



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ELC APPEAL NO. 7 OF 2021**

**JOSEPH OWISO OGOMBO..... APPELLANT**

**= VERSUS =**

**SEBASTIAN BEN ADUORI.....RESPONDENT**

**J U D G M E N T**

1. This appeal arises from the ruling made in Busia CMC ELC No. E32 of 2021 of Chief Magistrate’s Court by Hon. P.E. OLENGO SPM delivered on 7<sup>th</sup> July 2021. The appellant who is the Defendant in the subordinate Court raised the following grounds in their Memorandum of Appeal dated 14<sup>th</sup> July 2021;

a) **The Learned Senior Principal Magistrate erred in law and fact in holding that the Respondent brought the suit in the representative capacity when the Respondent had not taken out a Grant of Letters of Administration to sue on behalf of the estate of his late father.**

b) **The Learned Senior Principal Magistrate erred in law in failing to strike out the suit against the Appellant as the Appellant had no capacity to represent the estate of his deceased father.**

c) **The Learned Senior Principal Magistrate misdirected himself in law in the interpretation of ‘representative suit’ and arrived at a wrong conclusion.**

d) **The Learned Senior Principal Magistrate erred in law in failing to strike out the suit against the Appellant as any judgment passed in the suit would be null, void, unenforceable and nugatory.**

2. The Appellant prayed that the appeal be allowed and the ruling of the subordinate court dated 7<sup>th</sup> July 2021 be set aside and substituted with an order striking out the suit by the Respondent. He also prayed that he be granted the costs of this Appeal and those of the subordinate court.

3. The parties agreed to dispense with the hearing of the appeal by way of written submissions. The Respondent filed his submissions on 3<sup>rd</sup> December 2021 where he submitted the appeal has no merit as it is a waste of courts time and the same should be dismissed and judgment entered against the appellant to restrain them from interfering with his quiet possession of the suit land.

4. The Appellant filed his submissions on 3<sup>rd</sup> December 2021 where he submitted that the suit is defective and incompetent on the following grounds;

i) There is no proof that a Grant was issued to the plaintiff to enable him to file this suit and he therefore lacks capacity to sue on behalf of his late father.

ii) The registered owner of the suit land who was the father of the Defendant was dead by the time this suit was filed. Nobody has taken out a Grant of Letters of Administration to his estate and the defendant is just one of the children of the deceased. The defendant has therefore no capacity to defend the deceased's estate leave alone give the plaintiff 1 acre out of the suit land as this would be in contravention of Section 45(1) of the Law of Succession Act CAP 160.

5. Further, the Appellant submitted that unless both parties take out Grant of Letters of Administration to the estates of their respective fathers, any suit filed by either of them or defended by either of them would be incompetent and in respect of the defendant it would amount to intermeddling of the estate of a deceased.

6. The brief background of this appeal is that the Respondent filed the suit against the Appellant in the subordinate court seeking for judgment restraining the appellant from trespassing on, and to compel him to transfer one (1) acre portion from of LR. NO. SAMIA/BUBURI/92 to the Respondent. The Appellant filed a statement of defence denying the claim and an application under Order 2 Rule 15(1)(a) (d) and (2) and Order 51 Rule 1 of the Civil Procedure Rules for orders that the suit be struck out for not disclosing any reasonable cause of action and being an abuse of the court process.

7. The application was supported by the following grounds;

a) *That the suit is based on an alleged sale agreement between the plaintiff's late father and the defendant's late father.*

b) *That there is no averment that the plaintiff has taken out grant of letters of administration to the estate of his late father.*

c) *That there is also no averment that the defendant has taken out grant of letters of administration to the estate of his late father.*

d) *From (b) and (c) above the plaintiff has no capacity to sue and the defendant has no capacity to defend the suit which touches on the estate of the deceased persons.*

8. The Respondent in contesting the application filed a Replying Affidavit dated 17<sup>th</sup> May 2021 wherein he deposed that he had letters of administration and certificate of confirmation of grant issued in 1997 in NAIROBI Succession Cause No. 1678 of 1992. He attached to the affidavit a copy of the Certificate of Confirmation of Grant dated 16<sup>th</sup> October 1997 and a copy of the Kenya Gazette dated 8<sup>th</sup> January 1993 page 8.

9. The Learned Senior Principal Magistrate in his ruling delivered on 7<sup>th</sup> July 2021 noted that the Respondent had demonstrated his capacity to sue the Appellant on behalf of the estate of his late father. The Learned Senior Principal Magistrate also noted that the Appellant has been sued as a trespasser and not as a representative of the estate of his late father. The upshot of the ruling was that the application lacked merit and was dismissed with costs. The Appellant being unhappy with this decision, moved to this court by way of an appeal.

10. I have read the Memorandum and Record of Appeal together with the submissions and the applicable law and the issue for determination by this court is whether the application dated 11<sup>th</sup> May 2021 was merited so that the trial magistrate erred in disallowing it.

11. The impugned application was grounded on Order 2 Rule 15 of the Civil Procedure Rules provides that a party may at any stage of proceedings apply to strike out pleadings for disclosing no reasonable cause of action; being scandalous, frivolous or vexatious; for being prejudicial or embarrassing or for being an abuse of the court process.

12. From the grounds of the application as listed in paragraph 7 herein-above, the appellant claimed that the respondent had no *locus standi* to bring the suit on behalf of the estate of his deceased father. Equally, the appellant was claiming that he had no *locus standi* to defend the suit as he had not taken out letters of administration for the estate of his deceased father. *Locus standi* is defined in **Black's Law Dictionary**, 9<sup>th</sup> Edition (page 1026) as "*the right to bring an action or to be heard in a given forum*".

13. The Respondent filed a response to the application in which he did annexe copies of Letters of Administration and

Confirmation of Grant for the Estate of LEONARD ADOURI and the subordinate court did acknowledge that the Respondent had demonstrated his capacity to sue on behalf of his father's estate. Whether the annexed documents were sufficient to allow the Respondent's suit to stand is a question to be determined after hearing both parties. I find that the subordinate court was right to hold that the Respondent demonstrated he had *locus standi*.

14. The Appellant has pleaded that he has not taken out letters of administration for the estate of his father and thus lacks capacity to defend the suit. I have looked at the plaint and observe from a plain reading that one of the complaints raised by the Respondent is an allegation that the Appellant has trespassed on the suit land which he has been tilling for the last 45 years and was seeking restraining orders. The complaint of trespass is specific to actions done by the Appellant not the estate of the deceased. In the defence filed, there is no denial that the Respondent is in possession on the portion of the land in dispute. Therefore, as the person accused of trespass, the trial magistrate was right in finding that the defendant was sued in his personal capacity as a trespasser in spite of the claim rose from the alleged sale agreement between the fathers of the two parties.

15. Though Order 2 Rule 15 of the Civil Procedure Rules gives courts the discretion to dismiss suits or strike out pleadings where a cause of action has not been disclosed, said discretion is exercised judicially. In ***D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another*** [1980] eKLR, Madan JA, stated:

***No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.***

16. Being guided by the above decision, and on account of the explanation given above, I find that the Respondent's suit in the subordinate court discloses a cause of action, inter alia trespass and which is a triable issue. Whether or not the Appellant trespassed on to the suit land is a matter that will be determined after hearing of the parties.

17. Consequently, it is my considered view and I so hold that this appeal lacks merit and the same is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 21ST DAY OF APRIL 2022.**

**A. OMOLLO**

**JUDGE**



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)