



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 6 OF 2021

ELIZABETH KEMUNTO ONGERI

(Suing as the legal representative of the estate of CHARLES ONGERI MATAGARO).....PLAINTIFF

VERSUS

NELSON OCHORA ONGWAE.....1ST DEFENDANT

GEORGE OSEKO.....2ND DEFENDANT

CONCEPTA KEMUNTO OBWOCHA.....3RD DEFENDANT

ZACHARIAH OBWOCH OMANDI.....4TH DEFENDANT

KISII COUNTY LAND REGISTRAR.....5TH DEFENDANT

ATTORNEY GENERAL.....6TH DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff filed suit against the Defendants claiming her that the 5th Defendant had unlawfully sub-divided the parcel of land known as L.R No. WEST KITUTU/BOMATARA/1744 into two parcels known as L.R No. WEST KITUTU/BOMATARA/4637 and 4638. Thereafter, L.R No. WEST KITUTU/BOMATARA/4637 was subsequently transferred to the 1st Defendant while L.R No. WEST KITUTU/BOMATARA/4638 was transferred to the 3rd and 4th Defendants. He therefore prayed for a declaration that the sub-division of parcel no. L.R

2. No. WEST KITUTU/BOMATARA/1744 was wrongful, illegal and unlawful and an order for the cancellation of the resultant titles being parcels no. L.R No. WEST KITUTU/BOMATARA/4637 and 4638.

2. The Plaintiff's case is that her late husband Charles Onger Matagaro bought a portion of land parcel no. No. WEST KITUTU/BOMATARA/1744 from one Thomas Oseko Omwena now deceased, in 1998. The said parcel was however registered in the name of Marisera Okero-deceased who was the mother of the vendor, Thomas Oseko Omwena. The Plaintiff and her late husband thereafter took possession of the portion they had bought and planted trees and some crops. They continued cultivating the land until 2018 when the 1st Defendant wrongfully entered the said parcel of land and started harvesting the Plaintiff's crops.

3. The Plaintiff reported the matter to Nyakoe Police Station. On realizing that the Plaintiff had made the said report, the 2nd Defendant instituted Kisii CMELC Case No. 128 of 2018 and obtained a temporary injunction restraining the Plaintiff from interfering with land parcel number L.R No. WEST KITUTU/BOMATARA/4637. The said case is pending in the lower court.

4. When the Plaintiff perused the documents filed by the 2nd Defendant, she realized that parcel no. 1744 had since been sub-divided and it had given rise to new numbers. Upon conducting a search at the Lands Office, she learnt that L.R No. WEST KITUTU/BOMATARA/1744 had been sub-divided into parcels number 4637 and 4638 in 2011 after the death of Marisera Okero. She also learnt that L.R No. WEST KITUTU/BOMATARA/4637 was subsequently transferred to the 1st Defendant while L.R No. WEST KITUTU/BOMATARA/4638 was

transferred to the 3rd and 4th Defendants. This is what prompted her to file this case together with an application for injunction.

5. Upon being served with the Plaint and Summons to enter appearance the 1st-4th Defendants filed a Defence denying the Plaintiff's claim. They also filed a Notice of Preliminary Objection raising the following grounds:

- i. That the suit is sub-judice contrary to the provisions of section 6 of the Civil Procedure Act and therefore the Court lacks the jurisdiction to hear and determine the same by virtue of CMELC Case No. 128 of 2018 which is pending in court.
- ii. That the Plaintiff lacks the *locus standi* to sue against the estate of Marisera Okero.
- iii. That this court cannot enforce an illegal contract that is null and void *ab initio*.
- iv. That the 1st and 2nd Defendants cannot be sued since they are not administrators of their father's estate.

6. When the matter came up for mention on 3rd November 2021, the court directed that the Preliminary Objection be heard first and further that the same be canvassed by way of written submissions. The 1st to 4th Defendants filed their submissions on 20th December, 2021 while the Plaintiff's submissions were filed on 7th February, 2022. The 5th and 6th Defendants entered appearance but did not file any Defence or submission on the Preliminary Objection.

1ST-4TH DEFENDANT'S SUBMISSIONS

7. Learned counsel for the 1st-4th Defendants submitted on the 4 grounds raised in the Preliminary Objection. With regard to the first point which is whether the suit is sub-judice, counsel submitted that the Plaintiff had admitted the existence of CMELC Case No. 128 of 2018. It was his contention that at the core of the two suits is the ownership of the piece of land occupied by the Plaintiff and therefore this suit is sub-judice. He placed reliance on section 6 of the Civil Procedure Act and the case of **ASL Credit Limited v Abdi Basid Sheikh & Another (2019) eKLR** for the proposition that it was in the interest of the parties and the administration of justice to avoid a multiplicity of suits between the same parties over the same subject matter.

8. He further relied on the case of **Thika Min Hydra Co. Ltd V Josphat Karu Ndwiga (2013) eKLR** where the court held that:

"It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleadings in both cases".

9. With regard to the issue of *locus standi*, counsel submitted that the Defendants were wrongly sued as they are not the administrators of the estate of Marisera Okero-deceased and no Grant of Letters of Administration has been issued in respect of the estate of the deceased.

It is counsel's contention that since the subject matter relates to the estate of Marisera Okero, the Plaintiff cannot sue on behalf of her estate without obtaining a Grant of Letters of Administration.

10. On the issue of the validity of the contract of sale of land, counsel submitted that the person who sold land to the Plaintiff's late husband had no capacity to sell as the land was still registered in the name of a deceased person. The said sale was therefore in contravention of section 45 of the Law of Succession Act and it amounted to intermeddling with the estate of a deceased person. It is therefore his submission that the said sale is a nullity and it cannot be enforced in law.

PLAINTIFF'S SUBMISSIONS

11. On his part, learned counsel for the Plaintiff submitted that the Preliminary Objection raised by the 1st-4th Defendants does not fit the definition of a Preliminary Objection as set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors (1969) E.A 696**. The said case defined a Preliminary Objection as follows:

"A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.

Justice Newbold in the said suit argues that:

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 the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion

12. Counsel further relied on the case of **IEBC v Jane Cheberender & 2 Others Civil Application No. 36 of 2014** where the Supreme Court held that:

"The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the Objection against profligate deployment of time and other resources. And secondly, it serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to a preliminary objection as a sword for winning a case otherwise destined to be resolved judicially and on the merits."

13. On whether the suit is sub-judice, counsel submitted that the instant suit is different from the one in the lower court in that this suit seeks cancellation of title Nos. WEST KITUTU/BOMATARA/4637 and 4638 on the grounds that the same were obtained fraudulently whereas in the lower court, the 2nd Defendant seeks a permanent injunction and an order of eviction against the Plaintiff herein in respect of land parcel number 4637. He however concedes that if this suit is determined in the Plaintiff's favour, the suit in the lower court would automatically collapse. He however submits that the Plaintiff is at liberty to apply for stay of proceedings in respect of the suit in the lower court.

14. On the issue of *locus standi*, counsel submitted that even though the defendants are not the administrators of the estate of Thomas Oseko Omwena or Marisera Okero, it is apparent that they were involved in the fraudulent sub-division and transfer of the parcel number 1744 belonging to the estate of Marisera Okero who was their grandmother. It is therefore his contention that the 1st-4th Defendants are necessary parties.

15. On the question of the validity of the contract, counsel submitted that the same could only be determined after a full hearing.

ISSUES FOR DETERMINATION

16. The overarching issue for determination is whether the Preliminary Objection should be upheld.

ANALYSIS AND DETERMINATION

17. Having considered the grounds raised in the Preliminary Objection, it is common ground that there is another suit filed by the 2nd Defendant against the Plaintiff in the lower court. The said suit touches on the same subject matter herein as it relates to parcel number WEST KITUTU/BOMATARA/4637 which is one of the resultant titles from parcel no. WEST KITUTU/BOMATARA/1744.

18. The instant suit relates to parcel no. WEST KITUTU/BOMATARA/1744 and its resultant parcels being WEST KITUTU/BOMATARA/4637 and 4638. Counsel for the 1st to 4th Defendants has conceded that if this suit succeeds, the suit in the lower court could automatically collapse. Without delving into the other grounds raised in the Preliminary Objection, it is clear that this suit is sub-judice and it must be dealt with in accordance with section 6 of the Civil Procedure Act. The said section provides as follows:

Section 6;

“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 proceeding between the same parties, or between 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.”

19. As correctly submitted by counsel for the Plaintiff, the fact that this suit is sub-judice does not divest this court of its jurisdiction, rather the section provides that the court shall stay the suit that was filed later. The rationale for this doctrine was clearly explained in the case of **ASL Credit Limited v Abdi Basid Sheikh & Another (2019) eKLR** where the court relied on the case of **Kampala High Court Civil Suit No. 450 Of 1993 - Nyanza Garage vs. Attorney General** in which the Court held that:

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

20. Additionally, this court is enjoined to further the overriding objective of the Environment and Land Court Act and the Civil Procedure Act which is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. As the value of the subject matter herein falls within the jurisdiction of the Chief Magistrate's Court, it would be expedient to have the suit herein transferred to the Chief Magistrate's Court.

21. The upshot is that the Preliminary Objection succeeds in part and I make the following orders:-

- a) The suit herein is stayed pending the hearing and determination of CMELC Case No. 128 of 2018.
- b) This suit is transferred to Kisii Chief Magistrate's Court for hearing and determination.
- c) The costs of the Preliminary Objection shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF MARCH, 2022.

J. M ONYANGO

JUDGE