



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND COURT

LAND CASE NO.272 OF 2013

DANIEL OGERA OBONYO.....APPLICANT

VERSUS

AKATCH OKINDA.....1ST RESPONDENT

ARTHUR OBONYO.....2ND RESPONDENT

RULING

1. **Akatch Okinda** and **Arthur Obonyo**, the Respondents, filed the Notice dated 9th November 2013 raising Preliminary Objections to the Originating Summons dated 4th October 2013 filed by **Daniel Ogera Obonyo**, the Applicant. The Respondents listed six grounds which are as follows:
 - " 1) That the suit is a non-starter.
 - 2) That the suit is an utter abuse of the due court process, bad in law and misconceived.
 - 3) That the suit does not disclose any known cause of action in law against the Respondents.
 - 4) That the Applicant is a busybody in this proceedings.
 - 5) That the Applicant has wrongly sued the Respondents.
 - 6) That the court lacks jurisdiction to adjudicate on this matter."
2. That by consent entered on 8th April 2014, the parties Counsel agreed to file written submissions on the Preliminary Objection. The counsel for the Applicant filed their submissions dated 14th May 2015 while the Respondents counsel filed theirs dated 6th November 2015.
3. That the following are the main issues for determination;
 - a) Whether this court has jurisdiction to adjudicate on this case.
 - b) Whether the Applicant's Originating summons discloses a cause of action.
 - c) Whether the Respondents are wrongly sued.
 - d) Whether the Preliminary Objection should be upheld or rejected and who should pay costs.

4. The court has carefully considered the six listed grounds on the Notice dated 9th December 2013, the rival submissions by the counsel for each of the parties and the contents of the originating summons dated 4th October 2013 and filed on 7th October 2013 and come to the following conclusions:

a) That as submitted by the Respondents' counsel, the Applicant's Originating Summons seeks to primarily have his share of land parcel **Siaya/Ramba/2646** partitioned and registered in his names. The said land is registered in the names of **Daniel Ogera Obonyo** (Applicant), **Jacktone Onyango Sori Otieno Obonyo**, **Tong'o Okinda** and **Jeremiah Obonyo** as confirmed by the copy of the register attached to the Originating Summons dated 4th October 2013. The Respondent's counsel submits that the court cannot in law grant the Applicant's prayers as he has not joined co-tenants (co-owners) of the suit land in this case. The court agrees with the Respondents counsel's submissions that the order to have the suit land subdivided to identify and register the portion belonging to the Applicant cannot issue without either the consent of the other registered proprietors consent or being accorded an opportunity to be heard by being enjoined as parties. The Originating Summons is for that reason bad in law, misconceived and an abuse of the courts process.

b) That the Respondents counsel has further submitted that some of the registered proprietors of the suit land are deceased and the administration of their estates cannot be dealt with by this court but by the Succession Court. That indeed some of the registered proprietors of the suit land are deceased is confirmed by the Applicant in ground (a) of the Originating Summons. The deceased co-tenants are named as **Jacktone Onyango Sori**, **Tongo Okinda** and **Jeremiah Obonyo**. This shows that only the Applicant and **Otieno Obonyo** are still alive from the five registered proprietors. The provisions of Section 2(1), 47 and 48 of the Law of Succession Act Chapter 160 of Laws of Kenya provides the applicable law and the courts with jurisdiction to deal with the issues to do with administration of estates of deceased persons. The Applicant has not disclosed whether Succession Causes of the estates of the three deceaseds co-tenants have been filed and the person(s) who have been appointed as administrator(s) of those estates. The Provision of Section 91 (5) of the Land Registration Act No.3 of 2012 protects the interests of a co-tenant's share in the land owned in common as follows:

" 91.(5) If any land, lease or Charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's estate share shall be treated as part of their estate."

This court is therefore without jurisdiction to issue orders on the administration of the shares of the the three deceased co-tenants portions as they in law form part of their estates and the jurisdiction lies with the Succession Court.

c) That as submitted by counsel for the Respondents, the Originating Summons does not disclose any cause of action against the two Respondents. The Respondents are only mentioned at ground (b) of the Originating Summons. The Applicant has not disclosed what the Respondents have done or failed to do for him to file this suit against them. There is no specific order or determination prayed against the Respondents. The reasons as to why the Respondents have been sued is only disclosed in the Applicant's counsel's submissions. The written submissions cannot be a substitute for the pleadings. The Originating Summons is therefore without vital facts required under Order 2 of the Civil Procedure Rules. The Originating Summons is therefore an abuse of the courts process.

d) That flowing from the finding in (c) above, the court finds that there is no nexus shown between the determinations or orders sought and the Respondents. The Respondents are not co-tenants of the suit land. The Respondents have not been sued as personal representatives of any of the deceased co-tenants. The Respondents are therefore non suited in these proceeding.

e) That flowing from the findings above, the Applicant has not disclosed whether he has obtained the consent of the other co-tenants or their personal representatives before filing this suit. There is nothing in the Originating Summons to show that the Applicant was filing a representative suit. That even though Order 1 Rule 9 of the Civil Procedure Rules states that a suit shall not be defeated by reason of the misjoinder or non-joinder of parties, this suit must, fail as the Applicant's pleadings do not disclose any matter in controversy between him and the two respondents that can be determined by the court.

f) That the provisions of Sections 91 to 97 of the Land Registration Act deals with co-tenancies and partitioning of the properties. Where the co-tenants are in agreement, Section 94 of the said Act provides how they can subdivide their property and have their portions registered in their individual names. The Respondents not being con-tenants cannot have been said to have withheld their consent for the Applicant to sue them.

g) That though not submitted on by both parties, the Applicant and his claim do not fall under the categories and claims listed under Order 37 Rules 1 and 4 of the Civil Procedure Rules. The Applicant's claim is therefore wrongly filed through Originating Summons and the wrong provisions of the Civil Procedure Rules have been invoked.

5. That for reasons set out above the Respondents Preliminary Objection has merit and is hereby upheld. The Originating Summons dated 4th October 2013 is hereby struck out with costs.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this 24th day of February 2016.

In presence of;

APPLICANT Absent

RESPONDENTS Absent.

COUNSEL Mr Sava for Osevo for Plaintiff

Mr Gichaba for Defendant absent

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/2/2016

24/2/2016

S.M. Kibunja J

Parties absent

Mr Sava for Osevo for plaintiff

Mr Gichaba for Defendant absent

Court: Ruling delivered in open court in presence of Mr Sava for Osevo for plaintiff.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/2/2016