



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
ENVIRONMENT & LAND CASE NO.225 OF 2013

ROSA AHUBA OTENGO.....1ST PLAINTIFF

GEORGE ORUKO NJEGA.....2ND PLAINTIFF

VERSUS

MICHAEL ODUOR ODEMBA.....1ST DEFENDANT

DISTRICT LAND REGISTRAR SIAYA.....2ND DEFENDANT

R U L I N G

1. This is a ruling on a preliminary objection raised vide notice filed here on 27/6/2014 and dated 26/6/2014: The objection is raised by first defendant – **MICHAEL ODUOR ODEMBA**. Simply put, the suit was said to be a non- starter, with the plaintiff lacking Locus standi to bring it for lack of legal capacity.

2. The suit was also said to be **RES JUDICATA** as between the 2nd plaintiff and 1st defendant. It was stated that no cause of action is disclosed against the 1st defendant and that the suit is an abuse of court process. The plaintiffs were said to be busy – bodies in the proceedings.

3. On 7/7/2014, it was agreed that the objection be disposed of by way of written submissions. Towards that end, Odhiambo for 1st defendant filed submissions on 23/4/2014. The submissions are dated 22/7/2014. To date, nobody else has filed submissions. On 22/1/2015 the court noted that it had taken rather long for the others to file submissions.

It therefore decided to deliver its ruling on the basis of what was already availed.

4. This suit was filed vide a plaint dated 2/9/2013. The filing took place on 3/9/2013. The plaintiffs described themselves as beneficial owners of Land parcel No. **EAST UGENYA/JERA/226 (Suit Land)**.

5. The suit land was said to be family land held in trust for the interests of all beneficial owners and members of the family of the late **NYAPUR NJEGA**. The 1st plaintiff, being the wife of **JAMES OTENG'A NYAPUR who was brother to NYAPUR NJEGA**, has all along occupied and used the suit land in that capacity.

6. Upon the death of **NYAPUR NJEGA**, then 1st defendant is said to have fraudulently caused registration of himself as one of the owners. The 1st defendant is said not to be part of the late **NYAPUR NJEGA'S** family.

7. It emerged that there was a dispute over the suit land before the now defunct **SIAYA LAND**

DISPUTES TRIBUNAL. It appears clear that the dispute was between one **George Oruko Njega** and **Michael Oduor Ademba**. The dispute was about ownership and it is clear that the 1st plaintiff testified. The suit was dismissed but it was recommended that the complainant could still go to the High Court if he still felt there was fraud.

8. In the 1st defendants submissions, it was stated, inter alia, that the 1st plaintiff is the wife of one **JAMES OTENGO NYAPUR**. The said **Otengo** is one of the brothers of the registered proprietor's of the suit land. That brother is **Njega Nyapur**, who is now deceased. The 2nd plaintiff is the son of the same **Njega Nyapur**.

9. In spite of the fact that the plaintiffs represent the estate of **Njega Nyapur**, who is deceased, they have not taken out letters of Administration. That is why the issue of Locus Standi and Legal Capacity arises. The court was urged to strike out the suit and the decided cases of **REUBEN DIENYA NYAOKE VS WYCLIFF OMONDI ONDU**: succession Cause No.119/2013, Kisumu, was availed as a suitable guide.

10. RES JUDICATA was said to arise because the same issues raised in the suit were ventilated before the Land tribunal. Resjudicata is alleged to be between the 2nd plaintiff, who was claimant in the dispute before the tribunal and 1st defendant, who was the objector.

11. I have considered the material laid before me. It is clear from pleadings that the plaintiff represent the interests of the estate of the Late **Njega Nyapur**. They have not obtained letters of Administration. The decided case availed by the 1st defendant states the law correctly. Where such letters are not obtained, Locus standi is missing.

Any suit filed by any person who does not have such grant of letters of Administration becomes void ab-initio and is for striking out.

12. Apart from the cases availed by the 1st defendant, there are also the decided cases of '**DORIS AUMA & Another (2014) e KLR and NATHANIEL O. KHISA VS MARY KHISA NYANYI & 3 OTHERS (2013) e KLR**, which took the position that a suit instituted without letters of administration is void ab-initio if it concerns the estate of deceased person.

13. I therefore agree with the objector on this issue.

14. Then there is the issue of RESJUDICATA. I have already pointed out why it was raised. But I don't agree with the objector on this issue. And here is why: The tribunal dealt with the issue of ownership. At the time, the Land Disputes Tribunal derived its jurisdiction from the now repealed **LAND DISPUTES TRIBUNAL'S ACT (Act No.18 of 1990)**. Precisely, the tribuna's powers were stipulated in Section 3(1) of that Act, which stated that the tribunal had powers to decide on:

- (a) Division of, or determination of boundaries to Land, including Land held in common.
- (b) A claim to work or occupy.
- (c) Trespass to land.

15. From the above, it is clear that the tribunal had no competence or jurisdiction to handle the issue of ownership. A look at Section 7 of Civil Procedure Act (cap 21), which deals with RES JUDICATA is now necessary. In simple terms, the provision forbids handling of a suit which is similar to a suit previously handled and decided by a court competent to handle it. In a word, the law is that a suit should be tried and decided once. It is not open to the plaintiff to have the suit tried and decided again if the court handling it earlier was a competent one. Infact the operative words in the Section are “ .. **in a court competent to try such subsequent suit ..**”

16. Question is: Was the land disputes tribunal a court competent to try the earlier suit?The answer is obviously No. The tribunal lacked competence to decide on ownership. That is why counsel herein is

wrong on the issue of RES JUDICATA.

17. But counsel is wrong also for another reason namely: Even assuming, for arguments sake, that the tribunal had power to handle the issue of ownership, the tribunal itself gave green light to any party who felt there was fraud to move to High Court. It appears clear that the 2nd plaintiff felt that there was fraud and moved to this court. Why then fault the 2nd defendant for doing what he had green light to do?

18. Quite clearly therefore, the 1st defendant is wrong on the issue of RES JUDICATA.

19. The objection is therefore upheld on the issue of Locus Standi as it is well shown that the plaintiffs have not taken out letters of Administration. The issue of RES JUDICATA is hereby rejected.

20. The plaintiff's suit is therefore struck out for reason of Lack of Locus Standi or legal capacity to represent the estate of the late **NJEGA NYAPUR**.

A.K.KANIARU

ENVIRONMENT & LAND – JUDGE

30/6/2015

30/6/2015

A.K. Kaniaru J.

N.O. Oyugi court clerk

No party present

Odhiambo B.F. For defendant

Anyumba for plaintiff

Interpretation English/Kiswahili

Court: Ruling on preliminary objection dated 26/6/2014 and filed on 27/6/2014 read and delivered in open court. Right of Appeal 30 days.

A.K.KANIARU

ENVIRONMENT & LAND – JUDGE

30/6/2015