



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELCA NO. 18 OF 2019**

**MELICKZEDECK SHEM KAMAU.....APPELLANT**

**VS**

**BEATRICE WAITHERA MAINA.....1<sup>ST</sup> RESPONDENT**

**COUNTY LANDS REGISTRAR-MURANGA.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**(Being an Appeal from the ruling of the Hon E. Muriuki Nyagah PM in CMCC No 142 of 2019- Muranga delivered on the 16/7/19)**

**JUDGMENT**

1. The Appellant (Previously the Plaintiff in CMCC No 142 of 2019-Muranga) filed suit against the Respondents (then Defendants accordingly) in CMCC No 142 of 2019 seeking orders as follows;

a. A declaration that Land Parcel Number LOC.15 GAKUYU/1542 is a public access road and that the Title deed which was issued to Robinson Maina Dishon was erroneously issued since the said parcel is a public road of access and not private property.

b. A mandatory injunction directing the 1st Defendant to immediately cease blocking and re-open the public access road currently registered as Title Number LOC.15 GAKUYU/1542 for unhindered use by the Plaintiff and other members of the Public.

c. A permanent injunction restraining the 1st Defendant, her licencees, agents, servants, employees and/or any other person or persons claiming right through her from ever blocking or in any other way preventing the free and unhindered use of the public access road currently registered as Title Number LOC.15 GAKUYU/1542 by the Plaintiff and any other members of the public.

d. An order directing the 2nd Defendant to immediately rectify or cancel Title LOC.15 GAKUYU/1542 and mark the said Title as "Government of Kenya Public Road of Access".

e. Costs of this suit; and

f. Any other or further relief as this Court may deem fit to grant.

2. In the said suit the 1<sup>st</sup> Respondent is sued as the surviving spouse and successor in title of Robinson Maina Dishon, deceased. It

was the Appellant's case that the 1<sup>st</sup> Respondent has since 2016 inter alia blocked the access road to his property parcel No LOC 15/GAKUYU/445, which access is through the suit land despite the said suit land having been declared a public access road by the Land Dispute Tribunal and the Court in SPMCC No 77/2005-LDT (Kiaharu KIH/DISP/TRI/53/2005) and SPMCC No 49/2008-LDT (KIH/DISP/TRI/2/2008) as well as the Land Registrar-Muranga vide letter dated the 11/10/2010.

3. The 1<sup>st</sup> Respondent denied the Appellant's case vide its statement of defence filed under extreme protest and contended that the suit land was registered in the name of Robinson Maina Dishon whose estate was yet to be administered in law. That she is neither a legal representative nor an administrator of the estate and therefore the suit against her is fatally defective on ground of want of legal capacity. In addition, the 1<sup>st</sup> Respondent contended that the Appellant filed a similar suit against her deceased husband to wit HCCC No 106/2011- Nyeri which abated by operation of law upon the death of her husband. That no fresh suit can be permitted on the same action by Order 24 Rule 7 of the Civil Procedure Rules.

4. The 1<sup>st</sup> Respondent raised a Preliminary Objection of the grounds that;

a. The 1st Defendant has no Locus standi to be sued over land parcel No. LOC.15 GAKUYU/1542 which is registered in the name of Robinson Charles Maina Dishon Macharia who died on 7/6/2014 as she is not the legal representative and/or administrator of his estate.

b. The Plaintiff's suit as filed against the Defendant, the wife (spouse) to the registered owner of land parcel NO. LOC.15 GAKUYU/1542 is fatally defective for offending the mandatory Provisions of Order 24 Rule 7 of the Civil Procedure Rules in view of the previous suit Nyeri ELC cause No. 482 of 2014 (formerly Nyeri H.C.C.C Cause No. 106 of 2011) involving the Plaintiff and the deceased owner of land parcel No. LOC.15 GAKUYU/1542 who died on 7/6/2014.

c. The Plaintiff can only apply to revive the abated suit in Nyeri ELC cause No. 482 of 2014 but cannot file a fresh suit involving the same cause of action and the same subject matter.

d. The suit as filed offends the mandatory provisions of Order 1(i) (f) of the Civil Procedure Rule. In Paragraph 16 of the Plaint dated 6/5/2019.

5. The parties canvassed the Preliminary Objection by way of written submissions.

6. Upon consideration and determination, the Learned Principal Magistrate upheld the Preliminary Objection in his ruling delivered on the 16/7/2019.

7. Aggrieved by the decision of the Learned Principal Magistrate the Appellant has proffered 8 grounds of Appeal. Inter alia that the Learned Principal Magistrate erred in law and fact in holding that;

a. That the trial magistrate erred in law and in fact by relying on facts which were contested and had to be proved through evidence.

b. The Court failed to consider that the status of the road was not contested and there was a holding by previous Courts on this issue. That the 1st Defendant had no justification to block the road.

c. That the subject matter and the parties were not similar to those in Nyeri HCCC 106/11 that the road was blocked by a different person.

d. That the fact that the 1st Defendant admitted that she was not the legal representative weakened her case and her claim on right to block the access road.

e. That the Appellant was shut out of the seat of justice contrary to Article 48 and 50 of the Constitution causing the plaintiff to turn to extrajudicial methods to attain justice.

8. In his Appeal, the Appellant prays for orders that the Appeal be allowed and the ruling of the Court and all the consequential orders be set aside, reinstate the suit before another Magistrate other than the Learned Hon Muriuki Nyaga on grounds of reasonable

apprehension of bias.

9. The Appeal was canvassed by written submissions which I have read and considered. Save for the Appellants and the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not file their written submissions despite service.

10. As to whether the Preliminary Objection was a point of law the Appellant submitted that the objection was blurred with factual details which required proof through the adduction of evidence. Further it was not based on admitted facts.

11. As to whether the 1<sup>st</sup> Respondent has locus to be sued the Appellant states that he sued the 1<sup>st</sup> Defendant as the person who actually blocked and continues to block the access road in question. That she should be ordered to reopen the access road. That Order 1 Rule 3 of the Civil Procedure Rules gives the Appellant the right to sue whomsoever a right to relief is alleged to exist. That the 1<sup>st</sup> Respondent does not enjoy immunity from a Court case and cannot be heard to say that she has no locus to be sued. That the trial Court's holding that she has no locus is tantamount to giving the 1<sup>st</sup> Respondent immunity which is a breach of Art 48 and 50 of the Constitution. Further the Appellant should not be tasked to probate the estate of Robinson Maina through appointing the legal representative. That it is unjust for the Court to deny justice to the Appellant because the family of his violator has failed to go through probate.

12. The Appellant further admits that the 1<sup>st</sup> Respondent was not sued as the legal representative of the estate of her late husband but in her personal capacity for blocking the access road. That the case before the Court is a fresh suit arising from the conduct of the 1<sup>st</sup> Respondent and not on the cause of action in HCCC No 106 of 2011 -Nyeri.

13. As to whether the suit offends the provisions of Order 24 Rule 7 of the Civil Procedure Rules, the Appellant argued that HCCC No 106 of 2011 was dismissed for want of prosecution under Order 17 Rule 2 and not abatement by operation of law. That the Court needed to call evidence to rule in favour of one over the other. He argued that the cause of action against Robinson in HCCC No 106 of 2011 of unblocking the road did not survive him as he was sued personally. That the 1<sup>st</sup> Respondent was sued because she blocked the road after the demise of her husband. That since the cause of action against Robinson did not survive him, there is no necessity of substitution.

14. The 1<sup>st</sup> Respondent submitted that the suit land is still registered in the name of Robinson Charles Dishon Maina Macharia who died on the 7/6/14 and the 1<sup>st</sup> Respondent has not been appointed as the legal representative and or administrator of the estate. That other than being the surviving spouse of the deceased Robinson she has no capacity to be sued by the Appellant.

15. On whether HCCC No 106 of 2011 has abated the 1<sup>st</sup> Respondent submitted that this suit had been filed against the 1<sup>st</sup> Respondents husband, the registered owner of the suit land seeking the cancellation of the title of the suit land to allow the land to be designated as a public access road. That the same prayers have been sought in the CMCC No 142 of 2019 save with cosmetic changes. That Robinson died in 2014 and the cause of action survived him but no application under Order 24 Rule 4(1) of the Civil Procedure Rules has been made to substitute the 1<sup>st</sup> Respondent and as a result the suit abated by operation of law by 7/6/15.

16. This Court has power to review the facts and evidence and draw its own conclusions. In the case of **Abok James Odera & Associates –Vs- John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** the Court of Appeal restated the duty of first appellate Court as thus: -

“This being a first Appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way,”

17. Before I delve into the issues that commend themselves for the determination and disposal of the Appeal it is common ground as shown in the pleadings of the parties that the Appellant filed suit against the late Robinson Maina Dishon vide Nyeri HCCC 106/11 who was the proprietor of the land parcel No .LR LOC 15/GAKUYU/1542. The suit land is still registered in the name of Robinson, deceased. It is also acknowledged that the 1<sup>st</sup> Defendant is the wife of the late Robinson. The other uncontested fact is that the estate of Robinson has not been administered and neither the 1<sup>st</sup> Respondent is a legal representative nor an administrator of his estate.

18. The test in determining a Preliminary Objection was set out in the case of **Mukisa Biscuits Manufacturing Company Ltd –Vs- West End Distributors Ltd [1969] EA 696** where the Court 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.

Further that:

“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 discretion.

19. The effect of the case law cited above, is that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

20. The Court must proceed from the premise that an objection must be raised on a pure point of law, the effect of which if successful would dispose of the entire suit without allowing parties to go through the trial process. Arguably, the rationale of a Preliminary Objection is to interject the trial process. Given the draconian ramifications of Preliminary Objections, the Respondent must be seen to have proceeded in breach of a mandatory legal provision.

21. The 1<sup>st</sup> issue is whether the 1<sup>st</sup> Respondent has locus to be sued. This issue is closely linked to the second issue which is whether this suit is barred by the provisions of Order 24 Rule 7 of the Civil Procedure Rules.

22. In the case of **Alfred Njau –Vs- City Council of Nairobi [1983] KLR 625** the Court of Appeal, held inter alia that

“...Locus standi” literally means a place of standing and refers to the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”

23. Courts time and again have held that where there is no locus the Court lacks jurisdiction. In the case of **Julian Adoyo Ongunga –vs- Francis Kiberenge Abano Migori Civil Appeal No.119 of 2015**, Justice A. 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.”

24. It is commonly agreed that the 1<sup>st</sup> Respondent is neither a legal representative nor an administrator of the estate of her late husband. The Appellant has submitted that the 1<sup>st</sup> Respondent has been sued on her personal capacity and not in a representative position because the act complained of blocking the access road was carried out by the 1<sup>st</sup> Respondent from around 2016 when her husband had already passed away. That the action is personal to the 1<sup>st</sup> Respondent and has nothing to do with the estate of Robinson. He therefore contends that the said 1<sup>st</sup> Respondent is properly before the Court. Further that the cause of action in HCCC No 106 of 2011 was personal to Robinson.

25. In para 2 of the Complaint filed on the 6/5/2019 the Plaintiff described the 1<sup>st</sup> Defendant as the surviving spouse and successor in title to Robinson Maina Dishon, deceased.

26. In para 3 of the statement of defence the 1<sup>st</sup> Respondent states she is neither the legal representative nor the administrator of the estate of the late Robinson Maina Dishon who died on the 7/6/2014. She acknowledges that she is the wife of the said Robinson.

27. It is further commonly acknowledged by the parties that the suit land is still registered in the name of the said Robinson, deceased. See para 7 of the Complaint and para 4 of the defence.

28. It is trite that a party retains a right to file suit against such party that they deem a right or relief exists or flows from. The

Appellant argues that he has sued the 1<sup>st</sup> Respondent because she personally blocked the access road.

29. Going by the prayers sought by the Appellant in CMCC NO 142 of 2019, such prayers include a declaration that the suit land is a public access road, a mandatory injunction against the 1<sup>st</sup> Respondent to cease blocking the public access road, and rectification of the title by cancellation. These prayers in my view are substantial prayers that go the root of the dispute between the parties which is the dispute in respect to title of a deceased person.

30. The law of Succession protects property that is registered in the name of a deceased person. Section 45 of the said Act states that except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. In my view for any purpose includes in defence of a suit against the property of the deceased.

31. Suits against the estate of a deceased person is brought by or against the legal representative of the estate. Section 2 of the Civil Procedure Act defines a legal representative as 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.

32. In this case, the Court's attention has been drawn to the fact that the suit property vests in the estate of the deceased. The proper party would be the personal representative of the deceased owner as opposed to his surviving spouse, the provisions of Order 1 of Civil Procedure Rules cannot assist the Plaintiff where the sued party lacks legal persona in the circumstances of the case. The assertion by the Appellant that the 1<sup>st</sup> Respondent was sued in her personal capacity to account for her actions on the suit land is not apparent in the pleadings. From a cursory view of the facts of the case, it is clear that the Respondent is being called upon to give access and divest her late husband's land, a claim that confronted Robinson in HCCC No 106 of 2011.

33. In the case of **Mohammed Abushin Mkullu –Vs- Suleiman Abdalla Hassan (2012) EKLR**, Ibrahim J held that it is the duty of any party instituting a suit to find out which party they are filing claim against.

34. In the case of **Unilever Tea Kenya Ltd –Vs – National Land Commission & 2 Others (2018) EKLR**, the Court held that in order for a party to be enjoined as a Respondent he must be a proper party. That the only reason which makes it necessary to enjoin a party to an action is so that he should be bound by the result of the action.

35. An objection brought on this ground goes to the root of the matter and indeed the jurisdiction of the Court. Where a party moves the Court in breach of this principle the suit would be liable to be struck out summarily or deemed void abinitio.

36. It is the finding of the Court that the 1<sup>st</sup> Respondent is not the right party to the suit. The 1<sup>st</sup> Respondent would be incapable of defending the claim in the absence of letters of grant of administration of the estate of her husband.

37. The 2<sup>nd</sup> issue is whether this suit is barred by Order 24 Rule 7 of the Civil Procedure Rules. It is common knowledge between the parties that the Plaintiff filed a suit to wit HCCC No 106 of 2011 against the Husband of the 1<sup>st</sup> Respondent. The Appellant contends that the suit was dismissed for want of prosecution under Order 17 Rule 2 while the 1<sup>st</sup> Respondent argues that it abated by operation of law. The Appellant contends that for the Court to rule on the matter it has to call for evidence removing the objection from the province of a pure point of law. Further that the cause of action is different from the current suit in the lower Court. It is commonly accepted that the suit existed and that Robinson died before the suit was concluded. The divergent point is if it was dismissed or it abated.

38. Order 24 Rule [Order 24, Rule 1.] No abatement by pay's death if right survives. 1. The death of a Plaintiff or Defendant shall not cause the suit to abate if the cause of action survives or continues.

39. Order 24, Rule 4.] Procedure in case of death of one of several Defendants or of sole Defendant. 4. (1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.

40. [Order 24, Rule 7.] Effect of abatement or dismissal 7. (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

41. The procedural law is clear in the event of the death of a Defendant. In this case it is to be noted that the core prayer in HCCC No 106 of 2011 was the cancellation of the title of the deceased owner on the ground that the title was erroneously registered in his name whilst it is a public access road. As discussed above the prayers in the lower Court case still centers on the cancellation of title. It therefore follows that the suit in the HCCC survived the death of Robinson and the law decrees that the deceased Defendant ought to have been substituted with the legal representative within a period of 12 months in default the suit abates. The provisions of Order 24 Rule are mandatory and it follows that the suit abated by the 7/6/15 and no revival was done. Instead the Appellant filed a fresh suit thus running afoul to the provisions of Order 24 Rule 7 of the Civil Procedure Rules.

42. It is the law that a party must be 'suable' and this is an issue that goes to the root of the matter and also affects the jurisdiction of the Court. A Court cannot enforce orders against a person who lacks legal persona before it. See the case of **Football Kenya Federation –Kenya Premier League**. This must be distinguished from a case where the Court is enjoined to find against a party who has requisite capacity but has been inadvertently sued. The latter may be amended under the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules to enjoin the right Defendant to ensure that substantial justice is achieved. The letter and spirit of Article 159 and Article 50 of the Constitution of Kenya would be invoked in such cases.

43. In the case of **Kenya Farmers' Cooperative Union Ltd.–Vs- Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) Eklr** it was held that a Court of law has no jurisdiction to order for substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of law.

44. Further the provisions of Order 24 Rule 7 act as a statutory bar to prevent further claims that were pending in an abated suit, arguably the effect is that there is finality on such litigation. The Court holds that this is a point of law and not procedure.

45. Finally, the totality of my evaluation is that I find no fault on the part of the Learned Principal Magistrate in the decision that he reached. No bias has been demonstrated nor proved on the part of the Learned Principal Magistrate.

46. In the upshot the Appeal has no merit. It is dismissed.

47. The costs of the Appeal are payable by the Appellant to the 1<sup>st</sup> Respondent.

48. **It is so ordered.**

**DATED, SIGNED & DELIVERED ONLINE AT MURANGA THIS 17<sup>th</sup> DAY OF DECEMBER 2020.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of:**

**Kabura Mwangi for the Appellant**

**Kirubi for the 1<sup>st</sup> Respondent**

**2<sup>nd</sup> & 3<sup>rd</sup> Respondents – Absent (not participants in the Appeal)**

**Court Assistants, Njeri & Kuiyaki**



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