



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Suit 113 of 2005 (OS)

**MORRIS LUGALIA LUKE & 5 OTHERS (suing on their own behalf and on behalf of all the
members of new Langas Co. Investment).....PLAINTIFFS**

VERSUS

PAUL CHERUIYOT & 3 OTHERS:.....DEFENDANTS

R U L I N G

The application filed under Originating Summons on their own behalf and on behalf of “all members of New Langas Company Investment” seeking court to determine the legal owners of Parcel No. LR.8500, whether or not title should pass to heirs of EMMY CHEMSUNDE or should be transferred to the plaintiffs who are the purchasers for value, among other prayers. They then brought the court application seeking the following orders:-

1.
2. That the Honourable court be pleased to issue orders of temporary injunction restraining the defendants individually or acting as a group, their agents and or employees and or servants from interfering with the plaintiffs quiet possession and enjoyment of all property comprised in Title No. LR. 8500 otherwise known as Langas Estate of Eldoret Municipality.
3. That the Honourable court be pleased to order that the original title and or security for all the property comprised of Title No. LR. 8500 otherwise known as Langas Estate of Eldoret Municipality be deposited in court for safe keeping and preservation, pending the suit.
4. The Honourable court be pleased to order prohibition of any and all conveyance by the plaintiffs either individually or collectively and the case may be pending the hearing and determination of the suit before the court.
5. That the court be pleased to declare the plaintiffs as the bonafide owners of all parcel of land comprised in title No.LR.8500 otherwise known as Langas Estate Eldoret Municipality.
6. The defendants be condoned to bear the costs of this application”

Thereafter the defendants filed a preliminary objection seeking the court to strike out the entire suit on the following grounds:-

1. The plaintiffs have no locus standi to institute the suit under the provisions of the Laws of Succession Act.
2. The suit does not lie under the provisions of order 36 Rule 1 and 2 CPR.
3. The suit does not comply with the provisions of order 8 rules 8 and 1`2 CPR.
4. The originating summons and the documents filed in support thereof do not disclose any cause of a action.

The application and preliminary objection were heard simultaneously. There are 10 grounds supporting the application and two affidavits are sworn by **FRANCIS K. KARINGE** and **MORRIS LUGALIA LUKE**.

The background of the dispute as I understand it is that land No. LR.8500 was initially registered in the names of **JOSEPH ARAP KORIR** and **KIPTOT ARAP SITINEI**. It seems that at one time the land was subdivided into plots which were sold to many people. Some of the original purchasers sold to others. The purchasers have built in the plot and it is now know as Langas Estate. The sale was in **1970s** and **1980s**. However titles were never issued to the resultant plots and the original title No. 8500 is still the one in existence. The land is now known as Langas Estate. Both **JOSEPH ARAP KORIR** and **KIPTOT ARAP SITINEI** died. It seems that there was a succession cause and the title was transferred into the name of **EMMY CHEMSUNDE** who I believe was the wife of **JOSEPH ARAP KORIR**. From documents annexed one **PIUS TOTT** filed Nairobi **HC.P&A.NO.2504 of 2004** in respect of the Estate of his late father **KIPTOT SITINEI**. That cause is still pending as there were objections filed.

EMMY CHEMESUNDE herself died sometimes in the year 2004. The respondent in this application filed **Eldoret HC.P&A.NO.138 of 2005** seeking grant of Letters of Administration in respect of her Estate. Court was told that no grant has been issued as yet. Meanwhile the applicants filed this Originating Summons and this application.

In the grounds on the face of the application and the averments in the supporting affidavits and also in the submission of Ngigi Mbugua the counsel who prosecuted the application it was said that the applicants had bought plots from the owners of the land. There are almost two thousands people living in the land some who bought plots from the original purchasers. They have been paying land rates to Eldoret Municipality and have developed their plots. However ownership of the plots have never been passed to them. The originating Summons they seek to be declared owners of that land. However the respondents have filed the succession cause and the purpose is to have the land transferred to themselves and hence the prayer for injunction. They claimed to be the beneficial owners of the plots have purchased them. They even had negotiated with the respondents over the transfers of the same and some agreements reached. If injunctions and prohibition is not granted and land transferred to respondent they will suffer irreparable loss. The Originating Summons when finalized will determine their rights in the land.

The application as opposed. There is a replying affidavit. Also there were submission by Mr. Birech for 1st and 3rd respondent and Mr. Gicheru for the second respondents and also the grounds in the preliminary objection.

Mr. Birech submitted that the agreement said to have been entered between the applicants and 2nd respondent shows there was money to be paid when Succession cause was finalized. The 2nd respondent had not obtained any Letters of Administration by the time they entered into the agreement.

Further it was stated that no Letters of Administration had been issued to the respondent by the time this suit was filed though they had been applied for in succession cause No. 138 of 2005. The plaintiffs should therefore have filed objection proceedings in the succession cause and not file this suit.

Further it was submitted that land was for Agricultural use and there has been no change of user. There is therefore need for consent from Land Control Board.

Mr. Gicheru added his voice in opposing the application and further asked the whole suit to be struck out. He submitted that the interest of applicants are from **EMMY CHEMESUNDE** who died in 2004. The respondent have not yet been granted Letters of Administration to her Estate. As such they have no capacity to sue or be sued. They cannot therefore pass any property to the applicants at this point. The property could not have been sold before a grant was issued and confirmed. Thus any contract entered by the Applicant and any of the respondent is an illegal contract.

Further he submitted that there is no trust created and as such provisions of Order 36 rule 1 and 2 CPR do not come into play.

Lastly he submitted that there is no issue found in the Originating Summons to go for hearing. There was no affidavit accompanying the summons to start the applicants case. There was only a verifying affidavit. The applicants therefore has not established a prima facie case to entitle him to an injunction.

I have carefully and thoroughly considered the application, affidavits, annexure and the rival submissions and also the preliminary objection. I wish to first deal with the issue as to whether the entire suit and consequently the application be struck out. Due to lack of capacity by the respondent. It is trite law that a party to have capacity to sue or to be sued on behalf of an estate of a deceased person he/she must have a grant of Letters of Administration. This was the hold by the court of appeal in case of **EVANS OBINO NYAMOSI VS NDEGE OKANGI Civil Appeal NO. 32 of 1998 and in VIRGINIA E. W. OATIENO VS JOSEPH OCHIENG OUGO & ANOTHER (1982 – 88) KAR 1051**. It is not in dispute that the respondent in this suit have not been granted Letters of Administration. Indeed they have already appealed but they are yet to get the grant. S. 80 (2) the Law of Succession Act Cap 160 provides:-

“ A grant of Letters of Administration with or without the will annexed, shall take effect, only as from the date of the grant.”

Thus any grant will only take effect from the date it will be granted. However there is no denying that the petitioners have already petitioned the court for such a grant. This matter came to court by way of Originating Summons and not by way of a plaint. It will be drastic to strike out the suit at this time without hearing the parties. In the case of **WAMBUI OTIENO** referred above the suit was just heard by way of affidavits and submissions. No Letters of Administration had been obtained by then. On an appeal against the ruling made therein the court of appeal resubmitted the case to High Court and ordered that it be heard by way of viva voce evidence. The suit went for full hearing despite there being no grant at that time. I therefore feel that this is not the opportune time to deal with that issue to its conclusions and thus determine the whole suit.

From the averments in the affidavits and from the annexures it is clear that the claimant claim to have bought the land even before the deceased died. They are therefore denying to be creditors and that is provided for in Order 36 rule 1 CPR. The issue of selling immovable property of the deceased therefore do not arise. The claim is that this was done in her lifetime. Respondents claim to have taken possession of their respective plot in her life time. Provisions of S. 45 Laws of Summons Act therefore do not apply if indeed this is true. There are facts to be addressed when the suit is fully heard. It is then that the court will decide if any agreements made after the death of deceased are illegal or not.

Provisions of Order 1 rule 8 and 12 CPR are clear where there are more than one plaintiff or defendants. In this case court has been told there are other plaintiffs. That sound as a reparative action but court was not adduced on that. Rule 12 provides for authority to sue by the other plaintiff. In this suit the situation is different. The suit was filed by the firm of M/S Ngigi Mbugua & Co. Advocates. That is the firm who pleaded and by these proceeding on behalf of all the plaintiffs. The said firm acts for all the plaintiffs and as such there was no need of written authority by the other plaintiffs.

Lastly indeed there was no affidavit accompanying the Originating Summons to state the case of the plaintiff. This is necessary requirement as a verifying affidavit cannot state the case and the claim. However I believe this omissions is curable and can be dealt with when the time comes for directors. It does not make the suit fatly defective. Thus from the above I find that the suit is properly before the court

and therefore dismiss the preliminary objection to strike it out.

I now turn to the application proper. I should state from the counsel that the court cannot grant prayers. It seeks court to declare the applicants as the owners of the suit land. This is the same prayer in the originating summons. To grant such a prayer at this stage would be tantamount to determining the whole suit. The prayer is misconceived and does not live.

As for prayer 3 seeking court to order the original title to be deposited in court, court was not told who has the said title in his possession. Court do note that there have been several suits/cases over the said piece of land some which are still pending. It is not clear where the said title is and the applicant did not go to any length to address that issue. I will therefore decline to grant that prayer. Suffice it to say that the applicant also seeks for prohibition orders which would guarantee that there will be no dealings in the land.

As for prayer (2) and (4) seeking orders for injunction and prohibition the court found they are well merited. Principles of granting injunction are well set out in the case of **GIELA**. The applicants have to deponed that they live in the suit land and have done extensive developments on it. Infact it is even known as an Estate within Eldoret Municipality. The respondent have not rebutted those claims. Applicants are the one currently in occupations. The Respondents are not. It would be unjust to leave their occupation and rights unprotected delay the pending of the suit. There are no doubts that if they are to be evicted and the land transferred to other people the loss that would be occasioned would be irreparable and no amount of damages may atone them. The prayer for injunction and prohibition are therefore well merited in the circumstances.

In the circumstance I allow the application to the extent that the respondents their agents and or servants are hereby restrained from interfering with the applicants quiet possession and enjoyment of land No. LR.8500 Eldoret Municipality. Further they are prohibited from doing any conveyance of the suit property until the suit is heard and determined. However these orders do not stop them from pursuing grant of Letters of Administration in the cause they be filed.

Costs will be in the cause.

Dated and Delivered at Eldoret on 6th July,2007.

KABURU BAUNI

JUDGE.

DELIVERED IN THE PRESENCE OF:-

C/C - David

N/A for applicant

Mr. Nandwa for Gicheru for 1st, 2nd and 3rd Respondents

Mr. Sang for Mr. Birech for 2nd Respondent