



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Case 14A of 2007**

**ANDREA AMUNGA**

**HENRY OTIENYO**

**HARUN OSUNDWA.....PLAINTIFFS/APPLICANTS**

**V E R S U S**

**MAURICE OTUNGA**

**STANLEY SHILENJE.....DEFENDANTS/RESPONDENTS**

**R U L I N G**

The defendant filed a notice of preliminary objection dated 28.6.2007. The main grounds in the notice are that the plaintiff lacks locus standi to file this suit, that the claim is time barred, the suit is re-judata and that the claim is incurably defective, frivolous, vexatious and an abuse of the court process.

Parties agreed to proceed by way of written submissions. The applicant contends that the claim relates to the estate of the late **ANERIKO ONG'AMO ABWALABA** who was the proprietor of the suit land, plot number **BUTSOTSO.INGOTSE.618**, no grant of letters of administration was filed. Further, the claim is over 12 years old as the 1<sup>st</sup> defendant was given the land in 1986. This suit was filed in 2007. The defendants argue that the suit is res judicator as the same was deliberated upon before the Lurambi Land Disputes Tribunal, case No. 44 of 2005 and the award was adopted by the Chief Magistrate's Court, Kakamega in Land Award No. 209 of 2005 and no appeal was filed.

On their part, the plaintiffs argue that a grant of letters of administration was obtained before the suit was filed. The land is ancestral and they are beneficiaries. The claim is not statutory time barred as is not based on contract but on fraud. The plaintiffs are claiming that the 1<sup>st</sup> defendant is holding the title deed in trust for the plaintiffs and could not transfer it to the 2<sup>nd</sup> defendant.

The purpose of a preliminary objection is to have the dispute resolved at the preliminary stage. A preliminary objection should be able to convince the court that indeed the plaintiffs' claim is not grounded on the truth and is a mere waste of time. The plaintiffs have exhibited a limited grant issued to one of the – 3<sup>rd</sup> plaintiff. The grant was issued on 3<sup>rd</sup> March 2010. This was way after the suit had been filed in 2007. The 3<sup>rd</sup> plaintiff is one of the original plaintiffs in original plaint filed on 9<sup>th</sup> February 2007. The plaintiffs argue that they are beneficiaries of the estate original proprietor of the suit land. The defendants in the defence deny that there was any fraud committed. The 2<sup>nd</sup> defendant lawfully purchased the land for value and took possession from 1999 to date.

I do find that sine the plaintiffs are contending that there was fraud in the manner in which the 2<sup>nd</sup> defendant got the land that the 1<sup>st</sup> defendant was holding the land in trust for them, the plaintiffs have locus standi to bring this suit in their personal capacity and not as administrators of the late **ANERIKO ONG'AMO ABWALABA**. Further, the Lurambi Land Disputes Tribunal could not deal with the issue of Trust as it was outside its jurisdiction. The trial court will be able to determine whether indeed the 1<sup>st</sup>

defendant was holding the land in trust for the plaintiff.

In the end, I do find that the plaintiff's suit raises triable issues. The preliminary objection cannot dispose the suit once and for all. The issues raised by the plaintiffs need to be determined by the court. The preliminary objection is hereby dismissed. The preliminary objection is hereby dismissed. Costs shall follow the outcome of the main suit.

Delivered, dated and signed at Kakamega this 22<sup>nd</sup> day of November 2012

**SAID J. CHITEMBWE**  
**J U D G E**