



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC NO. 108 OF 2019

BELINA NANGILA SIMIYU

**BENSON WABOMBA PALANGA (Acting as the personal representatives
of the estate of the late John Simiyu Palanga - deceased)PLAINTIFFS**

VERSUS

FRANCIS WAMALWA WERE.....DEFENDANT

RULING

1. The plaintiffs commenced this suit as personal representatives of the estate of John Simiyu Palanga (deceased) through Originating Summons dated 10th September 2019 seeking determination of the following:

1. WHETHER the litigation in the formerly Kakamega H.C.C.C. no. 283 of 1991 currently ELC. no. 230 of 2017 - John Simiyu Palanga - deceased as substituted by Francis Wamalwa Were v Chepkoee Kosgei & Levi Luvandale Nandoya was instituted by the late John Simiyu Palanga to vindicate his rights of acquisition of land by adverse possession in respect of the land parcel known as KAKAMEGA/SANGO/83?

2. WHETHER upon the demise of the late John Simiyu Palanga - deceased the defendant was substituted as the plaintiff for the purposes of proceeding with the prosecution of the suit on behalf of the estate of the late John Simiyu Palanga - deceased?

3. WHETHER the judgment obtained in the said suit and any benefits accruing there-from belong to the estate of the late John Simiyu Palanga - deceased?

4. IF the answer to 3 above is in the affirmative is it proper for the defendant to obtain title to the land parcel known as KAKAMEGA/SANGO/83 in his personal name instead of proceeding to cause a transmission of the land to the estate for administration in-tandem with the provisions of the Law of Succession Act, Cap. 160 of the Laws of Kenya?

5. WHETHER the defendant is holding any benefits accruing from the decree in the formerly Kakamega H.C.C.C. No. 283 of 1991 and currently ELC. no. 230 of 2017 - John Simiyu Palanga - deceased as substituted by Francis Wamalwa Were v Chepkoee Kosgei & Levi Luvandale Nandoya as a trustee of the estate of the late John Simiyu Palanga - deceased and ought to be compelled to transmit or convey the benefits of the decree to the estate of the deceased for administration in terms of the Law of Succession Act, Cap. 160?

6. WHETHER in the event defendant fails to execute the requisite instruments to give effect to the transmission or vesting of the benefits of decree in the formerly Kakamega H.C.C.C. No. 283 of 1991 and currently ELC. No. 230 of 2017 - John Simiyu Palanga - deceased as substituted by Francis Wamalwa Were v Chepkoee Kosgei & Levi Luvandale Nandoya the Deputy Registrar of the Court can execute the same?

7. WHETHER the defendant should render vacant possession of the land parcel known as KAKAMEGA/SANGO/83 for the purposes of the administration of the estate of the late John Simiyu Palanga - deceased?

8. WHO should meet the costs of the suit?

2. In response, the defendant filed Notice of Preliminary Objection dated 11th March 2021. The objection was pleaded as follows:

The Respondent shall raise a preliminary objection on points of law at the hearing of the originating summons dated 10.9.2019 on the following grounds:

1. The court will lack jurisdiction to determine this cause as the applicant's reliefs and/or claims lies in the probate and administration court since the relief is basically based on transmission of the estate of the deceased.

2. The applicants claim is time-barred by virtue of sections 4(e), 7 and 9 of the limitation of actions Act Cap 22 laws of Kenya.

REASONS WHEREFORE, the respondent prays that the applicant's suit be struck out and/or dismissed with costs.

3. This ruling is in respect of the preliminary objection.

4. The court ordered that the objection be canvassed through written submissions. The plaintiffs filed submissions but the defendant did not file any.

5. The plaintiff argued that their cause of action cannot be in the probate and administration court as they are seeking to recover the property of the estate from the defendant. They cited **Order 37 Rules 1 and 2** of the **Civil Procedure Rules** and argued that the said provisions do not specify the court to which the originating summons should be presented. Relying on the case of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR**, they urged that if the court finds that the matter ought to have been filed in another forum, the court should transfer the matter to that other forum.

6. Regarding the aspect of limitation of actions, the plaintiffs argued that they only became aware of the defendant's intention not to deliver the property to the deceased's estate when the defendant obtained an order on 11th July 2018 for the Deputy Registrar to execute transfer forms in his name instead of the estate. That based on **Section 4 (1) (e)** of the **Limitation of Actions Act**, the suit was filed before lapse of six years. Further, that their suit is for recovery of land and that 12 years had not lapsed from the date of delivery of the judgment.

7. Finally, relying on the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the plaintiffs argued that the matters raised by the preliminary objection are contentious and that it does not qualify to be a preliminary objection.

8. I have carefully considered the preliminary objection and the submissions. The law relating to preliminary objections is settled. A preliminary objection is a pure point of law which goes to the jurisdiction of the court and which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. See **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**.

9. As noted earlier, the defendant who is the party that raised the objection, did not file any submissions in support of the objection. Ordinarily, if a party does not argue his case, the case should generally fail. That general rule does not apply to a preliminary objection since it raises the issue of the court's jurisdiction. A court can only exercise jurisdiction as conferred on it by the constitution or other written law. See **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**. Consequently, every court must ascertain for itself whether or not it has jurisdiction in any particular matter placed before it before embarking on determining the matter. It follows therefore that a valid preliminary objection cannot be dismissed simply because it has not been argued. The court must investigate and ascertain for itself whether the jurisdictional question raised in the objection is valid. I will therefore consider and determine the preliminary objection herein notwithstanding that the defendant did not offer any arguments in support of it.

10. A reading of the originating summons herein and its supporting affidavit shows that the plaintiffs have brought this suit as administrators of the estate of John Simiyu Palanga (deceased) pursuant to letters of administration intestate granted to them jointly on 1st February 2006 in HC Succession Cause No. 558 of 2005 (Kakamega). Their case is that the defendant herein obtained judgment in Kakamega ELC No. 230 of 2017 (formerly Kakamega HCCC No. 283 of 1991) as an administrator of the deceased's estate and not in his personal capacity. They contend that the benefits of the said judgment should accrue to the deceased's estate and not to the defendant personally. The issue in this suit is the effect and import of the judgment in Kakamega ELC No. 230 of 2017 (formerly Kakamega HCCC No. 283 of 1991) and really not the grant used in that case. Parties in this case cannot be sent back to the succession court to interpret the judgment. The issues raised in this suit go to title to the suit property. Jurisdiction to determine disputes concerning title to land falls squarely within this court.

11. Regarding the effect of **Sections 4 (e), 7 and 9** of the **Limitation of Actions Act**, I note from the material availed in the Originating Summons herein that the judgment in Kakamega ELC No. 230 of 2017 (formerly Kakamega HCCC No. 283 of 1991) was delivered on 5th November 2015. By dint of **Section 7** of the **Limitation of Actions Act**, an action to recover land should be brought within twelve years from the date on which the right of action accrued. This suit was filed on 10th September 2019, within the limitation period.

12. In view of the foregoing discourse, I find no merit in Notice of Preliminary Objection dated 11th March 2021. I dismiss it. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF JANUARY, 2022

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for Belina N. Simiyu (1st Plaintiff)

Benson W. Palanga (2nd Plaintiff) present in person

The Defendant present in person

Court Assistant: E. Juma