant as enumerated elsewhere in this judgement. My perusal of the 3rd Defendants Statement of Defence dated 30th Day of March 2023 does not reveal a counterclaim upon which such prayers would be anchored. The court cannot grant the prayers sought in the absence of a counterclaim. Counsel for the 3rd Defendant should have known better.
57. The upshot of the foregoing is that the Plaintiffs suit is hereby struck out. In view of this conclusion it is my considered view that it will be proper that each party bears its own costs.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 16TH DAY OF DECEMBER 2024

A E DENA

JUDGE

Ms. Kyalo for the Plaintiffs

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

Mr. Mungai for the 3rd Defendant

Daniel Disii Court Assistant.

