REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. 23 OF 2019

JOSEPH MURIUKI KITHINJI.....PLAINTIFF

VERSUS

PETERSON IRERI MWANIKI.....1ST DEFENDANT

THE MINISTER FOR LANDS.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL..4TH DEFENDANT

RULING

1. What is for determination before me is a preliminary objection dated 15.8.2019 and filed on 16.8.2019. The objection targets the suit as filed. It is premised on four (4) grounds as follows:-

i) That the plaintiff needs proper letters of administration Ad-Litem to move the Court, which the plaintiff has not presented. The plaintiff thus lacks the Locus standi to bring this suit.

ii) That as what is being challenged is the decision of a Quasi-Judicial Tribunal, i.e Minister's Appeal and the proper way to move the court is vide an application for Judicial Review, and not a plaint.

iii) That for such an application, leave of the court must first be sought, no leave has been sought.

iv) That for a judicial review, the plaintiff is out of time to file a judicial review, the time within which one can be filed is 6 months.

2. **JOSEPH MURIUKI KITHINJI** is the plaintiff in the suit while **PETERSON IRERI MWANIKI, THE MINISTER FOR LANDS, THE CHIEF LAND REGISTRAR AND THE HON. ATTORNEY GENERAL** are the defendants. The preliminary objection is brought by the 1st Defendant **PETERSON IRERI MWANIKI**.

3. In the suit, the plaintiff contested the decision by the Minister of Lands to dismiss the appeal. The Minister is said to have disregarded the evidence tendered during the hearing. According to the plaintiff, the views and comments by the assessors were never considered and so were the recorded proceedings. It is his assertion that the decision made by the minister was irrational, unreasonable and violated the plaintiff's right to fair hearing. The plaintiff's suit ultimately, seeks declaratory orders to have the

decision of the 2nd defendant made on 10. 12. 2018 nullified and also for him to be declared absolute owner of land parcel No. Gichiche/Gichiche/279.

4. The suit is opposed by the 1st defendant by way of statement of defence and preliminary objection. In the defence, the 1st defendant denied the allegations in the plaint and sought strict proof of such allegations. According to him, the plaintiff was given the right of audience and was afforded a fair trial. Due process is said to have been adhered to and all evidence tendered was considered. The 1st defendant asked that the claim to be struck out for lacking specificity as to what decision the plaintiff sought to be impugned. The suit is said to be fatally defective for having been filed by way of plaint as opposed to judicial review and for failure to seek leave prior to filing.

5. Further, the suit has been said to be time barred as suits of such nature ought to be brought within six months which are said to have lapsed. The plaintiff is said to lack locus standi to institute the suit for want of letter of administration to the estate of David Kithinji Nthambara who is said to have been the objector in objection No. 56/81.

6. The preliminary objection was argued orally, with the 1st 1st defendant submitting first. It was submitted that the plaintiff lacked locus standi to institute the suit. Counsel stated that the plaintiff had sued in his personal capacity and in the 1st defendant's personal capacity yet in the proceedings before the tribunal and appeal before the minister both parties were in a representative capacity. The plaintiff is said to have been representing his deceased father while the 1st defendant was representing his deceased brother. Counsel argued that the plaintiff had neither obtained letters of administration nor attached evidence of grant ad litem before the court. The failure to attach the letters of administration has been termed as defective and fatal.

7. It is contended that the title deed is registered in the name of Nyagah Mwaniki, whose title the plaintiff is seeking to have cancelled, yet the plaintiff has not included him in the suit. According to counsel for the 1st defendant, the suit parcel of land ceased being the 1st defendant's brother land as it has already been distributed and a confirmed grant is said to be attached as evidence of this. The plaintiff is said not to have any identifiable stake and further that the other parties have been sued erroneously.

8. The plaintiff is faulted for filing the suit by way of plaint where he is seeking declaratory orders against a decision which he has not attached in his pleadings before the court. According to the 1st defendant, the suit should have been filed by way of judicial review as it is challenging the decision of a quasi- judicial tribunal. It is claimed that even while filing by way of judicial review leave of court ought to have been sought.

9. It was further submitted that suit offends the provisions of Order 53 rule 2 of the Civil Procedure Rules. It was said to be time barred and ought to have been filed within six months after the decision was delivered. The plaintiff was faulted for failing to give notice to the Attorney General prior to filing suit against the office as is required by the law.

10. The suit is further said to offend the provisions of Sections 4(4) of the Limitations of Actions Act. It was argued that the parcel of land is a joint registration and cancellation of such title can only be made if one is making a claim on overriding trust. The suit has been said to be dead on arrival and a non- starter and the court has been called upon to dismiss it with costs.

11. Counsel for the 2nd, 3rd and 4th respondents associated himself with the submissions of the 1st respondent's and called upon the court to dismiss the suit with costs.

12. The plaintiff's counsel also made his submissions. He submitted that the court should only consider the issues in the preliminary objection and according to counsel the issues to be addressed should be Locus Standi and the procedure adopted in bringing the suit before the court.

13. On the issue of Locus Standi it was submitted that the parties before the minister were the plaintiff and the 1st defendant. It was stated that the parties were representing the deceased persons and the land was awarded to the 1st defendant as a representative of his brother. Counsel argued that even if the suit was to be instituted by way of judicial review the parties before the court would still be the proper parties.

14. According to the plaintiff's counsel the issue of locus standi is not a pure point of law as the respondents are said to have relied on fact and evidence to reinforce their argument on it. It was stated that the requirement for grants do not apply to proceedings

before the minister and reliance was made on the case of **R Vs Minister of Lands & Another Exparte aKyema Muasya [2019] eKLR**. According to the plaintiff, the issue of locus standi will be part of the hearing and will require evidence to be proved.

15. On the second issue, it was submitted that a party could move the court seeking declaratory orders as an alternative to judicial review, in support of this counsel relied on the cases of **Nicholas Njeru Vs AG & 8 others [2013] Eklr** and **Jamil Kiombe Vs Emily Jerono & Another E&L 218 of 2012**. Counsel finally reiterated that the suit was properly before the court.

16. Counsel for the 1st respondent made further submission in which he denied having raised issues of fact and reiterated that the letters of administration should have been sought prior to institution of the suit. Counsel challenged the authority relied upon by the plaintiff and averred that in the first authority the matter concerned community property as opposed to individual land. As for the second authority it was said that the judge was making an opinion in that regard and not expressing the law. The authorities were said to be different from the matter at hand as they referred to clan or communal land and not individual land.

17. I have considered the objection as raised, the authorities attached by the plaintiff and the oral arguments by the parties. I have also looked at the suit as filed. A preliminary objection was described in the case of ***Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.*** (1969) EA 696, where it was held as follows:

"So far as I am aware, a Preliminary Objection consists of a pure 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……"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 has to be ascertained or if what is sought is the exercise of judicial discretion.

18. It therefore follows that for a ground to suffice as a preliminary objection then it ought to be one that raises a pure point of law as in the Mukhisa case. The preliminary objection should also be one that if argued is capable of disposing off the suit. In the case of ***Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999***, the Court held that:-

"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings."

19. The 1st defendant has raised four grounds in his preliminary objection. The plaintiff's counsel has contended that the issue of locus standi is not a pure point of law as the court will require to consider it during the hearing by evaluating evidence.

20. Locus standi is defined in Black's Law Dictionary, 9th Edition (page 1026) as *"the right to bring an action or to be heard in a given forum"*. In the case of ***Alfred Njau and Others ..Vs.. City Council of Nairobi (1982) KAR 229***, the Court held that;-

"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".

21. A claim that one has no locus standi therefore challenges a party's right to be heard before a court and if a determination is made in the affirmative then this issue has the capability of disposing of the suit. A claim that a party lacks locus standi therefore is a pure point of law and one that needs to be raised and determined at the earliest.

22. Having made a determination that the issue of locus standi is a pure point of law, there is need to determine whether the plaintiff has a right to be heard before this court. The defendants have submitted that in the proceedings which are the basis of the suit herein the plaintiff and the 1st defendant were in the suit in a representative capacity on behalf of the plaintiff's father and the 1st respondent's brother respectively. It is further pleaded that the plaintiff has no identifiable stake in the suit. The plaintiff has however contested that he has brought the suit based on the parties that were before the minister in the appeal which in his view were himself and the 1st defendant.

23. I have looked at the plaint filed by the plaintiff, the adjudication proceedings before the minister, and the adjudication objection. The suit as filed is challenging the decision by the minister to dismiss the appeal filed before him. The plaintiff in his submissions has stated that the parties in the adjudication proceedings before the minister were himself and the 1st defendant. I find this not to be

true, for reason that the appellant in the adjudication proceedings was the plaintiff's father who was represented by the plaintiff and the respondent was the 1st defendant's brother represented by the 1st defendant.

24. There are also objection proceedings annexed by the 1st defendant. These proceedings were conducted much earlier than the appeal before the minister. In the objection proceeding the plaintiff's father was the objector, while the respondent is the 1st defendant's brother. It therefore follows that since the basis of this suit is a challenge to appeal before the minister and earlier the objection proceedings, then the parties in all the proceedings ought to be the same as the parties in the suit herein. David Kithinji (the plaintiff's father) and Faustin Ngari Nthiga (the 1st defendant's brother) are the proper parties in this suit. The plaintiff therefore lacks capacity to institute this suit and the 1st defendant is therefore wrongly sued in the suit.

25. Section 82 of the Law of Succession Act gives the personal representatives of a deceased person's estate the power 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 of his personal representative"*. It appears that one can only institute or enforce a suit on behalf of the estate of a deceased person once they have been appointed personal representatives to such estate. Such appointment under the Succession Act can only be by way of obtaining a full grant or a grant limited for purposes of instituting a suit and prosecuting it which would in this case be an Ad-litem.

26. The plaintiff has admitted not having obtained any grant prior to institution of this suit. In his submissions he has argued that the requirement for obtaining a grant as envisaged before the succession act is not required for a suit filed before the minister and the case of Republic Vs Minister for Lands & another, Mulatya Isika & Another (Interested parties) Exparte Kiema Muasya [2019] eKLR has been attached in support of this. The argument proffered by the plaintiff and the authority attached clearly refer to a case instituted before the minister, where the court noted that requirement for a grant had been dispensed with as individual rights in the land had not been determined and the property did not form part of the estate of the deceased but was communal land. This is not the case in the suit herein as the land is individual land.

27. Further, the proceedings before the minister are informal as compared to the proceedings before the court. The court is bound by the civil procedure rules which mandate that any suit brought/instituted on behalf or against a deceased person should be through the legal representative. The law of succession act on the other hand only recognizes a person as a legal representative by virtue of having a grant which gives them the mandate to act on behalf of the estate.

28. In the case of ***Julian Adoyo Ongunga & Another —Vs- Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi (Deceased) eKLR*** *Mrima J described a party filing a suit without an Ad Litem as follows;*

'...Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain the suit even where a valid cause of action exists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is 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...'

29. Further in the case of **Hawo Shanko v Mohamed Uta Shanko [2018] eKLR** Justice Chitembwe while addressing the failure to obtain a grant prior to filing a suit observed that:

"…….The general consensus is that a party lacks the Locus standi to file a suit before obtaining a grant limited for that purpose. 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 the estate. 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/her the authority to file the suit…..

The court further stated that;

'...if any relationship with the deceased does exist whether son, daughter, wife, widow is not sufficient. That relationship does not give the locus standi to any relative to obtain suit before obtaining limited grants. One's relationship to the deceased does not clothe

such a party with the locus standi. It is the Limited Grant which does ‘

30. From the above cases, it is apparent that for a party to have *locus standi* in a suit involving a deceased person then they must first obtain a grant limited for that purpose. I find that the plaintiff ought to have obtained a grant prior to filing a suit and further should have ascertained the 1st defendant’s capacity to defend the suit. In view of the foregoing, both the plaintiff and the 1st defendant have no locus standi to be before this court.

31. I now move to grounds 2, 3 and 4 which in my view can be determined as one issue which is whether the suit is properly instituted before the court. The suit herein has been filed by way of plaint seeking to have the decision by the minister of land declared null and void and further that the plaintiff be declared the absolute owner of the land. There are no documents attached to the plaint, however the 1st defendant has attached the pleadings of the proceedings before the minister.

32. From the pleadings filed by the 1st defendant and which facts are not disputed by either party, there were objection proceedings filed by one David Kithinji Nthambara, the plaintiff’s father, against Faustin Ngai Nthiga, the 1st defendant’s brother. It appears that after the determination of the objection an appeal was preferred to the minister which was dismissed. As a result the suit herein was filed.

33. The respondents in the suit are challenging the manner in which this suit was filed, as according to them, the plaintiff ought to have approached the court by way of judicial review. The plaintiff on the other hand has contended that the suit is properly before the court and the orders sought can be granted by way of plaint.

34. The land adjudication act stipulates the procedure for handling land adjudication matters. Section 29 of the Land Adjudication Act provides as follows*:*

(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication,and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

35. The plaintiff has relied on two authorities which according to him grant the court the power to entertain a suit filed by way of plaint seeking declaratory orders against the decision of the minister. The first case relied upon is **Jamin Kiombe Lidodo Vs Emily Jerono Kiomber & another [2013] eKLR** by Justice Munyao Sila where he dismissed a preliminary objection which challenged the approach of filing a plaint seeking declaratory orders against the decision of the Land Dispute Tribunal. The preliminary objection had sought that such suit ought to be filed by way of Judicial review as opposed to a plaint.

36. I have looked at the decision which was a ruling on two preliminary objections and I have come across the judgment in the same suit by Justice A. Ombwayo, who in dismissing the suit by the plaintiff, was of the view that the approach in challenging the decision by the land dispute tribunal should be way of Judicial review. The judge in the case of **Jamin Kiombe Lidodo v Emily Jerono Kiombe & another (on behalf of Soy Land Disputes Tribunal and District Land Registrar, Uasin Gishu) [2018] eKLR** after considering the substantive suit held as follows that

“It is clear from the foregoing that after adoption by the Magistrate’s court, the award of the Tribunal becomes a judgment of the court that can only be challenged by way of an appeal to the Appeals’ Committee and subsequent appeal to the High Court or by Judicial Review. The plaintiff in this case did not challenge the decision of the Tribunal and its adoption in accordance with the Land Disputes Tribunal Act or by way of Judicial Review. That is the only known procedure for challenging the said decision”.

37. I have also seen an application for review filed in the same suit on claim that there is an error on the face of the record in view of the findings by Justice A. Ombwayo via a vis the earlier ruling by Justice Munyao Sila. That application for review was dismissed and the court was of the view that an appeal instead ought to have been preferred as opposed to the application for review. I have not seen any appeal in the matter and to me the decision in the ruling as relied upon by the plaintiff is not binding, the court having

made a different determination in the judgment.

38. The court of appeal case in Nicholas Njeru Vs Attorney General & 8 others has also been relied upon. I have looked at the decision as well and I am of the view that the court was in essence just affirming the jurisdiction of the high court to grant declaratory orders.

39. In the case of **Vincent Narisa Krop & 3 others v Martin Semero Limakou & 12 others [2020] eKLR** the court stated as follows;

"The mandate of determining ownership of land in accordance with customary law at the land adjudication stage is therefore granted not to the courts but to the authorities vested with the power to determine customary ownership of land under the mechanisms set out in the Act. It is only through the mechanisms set out in the Act that the proper evidence of ownership can be adduced and the land awarded to the deserving persons. The appeal to the Minister is the final stage in the process. Decisions made at this stage should not be set aside easily; Save for judicial review orders to correct procedural defects in the proceedings leading to the Minister's determination, the Minister's decision is not appealable……".

40. I wish to associate myself with the reasoning in the above case and the provisions of Section 29 of the Land Adjudication Act that the Minister's decision is final. Counsels for the respondents have stated that the land adjudication process is quasi judicial and any challenge of the decision should be by way of judicial review. I agree with the respondents on this as the Fair Administrative Action Act has laid out the procedure, which is judicial review, that ought to be followed in challenging a decision by a quasi-judicial body. I find that the correct approach that should have been followed by the plaintiff in challenging the decision of the minister ought to have been by way of judicial review.

41. Having already made a finding that the plaintiff lacks locus standi and the approach of instituting the suit by way of plaint is not proper. I am inclined to allow the preliminary objection as prayed. I therefore dismiss the suit herein with costs to the defendants.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 9TH DAY OF DECEMBER, 2021

In the presence of Guantai for 1st defendant; Kimanzi for Andande for plaintiff, No appearance for Attorney General and in the absence of other defendants.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

9.12.2021