Leonard v Ewoton & 5 others (Environment & Land Case 24 ”B” of 2023) [2024] KEELC 424 (KLR) (1 February 2024) (Ruling)

Neutral citation: [2024] KEELC 424 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 24 ”B” OF 2023

FO NYAGAKA, J

FEBRUARY 1, 2024

BETWEEN

EWOTON EKUTAN LEONARD .... PLAINTIFF

AND

PIUS ATOK EWOTON .... 1ST DEFENDANT

PAUL CHEMUTTUT .... 2ND DEFENDANT

JAMES CHESANG .... 3RD DEFENDANT

PAUL KIPKORE .... 4TH DEFENDANT

MICHAEL KIPKOECH .... 5TH DEFENDANT

MATHEW KESHON .... 6TH DEFENDANT

RULING

1. The Plaintiff instituted the instant suit through a Plaint dated 18/05/2023 and verified by an Affidavit sworn by him on the same date. He claimed to be the brother to the 1st Defendant whom he averred was co-administrator of the Estate of their father, the late Francis E. Achuka. He pleaded that their father died on 07/08/2012. His further case was that the 2nd to 6th Defendants were purchasers, through the 1st Defendant, of their late father’s suit property in Trans Nzoia (County), particularly, known as plot No 328 Milimani Settlement Scheme which measures approximately 20 acres.

2. He pleaded further that the 1st Defendant had refused to have the Grant of Letters of Administration issued on 26/08/2012 confirmed so that the property be shared out. His claim was that the defendants were intermeddling with the estate of the deceased father. He sought a declaration that the 1st defendant had no authority to sell the suit property, a mandatory injunction against the 2nd - 6th Defendants

removing them from parcel No 328 Milimani Settlement Scheme (sic), an injunction against the 2nd to 6th defendants from trespassing onto the suit land and costs of the suit.

3. The 2nd - 6th Defendants filed a joint defence on 30/06/2023 by which they denied the allegations. They stated that they had not intermeddled with the estate of the deceased parent but rather that they bought from the 1st Defendant and with the knowledge of the Plaintiff the portions of land they occupied. They averred further that the Plaintiff did not have legal capacity to institute the suit and the Court did not have jurisdiction to handle the dispute. They pleaded that they would be raising a preliminary objection on jurisdiction.

4. The 1st Defendant entered appearance and raised a preliminary objection to the jurisdiction of the Court on account of, among other points that the matter was a subject of Kitale P & A No 154 of 2013 in the Estate of Francis E. Achuka which was still pending before the High Court.

5. This Court referred the matter to a Court-Annexed Mediation process for a possibility of settlement. After the negotiations and an 'agreement' being reached the parties signed the document the Mediator prepared and he filed it. When it came up for adoption as the judgment of the Court the Plaintiff raised objection to it. He did not want it adopted hence the Court summoned him, his learned counsel and those of the other parties, together with the Mediator.

6. The Plaintiff summed it up on oath about the events as transpired before and at the time he appended his signature. He stated that he and the 1st Defendant attended the mediation meeting on 14/08/2023. After lengthy discussions, including with his siblings, the mediator gave them a blank document to sign, he and his brother signed it and then the mediator wrote on a separate sheet of paper things they did not agree on. He stated that he, the brother and his other siblings did not agree to have the matter withdrawn from Court in order that they go home to discuss it at home.

7. He accused his brother of disposing the property without authority. He acknowledged that he and his brother were administrators to the estate of their father. That after they were granted temporary letters of administration both had been selling the property unknowingly and they had basically been left with nothing except the suit land. In cross-examination, he repeated that he and the brothers were to go home and agree on the issue but not on the succession matter. He admitted that the succession matter was not completed yet. On further cross-examination he denied filing a succession matter but that they had letters of administration which they may have been given by a lawyer. Lastly, on that he said they had even forged the signature of one of their sisters who resides in Germany.

8. The Mediator, one Francis Yator, stated on oath what transpired. He stated that upon receipt of instructions by the court to mediate in the matter between the two brothers, he called them and arranged for a meeting on 14/08/2023. They both came and discussed, together with their sister whom the Plaintiff called on phone and he give the mediator chance to talk. They informed him of the Kitale High Court Succession Matter No 154 of 2013. He advised them that in the circumstances they would have done well to go home and agree out of Court. That they consented to that, he wrote what they had agreed upon, read it to them and they signed it after which he filed the agreement and report. That the Plaintiff called his sister one Magdalene whom he informed of the negotiations and they agreed to have the matter settled at home. They agreed that the meeting be held in two weeks of the agreement and signature.

9. On cross-examination he stated that he had never met the parties before, was unaware of the succession matter up to the time Leonard told him about it during the meeting and Pius confirmed it was in existence. He stated the signing of the agreement was voluntary and both parties were satisfied.

10. At the end of the evidence of the two witnesses learned counsel for the 2nd - 6th Defendants submitted that the Court adopts the report. Also, that there was a succession matter in which the distribution of the estate of the deceased should be distributed first. He ended his submissions by asking the Court to find that the parties deal with the succession Court matter first. Learned counsel for the 1st Defendant too agreed that the agreement be adopted. He pointed that paragraph 7 of the Plaint was clear that the allegation averment was that the 1st Defendant had refused to complete the succession by having the Grant of Letters confirmed. That only upon confirmation and distribution can each beneficiary know their respective share and if one had sold more than their, they would know how to go about it. Similarly, learned counsel for the Plaintiff submitted the matter be referred first to the Court handling the succession to first determine the shares of each beneficiary. Then in case of any beneficiary having sold more than their share the Court would issue other remedies.

11. I have considered the pleadings herein, the submissions of the parties and the law. The three questions that I need to determine is whether to adopt the mediation agreement, whether the suit is premature and who to bear the costs of the suit, if it is found to be premature.

12. Regarding the adoption of the mediation agreement dated 14/08/2023, it is trite law that for an agreement to be said to be reached, all the parties have to be present and voluntarily agree to the terms. From the evidence of the Plaintiff and the mediator, only two parties were present when the 'agreement' was reached. These were the Plaintiff and the 1st Defendant. The 2nd - 6th Defendants were absent. That being so, it means that a number of parties herein were left out of the negotiations yet the terms of the agreement would have affected them. In the circumstances, the consensus reached excluded some parties. While their learned counsel submitted that the agreement be adopted I find that it would be contrary to the law to do so.

13. In regard to the second issue, all the parties argued that the matter was not ripe for filing before the Court hence it should be referred to the High Court for the conclusion of Succession Cause No 154 of 2013. The jurisdiction of this Court is provided for under Section 13 of the *Environment and Land Court Act*, Act No 19 of 2011. It stipulates that:

> " (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
>
> (2) In exercise of its jurisdiction under Article 162 (2) (b) of the *Constitution*, the Court shall have power to hear and determine disputes
>
> (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> (b) relating to compulsory acquisition of land;
>
> (c) relating to land administration and management;
>
> (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
>
> (e) any other dispute relating to environment and land."

14. To determine whether it has jurisdiction, the Court has to analyse the pleadings and where the dispute is not readily discernible the Court has to determine the predominant issue between the parties. First of all, it is common ground that both the Plaintiff and 1st Defendant are co-administrators of the Estate of Francis E. Achuka (deceased) by virtue of a temporary grant of letters of administration which were issued on 26/08/2013 in Kitale High Court Succession Cause No 154 of 2013. The Plaintiff avers that the 1st Defendant has refused to have the Grant of Letters confirmed and that the 2nd - 6th Defendants have intermeddled the Estate of Francis E. Achuka (deceased).

15. He argues that the 1st Defendant has sold part of the estate to the Defendants, before the confirmation takes place while he argued that he himself (Plaintiff) was not willing to discuss any issues to do with succession since they had, vide the temporary grant of letters, sold most of the properties of the deceased. When these facts are applied to the jurisdiction of this Court as contained in the provision cited above, it is clear to me, and I agree with all learned counsel, that this is a matter which should be dealt with by the High Court in the succession matter that is before. The Plaintiff only claims that the 1st Defendant has no authority to sell part of the suit land to the other defendants hence the latter should be removed from the land and a permanent injunction to issue against them. There is no issue of determination of ownership or use of the suit land.

16. It is unfortunate that the Plaintiff, having either jointly or severally with the 1st Defendant sold some of the properties of their late father using the temporary letters of administration, can now turn against his co-administrator and sue his for such acts as those he admitted they had done. Be that as it may, it does not mean that the actions of sale of the part of the Estate of the deceased before grant of letters of administration is confirmed is legally permitted. It means, from the Plaintiff's own admission that they both intermeddled with the estate.

17. The upshot is that the Plaintiff's suit is incompetent and premature hence this Court lacks jurisdiction to entertain it. It is struck out. Each party will bear its own costs since the Plaintiff and 1st Defendant are brothers and to order costs against the one who has lost is likely to burden the Estate with unnecessary expense.

18. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 1ST DAY OF FEBRUARY, 2024.

HON. DR. ***IUR*** **FRED NYAGAKA**

JUDGE, ELC KITALE