



No. 157

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

LAND AND ENVIRONMENT COURT

CIVIL CASE NO. 414 OF 2013

GRACE JEPKEMBOI BUSIENEI.....PLAINTIFF

VERSUS

DANIEL LEDAMA OLE SOYA.....1ST DEFENDANT

FRANCIS KISAS OLE SOYA.....2ND DEFENDANT

RULING

1. What is before me is the Plaintiff's application for interlocutory injunction brought by way of Notice of Motion dated 9th October, 2013. In this application, the Plaintiff has sought an injunction to restrain the defendants from evicting and/or intermeddling with all that parcel of land known as **LR. No. Transmara/Ololchani/3** (hereinafter referred to as **"the suit property"**) which is registered in the name of one, **Emmanuel Kimaiyo A Busienei (deceased)** (hereinafter referred to only as **"the deceased"**) who was the husband of the Plaintiff pending the hearing and determination of this suit. The Plaintiff's application has been brought on the grounds that the Plaintiff is the wife of the deceased and that the deceased was and is still the registered proprietor of the suit property. When the deceased died in the year 2006, he left the Plaintiff living and carrying out farming activities on the suit property. On or about 15th day of August, 2013 the defendants entered the suit property in the company of surveyors and started carrying out fresh survey on the suit property on the allegation that the Plaintiff and the deceased have encroached on the defendants' parcel of land and that it was necessary for a portion of the suit property to be curved out to form part of the defendant's said parcel of land and a new title deed issued with respect to the suit property. The Plaintiff has contended that the action of the defendants aforesaid amounts to intermeddling in the estate of a deceased person contrary to the provisions of section 45 of the Laws of Succession Act, Cap. 160 Laws of Kenya. The Plaintiff has contended that she has already started the process of applying for a grant of letters of administration of the estate of the deceased and since the defendants' said activities amounts to an interference with the suit property, the injunction sought should issue to restrain them from continuing with the said activities on the suit property pending the hearing and determination of this suit. The application is opposed by the defendants. The defendants have filed a replying affidavit sworn by the 1st

defendant on 8th November, 2013 and a Notice of Preliminary objection of the same date. In their replying affidavit, the defendants have denied that they have trespassed on the suit property and carried out the acts complained of by the Plaintiff. The defendants have contended that after the death of the deceased, the Plaintiff and her children gradually engaged in the destruction of the boundary features between the suit property and the defendants' parcel of land known as **LR. No. Transmara/Ololchani/299** (hereinafter referred to as "**Plot No. 299**"). This action on the part of the Plaintiff forced the defendants to lodge a complaint with the area District Land Registrar and Land Surveyor and requested them to come to the site to reinstate and fix the boundary between the suit property and Plot No. 299. The said District Land Registrar and Land Surveyor after giving notice to the Plaintiff and the defendants visited the site on 9th January, 2013 and fixed the boundary of the two parcels of land. The defendants have denied ever entering into the suit property on 15th August, 2013 as claimed by the Plaintiff. The defendants have claimed that it is in fact the Plaintiff who caused the destruction of trees and crops that had been planted by the defendants on the boundary of the two parcels of land on 24th September, 2013 an incident that was reported to the police and to the Forest Officer of the area. The defendants have contended that since the Plaintiff has not obtained letters of administration with respect to the estate of the deceased, she has no *locus standi* to maintain this suit which according to the defendants is fatally defective and should be dismissed together with the application for injunction. In their preliminary objection, the defendants contended that this suit and the application which is based thereon are incompetent, fatally defective, bad in law and should be struck out as this court lacks jurisdiction to entertain the same.

2. When the Plaintiff's application for injunction came up for hearing on 14th November, 2013, Mr. Otieno who appeared for the defendants indicated to the court that he wished to argue the preliminary objection first as it was capable of disposing off the Plaintiff's application without going to the merit of the same. The court granted Mr. Otieno's request. In his submission on the preliminary objection, Mr. Otieno argued that the Plaintiff's suit is fatally defective as it has been brought by a person who has no legal capacity to institute the same. Counsel argued that the Plaintiff has admitted in paragraph 12 of the Plaint and paragraph 6 of the grounds on which the injunction application has been brought that she has not obtained letters of administration with respect to the estate of the deceased. Counsel submitted that this suit which has been filed by the Plaintiff on behalf on a deceased person without letters of administration is incompetent as the Plaintiff has no *locus standi* to maintain the same. Counsel relied on a number of authorities in support of his submission and urged the court to strike out the Plaintiff's application with costs. Mr. Ochoki who appeared for the Plaintiff did not respond to the foregoing submissions by the defendants' advocate.
3. I have considered the defendant's preliminary objection to the Plaintiff's suit and injunction application. In her Plaint, the Plaintiff has sought only one relief namely, a permanent injunction to restrain the defendants from evicting the Plaintiff from the suit property and from selling, alienating, transferring or cultivating the same or grazing cattle thereon. It is not in dispute that the suit property is registered in the name of the deceased. It is also not in dispute that the Plaintiff has not obtained letters of administration with respect to the estate of the deceased. The Plaintiff has stated in the Plaint and in the application for injunction that she is in the process of applying for letters of administration with respect to the estate of the deceased. Due to the foregoing, it is clear that this suit has been filed by the Plaintiff before the Plaintiff obtained a grant of letters of administration of the estate of the deceased. I am in full agreement with this submission by the advocate for the Plaintiff that the Plaintiff has no *locus standi* to maintain this suit. In the Court of Appeal case of **Virginia Edith Wambui Otieno –vs- Joash Ochieng Ougo & Another (1982-88) 1 KAR 1049**, it was held per incuriam that an administrator is not entitled to bring an action as administrator before he has taken out letters of administration and if he does so, the action is incompetent from the date it was instituted. In the text, Law of Succession by **W.M. Musyoka** published by Law Africa, he has stated as follows at page 205 with regard to suits by administrators;

“Case law shows that no person has a right to enforce any cause of action, or defend any suit which survives the deceased or arises out of his death without a grant of letters of administration”.

4. Section 80(2) of the law of Succession Act provides that, a grant of letters of administration takes effect only from the date of the grant. It follows that the grant of letters of administration which the Plaintiff may have applied for will only take effect from the date when it will be issued. The effect of such a grant will not be retrospective and cannot therefore save the Plaintiff's suit herein. The issue of *locus standi* goes to the substratum of the suit. It is not a technical point which this court can overlook for the sake of substantive justice pursuant to the provisions of **Article 159(2)(d)** of the Constitution of Kenya. It is a matter of substantive law that a suit over a cause of action that has survived a deceased person or has arisen out of his death can only be brought by the deceased's administrator. It is also a matter of substantive law that a grant of letters of administration takes effect from the date of issuance.
5. I have said enough to show that the defendants' preliminary objection is well taken. I hereby uphold the same. This suit together with the application dated 9th October 2013 is accordingly struck out. The defendants shall have the costs of the suit and the application to be recovered from the Plaintiff after the hearing and determination of the defendants' counter-claim filed herein against the Plaintiff.

Delivered, dated and signed at Kisii this 22nd day of November 2013.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

Miss Kusa for the defendants

Mobisa Court Clerk.

S. OKONG'O

JUDGE