



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 75 OF 2016

QUINTO OCHERUK.....1ST PLAINTIFF

VINCENT OMUSUGU.....2ND PLAINTIFF

PHILIP OMUNYU.....3RD PLAINTIFF

= VERSUS =

ALEX EMOJONG.....DEFENDANT

R U L I N G

1. This ruling is on a Preliminary Objection based, first, on intimation to raise it in the defence filed on 16/8/2016 and, second, on notice to raise it filed on 4/12/2017. A brief highlight of the background is necessary in order to gain some understanding of the objection. The three Plaintiffs – **QUINTO OCHERUK, VINCENT OMUSUGU** and **PHILIP OMUNYU** – filed the suit herein on 20/7/2016 against the Defendant – **ALEX EMOJONG**. They pleaded, *inter alia*, that they are the sons of the late SYLVESTER OMUSUGU – who owned land parcel No. SOUTH TESO/ASINGE/553. The Defendant is said to have become owner of that land or a portion of it, which is registered in his name as SOUTH TESO/ASINGE/1045. He is said to have become such owner fraudulently.

2. The Plaintiffs sought an order to compel the Land Registrar to counsel the title and they would wish that the court distributes the land. In the particulars of fraud given in the plaint, the Defendant is accused of maliciously colluding with the Land Registrar to register the land in his name.

3. The Defendant filed his defence on 16/8/2016 and pleaded that the suit as filed is defective for failing to comply with mandatory provisions of law. A notice was given that a preliminary objection would be raised for that reason and also for the reason that the Plaintiffs lacked locus to bring the suit.

4. That is the simple background and the Defendant made good his intimation to raise an objection by filing the relevant notice on 4/12/2017. The notice is clear: The Plaintiffs are faulted for not having locus given that the land belonged to their late father and they have not yet obtained the requisite grant in probate proceedings. They were also faulted for not enjoining the land registrar yet the order sought is directed at him and he is also mentioned to have been party to the alleged fraud.

5. The objection was canvassed by way of written submissions. The Defendants submissions were filed on 22/6/2018. It was reiterated that the Plaintiffs lack the requisite grant to give them capacity to bring suit concerning their late father's estate. It was pointed out also that the Land Registrar should have been enjoined as a party but was not. A reference was made to a replying affidavit filed by the Plaintiffs on 3/5/2018 where the Plaintiffs make reference to probate proceedings – P&A No. 559 of 2016 – still pending in court. The Defendant was quick to point that the Plaintiffs should have shown a grant, not pending proceedings. The Defendant also faulted the Plaintiffs belated attempt to unprocedurally include the Land Registrar as a party in papers filed later in the proceedings. The court was urged to dismiss the suit with costs.

6. The Plaintiffs submissions were filed on 16/7/2018. It would appear that the Plaintiffs went off-target. They seem to address the merits of the suit while at the same time faulting the Defendant for some procedural lapses. No reference was made at all regarding lack of grant and failure to enjoin the Land Registrar as a party. Instead, the Plaintiffs seem to have focused on the suit itself and an application dated 10/11/2016 filed by them seeking to strike out the defence filed. That is why I am saying the plaintiffs are off-target. Neither the suit nor the application referred to was coming for consideration. The focus was the objection, nothing else.

7. I have looked at the case as filed, the Defendant's defence, the objection itself, and rival submissions. The issues raised by the defence are valid. The Plaintiffs are litigating over land belonging to their late father. In law, they have no capacity to do so without first obtaining the necessary grant from a court of law. It is not enough for the Plaintiff to say there are pending probate proceedings. They simply needed to show a grant given by a competent court. In **DORIS AUMA & Another [2014] eKLR**, the court observed, *inter alia*, that a suit instituted without letters of administration is void *ab-initio* if it concerns the estate of a deceased person. And in **NATHANIEL O. KHISA Vs MARY KHISA NYANYI & 3 Others! [2013] eKLR**, the suit was struck out because the Plaintiff had not obtained letters of administration.

8. Then there was the issue of failing to join the Land Registrar as a party. It is true that the suit as filed has only one Defendant. And that Defendant is not the Land Registrar. The Plaintiffs later on tried to purport to include the Land Registrar in papers filed later but that was completely unprocedural and therefore unhelpful. The Land Registrar can only be joined as a party through an amendment. The Plaintiffs were also wrong on this. They could not omit to include the Land Registrar as a party yet they allege fraud against him and also seek an order directed at him.

9. When all is considered therefore, the suit as filed is an exercise in futility and is a non-starter. The same is hereby dismissed with costs to the Defendant.

Dated, signed and delivered at Busia this 26th day of September, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

1st Plaintiff:

2nd Plaintiff:

3rd Plaintiff:

Defendant:

Counsel of Plaintiffs:

Counsel of Defendant: