



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO.489 OF 2013(O.S)

LAZARUS KIBUI NDEGWA.....APPLICANT

VERSUS

LABULE OKELLO LUTWA.....RESPONDENT

RULING

This suit was instituted by way of Originating Summons dated 22nd April 2013 that was filed in court on 23rd April 2013. In the Originating Summons, the applicant Lazarus KibuiNdegwa sought among others the following reliefs:-

1. That this honourable Court be pleased to vest L.R No. 209/8000/136 (I.R No. 25656/1) (hereinafter referred to as “the suit property”) upon the applicant, Lazarus KibuiNdegwa.
2. That the Registrar of Titles do register the applicant, Lazarus KibuiNdegwa as the owner of the suit property in place of the respondent, Labule Okello Lutwa.
3. That the Deputy Registrar of this court be authorized to execute the transfer and any other necessary forms to effect the transfer of the suit property to the applicant.

The Originating Summons was brought under Order 37 rule 3 of the Civil Procedure Rules. The same was brought on the grounds that the applicant had purchased the suit property from the respondent in the year 1993 and that he had not heard from the respondent since the year 2001. In his affidavit sworn on 22nd April 2013, the applicant stated that the respondent sold to him the suit property in the year 1993 and handed over to him the original certificate of title for the said property. He did not however lodge the instrument of transfer for registration at the time. The said certificate of title got burnt in his house on the suit property on 27th October 2000 an incident that compelled him to apply for a provisional certificate of title which was issued to him on 19th November 2001. The applicant stated further that when he presented the old instrument of transfer that had been executed in his favour by the respondent for registration after being issued with the said provisional certificate of title, the registrar of titles declined to register the same and insisted that the respondent appears in person to sign a new instrument of transfer or he seeks a vesting order from the court vesting the suit property upon him. He stated that he had not communicated to the respondent since the year 2001 and attempt to trace him even through the Ugandan High Commission did not bear any fruit. It is on account of the foregoing that he chose to apply for a vesting order.

On 20th May 2013, the applicant sought and obtained leave to serve the Originating Summons (O.S) upon

the respondent by way of substituted service through newspaper advertisement which advertisement was duly effected. On 10th June 2013, a memorandum of appearance was filed purportedly by the respondent in person. This was followed by a statement of defence that was filed on 17th June 2013. In the purported statement of defence, the respondent denied selling the suit property to the applicant. He also denied that he had surrendered the original certificate of title for the suit property to the applicant. The respondent contended that the applicant had applied for a provisional title so that he may fraudulently acquire the suit property. The respondent contended that there was a pending case namely HCC. ELC No. 1784 of 2007 concerning the suit property in which the applicant was a party the existence of which suit the applicant had failed to disclose to the court. The respondent contended that in HCCC ELC No. 1784 of 2007 aforesaid, the applicant did not claim that he had purchased the suit property from the respondent but that the 1st respondent had authorized him through a power of attorney to take care of the suit property. The 1st respondent urged the court to dismiss the applicant's suit with costs.

The respondent subsequently engaged the firm of Ogessa and Company Advocates which firm filed a replying affidavit on 5th July 2015 on his behalf in reply to the Originating Summons. In a rather strange twist in the suit, two other parties entered appearance both claiming to be representing the estate of the respondent, Labule Okello Lutwa whom they both claimed to be deceased. Henry Oryem Okello filed a memorandum of appearance through the firm of Shah and Parekh Advocates in his capacity as the legal representative of the estate of the respondent, Labule Okello Lutwa alias General Tito Okello alias General Tito Okello Lutwa, deceased. Henry Oryem Okello (hereinafter referred to only as **“Oryem”**) filed grounds of opposition and replying affidavit in opposition to the Originating Summons. The third person to appear was Agnes Wangui Kibugi (hereinafter referred to only as **“Agnes”**) who claimed to be the widow and the administrator of the estate of the respondent.

In his replying affidavit, Oryem stated that he is the sole surviving personal representative of the estate of the respondent who died on 3rd June, 1996 at Kampala, Uganda. He stated that a grant of probate of the will of the respondent was issued to his uncle one, Erisanwero Opira, deceased and he by the High Court of Uganda at Kampala on 26th September 1996. The said grant of probate was resealed by the High Court of Kenya at Nairobi on 27th February 2003. Oryem stated that the respondent who is his father used three names during his life time namely, Labule Okello Lutwa, General Tito Okello and General Tito Okello Lutwa. He stated that his co-executor, Erisanwero Opira died on 23rd December 2003 leaving him as the sole executor of the estate of the respondent. Oryem stated that when his father wanted to purchase a property in Nairobi in 1985 he is the one who travelled to Nairobi and identified the suit property and negotiated the purchase price with the owners. He is also the one who instructed the firm of Shah and Parekh to handle the transaction. The property was ultimately transferred to the respondent on 19th November 1985. Oryem denied that the respondent had sold the suit property to the applicant. He contended that the purported agreement for sale and instrument of transfer annexed to the applicant's affidavit in support of the application are forgeries. He denied that the two documents were signed by the respondent. He also denied that the respondent had given the applicant a power of attorney on 15th March 1998, by which date the respondent was already deceased. He termed the said power of attorney as another forgery by the applicant. Oryem stated that there is another case namely HCC. ELC No. 1784 of 2007 between the parties concerning the ownership of the suit property which suit is still pending and the existence of which suit the applicant failed to disclose to the court. He stated that contrary to the applicant's contention, the original certificate of title for the suit property was at all material times in possession of Mr. H. M. Parekh Advocate and not with the plaintiff and that the said certificate was destroyed in the said advocate's office in 1998 during the terrorist bombing of the American Embassy in Nairobi in the same year. Oryem annexed to his affidavit among others; a copy of the grant of probate that was issued by the High Court of Uganda at Kampala on 22nd July 1996 to him and Erisanwero Opira in respect of the estate of General Tito Okello Lutwa, a copy of an instrument of transfer dated 19th November 1985 through which the suit property was transferred to the respondent, a copy of a general power of attorney dated 15th March 1998 alleged to have been donated to the applicant by the respondent and a copy of an affidavit alleged to have been sworn by the respondent on 7th May 2001. In his grounds of opposition dated 18th June 2013, Oryem contended among others that; the suit herein is a nullity the same having been instituted against a deceased person, that the suit has been brought while there is

another suit pending hearing on the same subject matter between the parties in which similar issues have been raised and that, Order 37 rule 3 of the Civil Procedure Rules has been wrongly invoked by the applicant as the purported contract which is the basis of the applicant's claim is disputed.

On her part, Agnes claimed in her affidavit sworn on 5th July 2013 that she is the administrator of the estate of the respondent Labule Okello Lutwa pursuant to a limited grant of letters of administration that was issued to her in Nairobi High Court Succession Cause No. 1436 of 2013 on 24th June 2013. She stated that she is the widow of the respondent. According to the said limited grant of letters of administration, the respondent died on 9th September 1994. Agnes denied that the respondent had sold the suit property to the applicant. She also denied that the applicant has been in occupation of the suit property.

In view of the appearance that was made in the matter by Oryem and Agnes who claimed to be the legal representatives of the respondent whom they alleged to be deceased, the court made an order on 16th July 2013 that Oryem, Agnes and, the respondent who had entered appearance and filed a defence and affidavit, do appear personally in court for the purposes of identifying themselves so that the court may give further directions on that matter. On 4th November 2013, Oryem and Agnes appeared in court with their advocates and identified themselves as the son and widow of the deceased respectively. The respondent did not appear. After the appearance by Oryem and Agnes in court, Agnes was granted leave to file a further affidavit. The applicant also got leave to respond to the affidavits that had been filed by Oryem and Agnes. The court made a further order that the court file for, High Court Succession Cause No. 1436 of 2013 in which Agnes had been issued with a limited grant of letters of administration be brought up for perusal by the court. Oryem was also ordered to deposit copies of his passport and identify card and a copy of the passport of Lutwa Tito Okello in court. In her further affidavit sworn on 20th November 2013, Agnes reiterated that she is the widow of the respondent and that they lived with the respondent on the suit property. Agnes stated that the respondent died at St. Mary's Hospital in September 1994. A copy of the death certificate said to be that of the respondent that was used by Agnes to obtain a limited grant of letters of Administration shows that the respondent died in Kenya on 9th September 1994 at St. Mary's Hospital, Nairobi of Cardiac arrest at the age of 43 years.

In his further affidavit sworn on 4th May 2015 in response to the affidavits that were filed by Oryem and Agnes in opposition to his Originating Summons, the applicant contended that he purchased the suit property from the respondent Labule Okello Lutwa and not Lutwa Tito Okello alias General Lutwa Okello Tito whose estate is being represented by Oryem. The applicant denied that the respondent died on 3th June 1996 at Kampala as alleged by Oryem and contended that he was in contact with the respondent until the year 2001 when their communication broke down. The applicant averred further that the respondent Labule Okello Lutwa is not the same as General Tito Okello Lutwa whose estate is being administered by Oryem. The applicant pointed out that the suit property is not indicated in the Will of General Tito Okello Lutwa as one of his assets which to him is a pointer to the fact that General Tito Okello Lutwa and the respondent Labule Okello Lutwa who owned the suit property are two different people. The applicant averred that Oryem has not placed any evidence before the court to show that the names Labule Okello Lutwa, General Tito Okello Lutwa and Lutwa Tito Okello refer to one person. The applicant denied that the agreement for sale and the instrument of transfer that are annexed to his affidavit in support of the Originating Summons are forgeries. He maintained that the same were executed by Labule Okello Lutwa whose signature need not be the same as that of General Tito Okello, Oryem's father whose estate he is administering. The applicant admitted the existence of HCC.ELC No. 1784 of 2007. He contended however that there is no claim that has been made in that case against him by Oryem who is the plaintiff in that case. As concerns the contention that this suit is a nullity having been filed against a deceased person, the applicant contended that the person who is dead is Oryem's father, General Tito Okello Lutwa and not the respondent, Labule Okello Lutwa. The applicant maintained that he has been in possession of the suit property at all material times and denied that he took possession of the same in 2011 when he evicted a tenant who was occupying the same. With regard to the affidavit of Agnes, the applicant denied that Agnes is the widow of the respondent. He contended that Agnes obtained a grant of letters of administration in respect of the estate of the respondent using a forged death certificate. As concerns the pleadings that were purportedly filed by Labule Okello Lutwa, the applicant urged the court

to strike out the same because neither Labule Okello Lutwa nor his advocates on record attended court when the court called upon among others, the said Labule OkelloLutwa to appear in court and identify himself.

When the Originating Summons came up for directions on 14th May 2015, the advocates acting for Oryem informed the court that they wanted to argue some preliminary points of law which if successful would determine the Originating Summons. They pointed out that the said preliminary points of law were contained in their grounds of opposition that was filed in opposition to the Originating Summons. On 30th June 2015, the court directed that grounds 1, 2 and 3 in Oryem's grounds of opposition dated 18th June 2013 be heard as a preliminary objection to the Originating Summons by way of written submissions. Following these directions, the applicant, Oryem and Agnes filed written submissions which are on record. This ruling is in respect of the said preliminary objection. I have gone to great length to set out the parties' respective cases so that it becomes easy when considering Oryem's preliminary objection to flag out the issues arising in the suit and to determine whether the same can be determined in a summary manner by way of a preliminary objection.

As I have stated earlier in this ruling, Oryem's preliminary objection to the Originating Summons herein is based on the following grounds:-

1. That the Original Summons is a nullity the same having been filed against a deceased person.
2. That there is another case pending involving the parties herein namely HCC. ELC No. 1784 of 2007 in which the issues raised in the present suit have been raised.
3. That the applicant has wrongly invoked the provisions of order 37 rule 3 of the Civil Procedure Rules in that the contract on the basis of which this suit has been brought is contested.

I have considered Oryem's preliminary objection, the parties' respective submissions and the authorities cited in support thereof. The law on preliminary objection is settled. In the case of **Mukisa Biscuits Manufacturing Company Ltd. vs. West End Distributors Ltd. (1969) E. A 696**, the court stated as follows at page 701:-

“A Preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In the case of **Orarovs. Mbaja [2005] 1 KLR 141**, it was held that;

“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed. The court's discretion is never exercised just on the basis of propositions of law; there must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised.”

Having set out the facts of this case, the points that have been raised by way of preliminary objection and the definition and scope of a preliminary objection, it is now an opportune time to consider whether these points which have been raised as a preliminary objection can be determined as such. The first objection to the Originating Summons is that the same is a nullity having been brought against a deceased person. This objection in my view would have merit if there was no dispute over the death of the respondent, Labule Okello Lutwa. As things stand now, there is a dispute as to whether or not the respondent is deceased. Oryem and Agnes who have claimed that the respondent is deceased are not in agreement as to when he died and where. The applicant on the other hand has claimed that the respondent is not

deceased. He has contended that the deceased whose estate is being represented by Oryem is General Tito Okello Lutwa who is not the same person as Labule Okello Lutwa the respondent herein. As concerns the claim by Agnes that the respondent is deceased, the applicant has contended that the death certificate that has been produced by Agnes in court to prove the death of the respondent is a forgery. I have seen a letter in the court file dated 18th November 2013 addressed to Oryem's Advocates by the Director of Civil Registration to the effect that the purported death certificate for the respondent, Labule Okello Lutwa that was used by Agnes to obtain a limited grant of letter of administration is a forgery. The issue as to whether or not the respondent is deceased became more complicated when a person claiming to be the respondent entered appearance in person and filed a statement of defence and a replying affidavit in response to the Originating Summons. There is an advocate on record acting for said person who claims to be the respondent. It is clear from foregoing that whether or not the respondent is deceased is an issue which is disputed and which this court cannot resolve without conducting a trial. The issue cannot therefore be determined as a preliminary objection. I do not think that the mere fact that Oryem has filed a suit against the applicant and another person in HCC. ELC No. 1784 of 2007 as a legal representative of the respondent herein is conclusive evidence that the respondent is deceased. That case is still pending and the issue as to whether the respondent herein and General Tito Okello Lutwa whose estate Oryem is representing is one and the same person is still live.

The second point concerned the pendency of the HCC.ELC No. 1784 of 2007. Oryem has contended that the issues raised in the present suit have also been raised in the said suit that was filed earlier and as such this court cannot proceed with the hearing of this suit while that suit is pending. The objection was grounded on section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya which provides that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between the parties under whom they or any of them claim, litigating under the same title where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

I find no merit at all in this objection. Oryem has not furnished this court with the pleadings filed in HCC. ELC No. 1784 of 2007. In the absence of the said pleadings, this court is not in a position to determine whether the issues raised in the said suit and in the present suit are the same. Oryem has made mere allegations without any acceptable evidence in support thereof. I don't think that the similarity in the subject matter of this suit and HC. ELC No. 1784 of 2007 without more would justify a stay of this suit.

The final objection by Oryem was that this suit should not have been brought by way of Originating Summons under order 37 rule 3 of the Civil Procedure Rules. He has contended that Order 37 rule 3 of the Civil Procedure Rules is not applicable where the validity of a contract between a vendor and a purchaser of immovable property is disputed. Oryem has contended that since he has disputed the validity of the agreement for sale which the applicant claims to have entered into with the respondent, the issue cannot be determined in an Originating Summons and the only option left for this court is to dismiss the suit so the applicant can file a normal civil suit. In support of this submission, Oryem cited the court of Appeal case of **Wakf Commissioners vs. Mohamed Bin Umeya Bin Abdul Maji Bin Mwijabu [1984] KLR 346**. It is not disputed that the validity of the agreement for sale which the applicant claims to have entered into with the respondent is in dispute. It has been disputed by Oryem and Agnes and even the shadowy respondent. This fact alone however does not justify the dismissal of this suit. The law has changed since the decision of the court of Appeal in the Wakf Commissioners case cited above. When the decision was made, Order 36 rule 10 of the repealed Civil Procedure Rules gave the judge hearing an Originating Summons power to dismiss the same and direct the applicant to file an ordinary civil suit if it appears to him that the matters in respect of which relief is sought cannot properly be disposed of in a summary manner. The said order 36 rule 10 of the civil procedure rules was deleted in 1995 through legal notice No. 216 of 1995 and replaced with a new rule 10 which provided among other things that where on an Originating Summons it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause has been so begun and may in particular order that any affidavits filed shall stand as pleadings. Order 37 rule 19 of the current Civil Procedure Rules, 2010 are

in the same terms. The effect of this rule is that an action brought by way of Originating Summons can be continued with as if it has been originated by a plaintiff. From my reading of the applicant's Originating Summons, the applicant did not bring this suit for the determination of the validity of the contract or agreement for sale that he claims to have entered into with the respondent. The suit is seeking a vesting order and the transfer of the suit property to the applicant. If in response to the application the validity of the said contract has been challenged and has become an issue for determination, I don't think that, that renders the procedure that was adopted by the applicant inappropriate. The court faced with that situation ought to adopt the procedure set out in order 37 rule 19 of the Civil Procedure Rules, 2010 and proceed with the Originating Summons as if the suit has been originated by a plaintiff but not to dismiss the suit as suggested by Oryem. Again I find no merit in this ground of objection.

In the final analysis, I am of the view that the preliminary objection that was argued herein was inappropriately raised. The same lacks merit and is hereby dismissed with costs to the applicant. It is so ordered.

Delivered, Dated and Signed at Nairobi this.....15thday ofJanuary.....2016

S. OKONG'O

JUDGE

In the presence

Ms. Opile holding brief for Kinyanjui for the Applicant

N/A for the Respondent

Mr. Njuguna for Parekh for Oryem

Mr. Muriithi for Agnes