



**Okimaru v Wangwe & 2 others (Environment & Land Case
71 of 2016) [2023] KEELC 16557 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16557 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 71 OF 2016**

EC CHERONO, J

MARCH 29, 2023

BETWEEN

OMAR OMULAMA OKIMARU PLAINTIFF

AND

BENARD WAFULA WANGWE 1ST DEFENDANT

**THE CHAIRMAN MALAKISI LAND OWNERS COMMITTEE 2ND
DEFENDANT**

THE COUNTY GOVERNMENT OF BUNGOMA 3RD DEFENDANT

RULING

- 1 By a plaint dated July 21, 2016 and filed in court the following day on July 22, 2016, the plaintiff seeks for the following Orders;
 - a). A declaration that the plaintiff is the sole lawful owner of Plot No. 332 Malakisi Town.
 - b). An order of permanent injunction restraining the 2nd and 3rd Defendants from recognising and authorising the issuance of a Title deed with respect to Plot No. 332 Malakisi Town to the 1st Defendant.
 - c). Costs and interests thereon at court rates
 - d). Any other relief this Honourable Court shall deem fit and just to grant.
- 2 By a statement of defence dated September 28, 2016 and filed the same date by A.W. Kiyuyi instructed by A.W Kituyi & Co. Advocates, the 3rd defendant denies the plaintiff's claim and prays that the suit be dismissed with costs. In addition, the 3rd defendant filed a preliminary objection on the following points;



1. The plaintiff's suit is bad in law, defective and ought to be struck out as the plaintiff do not have locus standing to bring action in this case.
2. The suit is bad in law. Defective and ought to be struck out as the orders sought are incapable to be granted by this court.
- 3 The 1st Defendant through the firm of M/S Elizabeth Chungé & Company Advocates filed a statement of defence dated October 10, 2016 and filed on October 11, 2016 also denying the plaintiff's claim.
- 4 During the first hearing of this case, the 3rd defendant through his advocates drew the court's attention to the Notice of Preliminary which the parties agreed to be canvassed by written submissions.

3rd Defendants Written Submissions

- 5 On the first issue whether the plaintiff has locus standi to bring this suit, the 3rd defendant submitted that the plaintiff lacks locus standi to institute this suit. He argued that the plaintiff has no letters of Administration or a limited grant of letters of administration to give him capacity to bring an action on behalf of the Estate of the deceased Willington Okimaru Lukhale and no title deed was issued to the deceased as the legal owner of the disputed plot no. 332 Malakisi Town. The 3rd defendant contends that the plaintiff has not instituted this suit as a legal representative of the estate of Willington Okimaru lukhale(deceased) and hence his claim is fatally defective and the suit should be struck out
- 6 He referred to paragraphs 5, 6 & 7 of the plaint where the plaintiff avers as follows;

- “5. That at all material times prior to this suit is the lawful sole owner of plot no. 332 Malakisi Town Measuring approximately 0.04Ha.
6. The plaintiff avers that he did inherit the said plot no. 332 Malakisi Town from the deceased Willington Okimaru Lukhale who passed on in the year 1977
7. The plaintiff avers that he inherited both land parcel no. 345 and plot no. 332 Malakisi Town from his deceased father Willington Okimaru Lukhale.”

- 7 He referred to the following cases in support of the objection;

- 1). *Mukisa biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) E.A
- 2). *Alfred Njau v City Council of Nairobi* (1983) KLR 625
- 3). *Julian Adoyo Ongunga v Francis Keberenge Abano*, Migori Civil Appeal No. 119 of 2015
- 4). *Melchizedeck Shem Kamau v Beatrice Waithera & 2 Others* in Muranga ELC Case No. 18 of 2009
- 5). Kakamega ELC Case No. 61 of 2017 between *Jona Omonya v Boniface Onse & 2 Others*

The 3rd Defendant's Written Submissions

- 8 The 3rd defendant submitted on two issues. The first is whether the plaintiff has capacity to sue as a beneficiary in the estate of the late Willington Okimaru Lukhale
- 9 The 1st defendant submitted that an estate of a deceased person can only be represented in legal proceeding by a person who is duly authorized to do so through a grant of letters of administration. The 3rd defendant further submitted that in paragraph 5 of the plaint, the plaintiff averred that he is



the lawful sole owner of plot no. 332 Malakisi Town Measuring 0.04 Hectares. He argued that the plaintiff's claim is baseless as he has no Title deed and therefore has no locus standi to institute this suit.

10 The 3rd defendant further submitted that the plaintiff's suit is frivolous, vexatious and otherwise an abuse of the due process of this Honourable court for being devoid of merit and a waste of the court's time

1st Defendants Submissions

11 The 1st defendant submitted on the following three issues;

- 1). Whether the plaintiff prior to this suit was the lawful sole owner of plot number 332 Malakisi Town;
- 2). Whether the plaintiff has capacity to sue and
- 3). Who is to pay costs of the P.O

12 On the first issue, the 1st defendant submitted that from the evidence on record, the plaintiff was not the initial lawful sole owner of the suit property as he has not filed any evidence to support his claim such as a Certificate of Title, Lease or Allotment Letter.

13 Regarding the second issue, the 1st defendant submitted that an estate of a deceased person can only be represented in legal proceedings by a person who is duly authorized to do so through a grant of letters of administration. He submitted that a party cannot commence a suit and thereafter obtain letters of administration

14 On the issue of costs, the 1st defendant submitted that costs follow the event and that should the Preliminary Objection succeed, she prays or cost of the suit.

The Plaintiff's Submissions

15 The plaintiff on his part contends that he inherited a parcel of land being plot No. 332 Malakisi Town Measuring 0.04 Ha. from Willington Okimaru Lukhale (deceased) who passed on in 1977 by virtue of being his son. He submitted that the suit land forms part of the trust land under Malakisi local Physical Development Plan. He cited the case of *Christopher Mutiembu Machimbo & 3 Others v County Surveyor, Trans-Nzoia & 4 Others* (2022) KLR

Analysis and Decision

16 I have considered the Notice of Preliminary objection by the 3rd defendant and the rival submissions by the parties as well as the applicable law.

17 By way of a letter dated September 28, 2016 and filed in court the same date, the 3rd defendant gave Notice of intention to raise a Preliminary objection on the following issues;

- 1). The plaintiff's suit is bad in law, defective and ought to be struck out as the plaintiff do not have locus standing to bring action in this case
- 2). The suit is bad in law, defective and ought to be struck out as the orders sought are incapable to be granted by this court.

18 The plaintiff at paragraphs 5, 6 & 7 of the plaint averred that he inherited the suit land parcel No.332 Malakisi Town from his late father Willington Okimaru Lukhale. Based on those averments, the 3rd defendant raised the present objection arguing that the plaintiff lacks the locus standi to institute this



suit for want of letters of administration. At paragraph 8 & 9 of the plaint dated July 21, 2016, the plaintiff averred as follows;

- “ 8. The plaintiff avers that the said parcels of land form part of the trust land under Malakisi Local Physical Development Plan
9. The plaintiff avers that after the survey by the Malakisi land committee in the year 2007, he was duly identified and confirmed as the owner of the said plots being trust lands thereto.”

19 My understanding of the plaintiff’s meaning of inheritance as used in the plaint has a different usage and meaning from that given under the Probate and Succession law. According to the plaintiff, the suit property is part of a trust land under Malakisi Local Physical Development Plan to be inherited without a grant unlike the estate of a deceased person requiring to be succeeded under the *law of succession Act*.

20 It is trite law that a preliminary objection is a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct and cannot be raised if any fact has to be ascertained. Since the word "inheritance" ascribed by the plaintiff is different from inheritance as known by the defendants, the preliminary objection dated September 28, 2016 is not upheld and the same hereby dismissed. Costs shall be in the cause.

READ, SIGNED AND DELIVERED IN THE OPEN COURT AT BUNGOMA THIS 29TH MARCH, 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Applicant /Advocate absent
2. Respondent /advocate absent
3. C/A Lusweti

