



REPUBLIC OF KENYA



Mwangi & another v Komu t/a Rubis Service Station Murang'a & another (Environment & Land Case E005 of 2022) [2023] KEELC 739 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 739 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E005 OF 2022
LN GACHERU, J
JANUARY 26, 2023**

BETWEEN

PATRICK KANURI MWANGI 1ST PLAINTIFF

FABIANO KAMAU MWANGI 2ND PLAINTIFF

AND

**JAMES KARANJA KOMU T/A RUBIS SERVICE STATION
MURANG'A 1ST DEFENDANT**

RUBIS ENERGY KENYA LIMITED 2ND DEFENDANT

RULING

- 1 This suit was filed on 23rd March 2022, by Patrick Kanuri Mwangi and Fabiano Kamau Mwangi, as 1st and 2nd Plaintiffs against the Defendants herein, and had sought for various orders against the two Defendants. Among the prayers sought were Orders of eviction of the Defendants and demolition of the structures built on the suit land.
- 2 Further Patrick Kanuri Mwangi, had described himself as the Administrator of the estate of Joseph Mwangi Kabachia(deceased), who is the registered owner of the suit property Loc.11/Maragi/1806, which parcel of land has been divided into portions A, B, C, D, E, F, G, H and J.
- 3 Further, that upon subdivision of the suit land, Portion A was allocated to the 2nd Plaintiff who had even developed the said land portion during the deceased's lifetime.
- 4 That the 2nd Plaintiff entered into a contract with one Henry Gikonyo, to lease Portion A of the subdivided Loc.1/Maragi/1806, and the said Henry Gikonyo erected a Petrol station. There was a term of the contract that the said Henry Gikonyo would not sublet or part with the possession of the said premises, without consent of the 2nd Plaintiff.



- 5 That in December 2021, the said Henry Gikonyo refused and failed to pay the rental fees as agreed, and he removed the Petrol pumps in the said Petrol Station, between December 2021 and February 2022. However, the Defendants unlawful and without consent of the Plaintiffs entered into the said Portion A of the LR No. Loc. 11/Maragai/1806, owned by the 2nd Plaintiff-Fabiano Kamau Mwangi, and carried out excavation acts on the said Portion A of the suit land. That they branded the structures with Rubis name and colours without any colour of right or the Plaintiff's consent and commenced trading in oil and supermarket without consulting the Plaintiffs.
- 6 The Plaintiffs therefore, wanted immediate eviction of the Defendants.
- 7 The 2nd Defendants entered appearance through G&A Advocates LLP and filed a Statement of Defence on 7th September 2022.
- 8 The 2nd Defendant denied all the contents of the allegations made in the Plaint and further averred that though the 1st Plaintiff alleged to be the administrator of the estate of Joseph Mwangi Kabachia, the owner of the suit property, the Plaintiffs instituted the suit in their own names and not the name of the deceased as required by the provisions of the *Civil Procedure Rules*. The 2nd Defendant gave a Notice of their intention to raise a Preliminary Objection. Further, the 2nd Defendant alleged that it was in possession of the suit property, with the authority of the Plaintiffs by virtue of the sublease agreement between itself and a third party who had the authority of the Plaintiffs to act as such.
- 9 The 2nd Defendant urged the Court to dismiss the Plaintiffs suit with costs.
- 10 The Plaintiffs were represented by Kinyua Mureithi & Co. Advocates.
- 11 However, on 8th September 2022, the 1st Plaintiff filed a Notice of Change of Advocate from Kinyua Mureithi & Co. Advocates to T M Njoroge Advocates. Simultaneously, the 1st Plaintiff filed a Notice of Withdrawal of the whole suit by the 1st Plaintiff.
- 12 The filing of the said Notice of Withdrawal meant that the suit by the 1st Plaintiff has been withdrawn wholly and the claim now as it stands is by the 2nd Plaintiff alone – Fabiano Kamau Mwangi.
- 13 Subsequent to the above withdrawal, the 2nd Defendant filed a Notice of Preliminary Objection dated 4th October 2022, on the following grounds;
- a. The Plaintiffs herein presently do not have the requisite locus standi to institute the instant suit pursuant to Section 19 of the *Civil Procedure Act* as read together with Order I, Rule 1 of the *Civil Procedure (Amendment) Rules* (2020) to the extent that they have ceased to have the capacity to occupy, subdivide or administer any portion of land reference No. Loc.11/Maragi/1806. The Grant allocated to the Plaintiffs had been revoked under Section 76(e) of the *Law of Succession Act* Cap 160 of the Laws of Kenya.
 - b. The Plaintiffs are now strangers to the property known as Land Reference Number Loc.11/Maragi/1806, the subject matter of the instant suit.
 - c. The Plaint has therefore become incompetent and should be struck out with costs to the Defendants.
- 14 The above Preliminary Objection was filed during the pre-trial stage as the suit was being prepared for main hearing. The Court directed that the Preliminary Objection be dispensed with first by way of written submissions.



G & A Advocates LLP for the Defendants filed the written submissions on 18th October 2022, and submitted that the 2nd Plaintiff lacked locus standi and capacity to institute the suit because the suit property is registered in the name of Joseph Mwangi Kabachia(Deceased) and the 2nd Plaintiff had instituted the case on the strength of the grant issued to the 1st Plaintiff, which grant was revoked on 4th August 2022, under section 76(e) of the Law of Succession Act. The 2nd Defendant relied on various decided cases among them the case of Charles Ratemo Nyambati v Jackton Ocharo & 4 others (2016) eKLR, where the Court held that;

“It cannot therefore be anyone having a claim on this estate who can file a claim. The Law of Succession is clear that it must be the Legal Representative. The Applicant has not shown that he is the legal representative. He therefore lacks the locus standi specific to this estate of his deceased brother.....”

The 2nd Defendant also relied on Section 2 of the Civil Procedure Act which defines a Legal Representative as follows;-

“legal representative” means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued”.

15. They emphasized that from the above, the 2nd Plaintiff has no locus standi to bring these proceedings since he is not in the legal representative to the estate of Joseph Mwangi Kabachia(Deceased).

16. The 2nd Plaintiff filed his written submissions on 24th October 2022, and relied on the case of Mukisa Biscuits Manufacturing Co. Ltd v West EndDistributions Ltd (1969) where it was held that:-

“ 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”.

17. He also relied on the case of Peter Mwangi v Joseph Ngaba Kuria & another; Leah Njeri Ndichu (Interested Party) 2022 eKLR, where the Court held;

“For a preliminary objection to succeed, the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.”

18. It was submitted that the Objection raised by the 2nd Defendant is not a point of Law as the Court has to ascertain through facts the interest of the 2nd Plaintiff in LR. No. 11/Maragi/1806, and thus the Court will have to delve into facts on merit of the claim.

19. Though the 2nd Plaintiff submitted that the Defendants had not filed a Defence and that a Preliminary Objection cannot be used as Defence, the Court has noted that the 2nd Defendant did file a Defence on 7th September 2022. Further, that the 2nd Defendant alleged that the grant allocated to the 1st Plaintiff had been revoked under Section 76(e) of the Law of Succession Act Cap 160 Laws of Kenya. That this is not a point of law and again the revoked grant was not exhibited and the Succession Cause number



was not given. That the issue raised by the 2nd Defendant needed ascertainment of facts and as this not a point of Law. He relied on the case of *Peter Mungai (Supra)*, where the Court further held;

“As already been stated, one of the preconditions for a valid Preliminary Objection is based on the assumption that the facts pleaded are correct and unopposed by the rival party. While no proof of such death was tendered, the ground of objection would in itself call upon the Court to enquire on the date of the death and whether the suit was a nullity ab initio or whether the cause of action survived the deceased to warrant substitution to be validly done. All these require the Court to call in aid evidence to ascertain the same hence ousting the Preliminary Objection from being a pure point of Law”.

The 2nd Plaintiff submitted that the Preliminary Objection as raised is calling upon the Court to delve into evidence and find out who has the beneficial or legal interest over Portion A of the suit property. He urged the Court to dismiss the instant Notice of Preliminary Objection, as it lacks merit.

20. The Court has considered the Preliminary Objection as raised and the submissions thereon. The Defendants are questioning the capacity of the 2nd Plaintiff herein to institute this suit. From the description of what a Preliminary Objection, is as stated in the Mukisa Biscuits Case (*Supra*), it is an objection that raises a pure point of law and it cannot be raised if any facts have to be ascertained.
21. The 2nd Defendant averred that the 2nd Plaintiff has no locus standi or capacity to bring this suit. Capacity signifies right to be heard. In the case of *Law Society of Kenya v Commissioner of Lands & Others*, Nakuru HCCC No. 464 of 2004, the Court held as follows; -

“locus standi means capacity to sue.

The 2nd Defendant alleges that the 2nd Plaintiff has no capacity to sue as he is not the legal representative of the estate of Joseph Mwangi Kabachia.

However, the 2nd Plaintiff alleges that he has beneficial interest in Portion A, of the suit property Loc.11/Maragi/1806, since he was allocated the same during the lifetime of the deceased Joseph Mwangi Kabachia, and he even developed it during the said lifetime.

The Court gave a background of the claim and it is clear that the 2nd Plaintiff claim is over Portion A, of the suit property, which he claims that he owns and has developed and leased it out to one Henry Gikonyo.

For this Court to ascertain whether the 2nd Plaintiff indeed has beneficial interest over the said Portion A, of the suit property, evidence has to be called and facts have to be ascertained. Therefore, the objection as raised by the 2nd Defendant is not a pure point of Law since facts have to be ascertained. Further the 2nd Defendant averred that the grant issued to Patrick Kanuri Mwangi upon which the 2nd Plaintiff had hinged his case on was revoked, under Section 76 (e) of the *Law of Succession Act* and the said revocation was done on 4th August, 2022. However, the revoked grant was not attached to the Preliminary Objection. The Succession Cause was not attached or cited or even the said Succession Cause number given.

For this Court to confirm that indeed the said Grant was revoked, it has to call for evidence, by calling for the said revoked grant to ascertain that the same was indeed revoked, and the calling of such evidence would amount to ascertainment of facts. It is clear from the description in Mukisa Biscuits Case (*Supra*) that a Preliminary Objection cannot be raised if any fact has to be ascertained.



Though this Court concurs with the 2nd Defendant that locus standi is so cardinal and goes to the heart of any civil suit and is equal to jurisdiction, the Court finds that looking at the claim herein, and the fact that 2nd Plaintiff is claiming that he owns Portion A of the suit property, which Portion A has been trespassed upon by the Defendants, then the Court cannot hold and find without calling evidence that the 2nd Plaintiff has no locus standi or capacity to institute this suit.

For the above reasons, the Court finds that whatever the Defendants are alluding to can only be ascertained by calling of evidence in the main hearing of the suit herein.

Consequently, the Preliminary Objection herein is not a proper Notice of Preliminary Objection as per the description given in Mukisa Biscuits case (Supra). The instant Preliminary Objection is dismissed entirely with costs to the 2nd Plaintiff.

Let the suit be set down for hearing and be determined on merit. The Pre-Trial Conference(PTC) to proceed before the Deputy Registrar on 15th February, 2023.

22 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26TH DAY OF JANUARY 2023.

L. GACHERU

JUDGE

In the presence of;

Mr Kinyua Mureithi for the 2nd Plaintiff

1st Defendant – Absent

Mr Mboya H/B Ochola for the 2nd Defendant/Objector

Joel Njonjo - Court Assistant

