



**Agalo (Suing as the personal representative of the Estate of Vitalis Otieno Agalo) v Aludo
(Environment & Land Case 3 of 2020) [2023] KEELC 18389 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18389 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 3 OF 2020**

M SILA, J

JUNE 21, 2023

BETWEEN

**BONFACE OWUOR AGALO PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF VITALIS
OTIENO AGALO**

AND

FLORENCE OMOLO ALUDO DEFENDANT

RULING

1. The application before me is that dated February 14, 2023. It is an application filed pursuant to the provisions of Order 2 Rule 15 (1) (a) and (b) of the [Civil Procedure Rules](#) and seeks that the plaint herein be struck out for disclosing no reasonable cause of action, or the same is scandalous, frivolous, vexatious and an abuse of the court process. The application is based on the following grounds (slightly paraphrased for brevity) :-
 - i. That the plaintiff filed suit on February 18, 2020 on behalf of the estate of Vitalis Otieno Ogalo having obtained letters of administration ad litem on June 20, 2019.
 - ii. That the grant of letters of administration were revoked by court on October 6, 2020.
 - iii. That the plaintiff has lost capacity to maintain the suit.
 - iv. That the plaintiff has no locus and has no mandate to bring the suit in absence of letters of administration.
 - v. That it will be engaging in an academic exercise to hear the case in a full trial.
 - vi. That the plaint lacks merit, is scandalous, frivolous and vexatious.



2. The application is supported by the affidavit of the defendant. She has deposed that on June 20, 2019, the plaintiff obtained a grant of letters ad litem through the suit Kisii Succession Cause No her deposed that the letters of administration were revoked on October 6, 2020 after she filed an application. There is an annexed order dated October 6, 2020 which shows that the grant was duly revoked.
3. The plaintiff has opposed the application by filing a preliminary objection and a replying affidavit. The preliminary objection is that the application offends the provisions of Order 2 Rule 15 (2) of the Civil Procedure Rules. In the replying affidavit, it is averred that the defendant/applicant had no part in Succession Cause No 335 of 2019. He also contends that the attachment 'FOA-1' and 'FOA'2 in the supporting affidavit, which is the grant and the order revoking the grant, are not certified as a true copy of the original. He has continued to state that he filed succession cause No 18 of 2022 in the Chief Magistrates' Court at Kisii to petition for a grant of letters of administration for the estate of the late Vitalis Ochieng Agalo. He adds that his father, Vitalis, is buried in the disputed property and that land is emotive. He contends that he has a right to access justice and that the suit is merited and should be heard and determined.
4. I have considered the above alongside the submissions of counsel. I really see no substance in the deposition of the respondent that the attachments FOA-1 and FOA-2 are not certified as true copies of the original. FOA-1 is the same document that the respondent used to file suit. FOA-2 is the order said to have revoked the grant and the respondent does not say that this order is not true. The two attachments are duly commissioned as required by law. I see no substance in the arguments that the attachments FOA-1 and FOA-2 are not certified as true copies of the original for they did not have to be so certified. I would probably have taken it a bit more seriously if the respondent had stated that no such orders have ever been issued. I also don't see any substance in the preliminary objection. It is said that the application offends Order 2 Rule 15 (1) (2). To get the context, I opt to copy the whole of Order 2 Rule 15 (1) which is drawn as follows :-

'Striking out pleadings [Order 2, rule 15.]

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a) It discloses no reasonable cause of action or defence in law; or
 - (b) It is scandalous, frivolous or vexatious; or
 - (c) It may prejudice, embarrass or delay the fair trial of the action; or
 - (d) It is otherwise an abuse of the process of the court, may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
 - (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
 - (3) So far as applicable this rule shall apply to an originating summons and a petition.
5. It is true that where the application is based upon subrule (1) (a), i.e, that the pleading discloses no reasonable cause of action, then no affidavit is necessary. However, this application is not just based upon subrule 1 (a), but also subrule 1(b). In any event, there is no prejudice to the respondent where an applicant files an affidavit, for the respondent has opportunity to respond to it. The preliminary objection is frivolous and is dismissed with costs.



6. On the substance of the application, it does appear that the plaintiff had on June 28, 2019 obtained a grant of letters of administration ad litem to enable him file this suit on behalf of the estate of Vitalis Otieno Agalo (deceased) who the plaintiff avers is his late father. He then proceeded to file this suit on February 18, 2020. His claim was that at the time of his death on October 18, 1998, the deceased was the registered proprietor of the land parcel West Kitutu/Bogusero/139. It was pleaded that on March 10, 2016, the defendant who it was claimed is a stranger to the estate of the deceased, fraudulently caused her name to be registered as proprietor of the suit property. Inter alia, it is contended that the defendant committed fraud by obtaining registration in a manner inconsistent with the *Law of Succession Act*, Cap 160, Laws of Kenya. In the suit, the plaintiff sought orders for an order to cancel the title of the defendant. The defendant filed defence where she inter alia pleaded that the deceased had sold the suit property to her and executed all transfer documents before his death. She asserted to be the lawful proprietor of the suit property.
7. It is clear from the foregoing that the plaintiff was commencing this suit on behalf of the estate of the deceased. He did obtain the grant of letters of administration ad litem on June 28, 2019, through the suit Kisii Chief Magistrates' Court Ad Litem Cause No 335 of 2019, permitting him to file this suit. I therefore see no issue with his filing of the plaint herein. However, once the grant of letters of administration ad litem were revoked on October 6, 2020, the plaintiff ceased to have capacity to represent the estate of the deceased. I have not been informed that the plaintiff now has reestablished capacity to represent the estate of the deceased. In his replying affidavit, the plaintiff averred that he has filed Succession Cause No 18 of 2022 in the Kisii Chief Magistrates' Court petitioning for a grant of letters of administration ad litem yet again for the estate of the deceased. I have not seen any evidence of such filing, for no document was annexed by the respondent in his replying affidavit. But what is important is that at the moment, the plaintiff has no capacity to represent the estate of the deceased. Without having the requisite locus standi, the plaintiff cannot prosecute this suit. I agree with the defendant that the continued existence of this suit serves absolutely no purpose.
8. I find that the application is merited and it is hereby allowed. I wouldn't know whether there was ever substance in the plaintiff's case, and the same is being struck out for want of capacity after it had been properly filed. I am also not privy to the factors that led to the revocation of the grant. I cannot therefore say that the entire suit was an abuse of the court process, given that position, I make no orders as to the costs of the main suit.
9. However, the defendant was entitled to file this application. She will have all the costs related to this application which she is at liberty to tax.
10. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 20 DAY OF JUNE 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

