



Wambugu & 2 others v Administrators of Estate of Kaihu Karugo & 4 others (Environment and Land Case Civil Suit E081 of 2021) [2023] KEELC 908 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 908 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E081 OF 2021**

**J OMANGE, J
JANUARY 26, 2023**

BETWEEN

**ROBIN MWANGI WAMBUGU 1ST PLAINTIFF
MOSES MWANGI 2ND PLAINTIFF
ANTHONY MWANGI 3RD PLAINTIFF**

AND

**ADMINISTRATORS OF ESTATE OF KAIHU KARUGO 1ST DEFENDANT
KAMAU NJIGUA 2ND DEFENDANT
ADMINISTRATORS OF ESTATE OF MUGURU MWANGI 3RD DEFENDANT
ADMINISTRATORS OF ESTATE OF NGUGI NGANGA 4TH DEFENDANT
ADMINISTRATORS OF ESTATE OF NYAMU MUCHUNU 5TH DEFENDANT**

RULING

1. The preliminary objection filed by the 3rd defendant/ respondent is brought on the following grounds:-
 - a. The suit or issues raised were directly issues in former suit being High Court Civil Suit No 90 of 2010(OS)
 - b. The former suit was between parties or parties under whom they are or any of them claim; being the partners or the legal representatives of the dissolved partnership entity of Kenda Boarding and Lodging.
 - c. The parties are litigating under the same title; being the ownership of the subject suit LR No209/230/5.



- d. The issues were heard and finally determined in High Court Civil suit no 90 of 2020(OS) vide the judgement dated and delivered on October 5, 2018 and the doctrine of finality has set in and the court that heard and determined the issue on the ownership of LR No 209/230/5 was competent to try the suit in which the issues were raised.
 - e. The judgement delivered in High Court Civil Suit No 90 of 2010 conclusively determined the rights of the parties in regards to all the matters in controversy in particular ownership of the suit property.
 - f. The suit is time barred contrary to section 4 of the Limitation of Actions Act chapter 22 of laws of Kenya and has been filed without leave of court to enlarge time if any as it is founded on a contract or partnership agreement made on May 4, 1984.
 - g. That the plaintiffs have instituted this suit in their own names without grant of representation and not as personal legal representatives of the estates legal representatives.
2. The court directed that the two preliminary objections proceed by way of written submissions.
 3. Counsel for the 1st and 5th defendants submitted that the applications and the suit herein are *res judicata* as the issues had been substantially determined in High Court Civil Suit No 90 of 2010. Counsel referred the court to the OS which was attached to the replying affidavit filed in opposition to the application and pointed out that prayers included the suit property. The determination by the court was thus final. Counsel further submitted that the applicants had not established in what capacity they were filing the suit as they did not have letters of administration.
 4. Counsel for the 2nd and 4th defendant similarly argued that the suit was *res judicata* and that applicants had no *locus standi*. Counsel further submitted that allowing the present suit would be tantamount to reopening the previous suit which the court cannot do.
 5. Counsel for the 3rd defendant reiterated the submission that the suit was *res judicata* and further that the plaintiffs had no capacity to file the suit.
 6. Counsel for the plaintiff/ applicant in response to the application contended that the preliminary objections did not meet the threshold for a preliminary objection and further that the issues should have been canvassed by way of an application to strike out the pleadings not by way of preliminary objection.
 7. The issues that arise for determination are do the preliminary objections meet the threshold for an objection? Is this matter *res judicata*? Do the plaintiffs have locus to file the matter? And lastly is the suit time barred?
 8. The question of the definition of a preliminary objection was clearly set out in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969]EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....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.

9. I have considered the submissions by all counsels and I note that the three issues that have been raised are pure points of law. The three points if upheld may dispose of the suit. Consequently, I find that the preliminary objection meets the test set out in the cited case.
10. Section 6 of the [Civil Procedure Act](#) provides:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.
11. As such in determining the issue of *res judicata* the court is called upon to determine the following issues;
 - a. Whether the issue was directly and substantially in issue in the former suit
 - b. Whether suit was between the same parties or parties claiming under them.
 - c. The parties were litigating under the same title.
 - d. The issues were heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.
12. It is the contention of the 3rd defendant that the issues in this matter were substantially and directly in issue in HCC No 90 of 2010 and in subsequent mediation proceedings. The plaintiff on his part avers that the issue of ownership of land was not addressed. There are contested issues of fact the court cannot determine at this preliminary stage.
13. On the question of limitation of actions, counsel for the 3rd respondent submits that the suit is time barred as it appears to be founded on a contract or partnership agreement dated May 4, 1984. From a plain reading of this submission, it is evident that it not clear exactly when the cause of action. The court would thus be resolving issues of fact if it were to determine this issue at this stage. As such this objection fails.
14. On the 3rd issue, of capacity counsels for the 1st, 2nd and 3rd Respondent submit that the plaintiffs have filed this suit as beneficiaries, yet they have not obtained letters of administration. As such they have no capacity to sue. Counsel for the plaintiff did not address the court on this issue.
15. In the plaint the plaintiffs aver that the suit property belongs to Mwangi Kimani, Wambugu Njuru and Kahoreria Thuita who are now deceased. They depone that they are administrators and beneficiaries of the estate. The plaintiffs are thus suing on as representatives of the estate of the deceased.
16. Order 4 rule 4 of the [Civil Procedure Rules](#) provides that:-

“Where the plaintiff sues in a representative capacity the plaintiff shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaintiff shall



state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises”

17. The plaintiffs have not pleaded that they have obtained letters of administration. In the absence of letters of administration do the plaintiffs have capacity to sue on behalf of the estate?

18. Section 54 of the [Law of Succession Act](#) provides as follows: -

“A court may, according to the circumstances of each case, limit a grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule.”

The 5th schedule to the [law of succession Act](#) provides for grants limited for specific purposes. Paragraph 14 of the schedule reads as follow:-

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letter of administration may be granted to the nominee of a party in the suit, limited for the purposes of representing the deceased therein, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matter at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

19. The courts have found that it prudent to have a representative issued with a limited or full grant before filing suit. This prevents multiplicity of suits which would otherwise result if each beneficiary of an estate was to file their own case. Equally important, the procedure for obtaining a grant has inbuilt safeguard to ensure that the petitioner has the consent of other beneficiaries to whom he/ she will be accountable. This secures the estate for the benefit of all beneficiaries. By hearing plaintiffs who do not have the benefit of the consent of others who have a stake in the estate and who have not followed the clearly defined procedure, courts would be aiding litigants in intermeddling in estates of deceased persons.

20. As I conclude, I am persuaded by Mrima J in [Julian Adoyo Ongunga v Francis Kiberenge Abano](#) Migori Civil Appeal No 119 of 2015, in which he said;

“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”

21. In the end, I find that the preliminary objection has merit and is upheld as follows;

- a. The plaint and application dated March 1, 2022 are hereby struck out
- b. Costs are awarded to the defendants.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF JANUARY 2023.

JUDY OMANGE



JUDGE

In the presence of: -

Mr. Murithi for 1st Defendant

Mr. Maira for 2nd and 4th Defendants

Mr. Chengecha for Plaintiff

