



Kisero (Suing as the administrator of the Estate of the Late Benard Kisero Owenda - Deceased) & 2 others v Liech & 3 others (Environment & Land Case 88 of 2012) [2024] KEELC 3975 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3975 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 88 OF 2012**

SO OKONG'O, J

MAY 2, 2024

BETWEEN

ELIUD JUMA KISERO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE BENARD KISERO OWENDA - DECEASED) 1ST PLAINTIFF

MARICUS ADUKE OLOTO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE JAMES OLOTO OWENDA - DECEASED) 2ND PLAINTIFF

GEORGE OTIENO OYANDA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE JACOB OYANDA - DECEASED) 3RD PLAINTIFF

AND

DORCAS LIECH 1ST DEFENDANT

ELIZABETH LIECH (SUED AS JOINT ADMINISTRATORS OF THE ESTATE OF THE LATE ENOCK LIECH OCHARA - DECEASED) 2ND DEFENDANT

THE LAND REGISTRAR, KISUMU 3RD DEFENDANT

THE LAND ADJUDICATION OFFICER, KISUMU 4TH DEFENDANT

JUDGMENT

1. Eliud Juma Kisero (hereinafter referred to only as “Juma”) filed this suit in his personal capacity against Dorcas Liech and Elizabeth Liech (hereinafter referred to only as “widows of Liech”) in their personal capacities on 29th October 2012. Juma averred that at all material times, his deceased father, Benard Kisero Owenda, his father’s brother, James Olotu Owenda and his father’s cousin, Jacob Oyanda (hereinafter referred to only as “the owners of the original parcel”) were the proprietors of all that parcel of land known as South Nyakach/West Koguta/2549 (hereinafter referred to as “the original parcel”).



2. Juma averred that the widows of Liech were the widows of one, Enock Liech Ochara, deceased (hereinafter referred to only as “the deceased”). Juma averred that the deceased colluded with the 3rd Defendant when the original parcel was being subdivided and acquired a portion thereof namely, South Nyakach/West Koguta/2984 (hereinafter referred to only as “the suit property”) without express authority from the owners of the original parcel. Juma averred that Liech widows were in the process of disposing of the suit property.
3. Juma averred that the deceased was a stranger to him and that the widows of Liech who purported to be the administrators of the estate of the deceased had tampered with the boundaries of the suit property and were holding a title that was fraudulently issued to the deceased.
4. Juma sought judgment against the widows of Liech for; a permanent injunction restraining them from interfering with or transferring the suit property; an order for the Land Registrar, Nyando to cancel the title deed that was issued to the deceased and revert the ownership of the suit property to the owners of the original parcel; and the costs of the suit. The widows of Liech filed a statement of defence on 15th November 2016 with leave of the court. The widows of Liech denied Juma’s claim in its entirety. The widows of Liech denied that they were in the process of disposing of the suit property.
5. On 6th February 2023, without leave of the court, Juma purported to file an amended plaint dated 6th February 2023 in which he introduced a completely new case from the original suit and added new parties. Juma’s new suit had Eliud Juma Kisero, Maricus Aduke Oloto and George Otieno Oyanda as Plaintiffs suing as the administrators of the estates of Benard Kisero Owenda, James Oloto Owenda and Jacob Oyanda respectively (hereinafter referred to only as “the Plaintiffs”). In the new suit, Dorcas Liech and Elizabeth Liech (the widows of Liech) were sued in their capacities as the administrators of the estate of Enock Liech Ochara, deceased (the deceased). Juma added the Land Registrar, Kisumu and the Land Adjudication Officer, Kisumu as 3rd and 4th Defendants to the suit. Although Juma claimed that the said amendment was made pursuant to the leave that was given by the court on 5th December 2022, no such leave was granted by the court according to the court record.
6. In the amended plaint, the Plaintiffs averred that without a valid objection, Enock Liech Ochara, deceased (the deceased) fraudulently colluded with the 4th Defendant and had his name included in the register alongside the owners of the original parcel as one of the owners of the original parcel. The Plaintiffs averred that the inclusion of the name of the deceased as one of the owners of the original parcel was unlawful and fraudulent since the deceased was never a co-owner of the original parcel.
7. The Plaintiffs averred that upon the death of the owners of the original parcel, the original parcel was secretly, unlawfully and fraudulently subdivided by the deceased into four portions namely, South Nyakach/West Koguta/2981, 2982, 2983 and 2984 and the deceased caused South Nyakach/West Koguta/2984(the suit property) to be transferred to his name without the authority of the owners of the original parcel.
8. The Plaintiffs sought judgment against the Defendants in the amended plaint for; an order for the cancellation of the subdivision of the original parcel and the resultant parcels of land, and reversion of the original parcel in the name of the owners of the original parcel; an order for the cancellation of the registration of the deceased as one of the owners of the suit property and that the said property should remain in the names of the owners of the original parcel; a permanent injunction restraining the Defendants from interfering with or transferring the original parcel; and the costs of the suit together with interest.
9. The Plaintiffs took out summons to enter appearance and served the same upon the 3rd and 4th Defendants. There is no evidence that summons were taken out and served upon the widows of Liech



who had now been sued in new capacities. The 3rd and 4th Defendants filed a joint statement of defence on 10th March 2023 in which they denied the Plaintiff's claim in its entirety. The widows of Liech who had been sued as the administrators of the estate of Enock Liech Ochara (the deceased) did not respond to the amended plaint.

10. The suit came up for hearing on 15th November 2023 when only the Plaintiffs and their advocates attended court. The 1st Plaintiff, Eliud Juma Kisero (Juma) gave evidence as PW1. PW1 adopted his witness statement filed on 3rd December 2021 as part of his evidence in chief. He produced the documents attached to the Plaintiffs' bundle of documents filed on 29th October 2012 together with the original plaint as Plaintiffs' exhibits 1 to 9 and the documents attached to the further list of documents filed on 6th February 2023 as Plaintiffs' exhibits 10 and 11. PW1 stated that Enock Liech Ochara (the deceased) was not supposed to be registered as the owner of the suit property, South Nyakach/West Koguta/2984 since he did not own land in the area before and after land adjudication and registration.
11. The Plaintiffs' next witness was, Grace Abwao Njoga (PW2). PW2 adopted her witness statement dated 3rd December 2021 as her evidence in chief. She stated that the deceased was known to her and that he was not a beneficiary of the suit property. The Plaintiffs' last witness was George Otieno Oyanda (PW3). PW3 adopted his witness statement filed on 7th October 2019 as part of his evidence in chief. He stated that the deceased was known to him. He stated that the deceased was not supposed to be registered as the owner of the suit property.
12. After the close of evidence, the parties were directed to make closing submissions in writing. The Plaintiffs filed submissions dated 22nd January 2024 while the Defendants did not file submissions. The Plaintiffs reiterated that the inclusion of the name of the deceased as a co-owner of the original parcel was unlawful. The Plaintiffs submitted that the original parcel was owned by the owners of the original parcel before land adjudication in South Nyakach and as such the deceased could not have been lawfully registered as a co-owner of the property together with the owners of the original parcel. The Plaintiffs submitted that the deceased was their distant uncle and as such he had no right to the suit property.
13. The Plaintiffs submitted further that when the original parcel was subdivided in 1994, some of the owners of the original parcel were deceased and as such did not consent to the subdivision of the property. The Plaintiffs submitted that the signatures in the mutation form purporting to be those of the owners of the original parcel who were deceased at the time were forgeries. The Plaintiffs submitted that the conduct of the deceased amounted to intermeddling with the original parcel. The Plaintiffs submitted that since the owners of the original parcel who were deceased at the time of the subdivision did not consent to the same, the subdivision exercise that was conducted by the deceased should be cancelled.
14. The Plaintiffs submitted that the Defendants obtained part of the original parcel fraudulently and as such their title to the property was liable to be impeached under Section 26 of the [Land Registration Act](#) 2012. The Plaintiffs submitted that the title held by the deceased in respect of the suit property should be cancelled. The Plaintiffs submitted further that since the subdivision of the original parcel was unlawful, the subdivision of the suit property was similarly unlawful.
15. I have considered the pleadings, the evidence tendered by the Plaintiffs at the trial and the submissions by the Plaintiffs' advocates. Before I consider the merit of the Plaintiffs' claim, I need to dispose of a preliminary issue that I raised earlier in the judgment. As I mentioned earlier, this suit was brought by



Juma in his personal capacity against the widows of Liech also in their personal capacities. Order 4, rule 4 of the Civil Procedure Rules provides as follows:

“Where the plaintiff sues in a representative capacity the plaintiff shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaintiff shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises.”

16. A reading of the plaintiff dated 6th September 2012 leaves no doubt that Juma did not bring the suit as an administrator of the estate of his father, Benard Kisero Owenda or of any other estate. It is also clear that the suit was brought against Dorcas Liech and Elizabeth Liech as “the widows to one Enock Liech Ochara” and not in their capacities as the administrators of the estate of Enock Liech Ochara, deceased (the deceased).
17. At the time of bringing the suit, all the owners of the original parcel were deceased. Enock Liech Ochara was also deceased. The claim before the court could have been brought only by the administrators of the owners of the original parcel against the administrator(s) of the estate of Enock Liech Ochara, deceased (the deceased). For the foregoing reason, Juma’s suit was procedurally flawed and was incompetent.
18. I believe that it was this procedural defect in Juma’s suit that informed Juma’s advocates’ decision to amend the plaintiff to add more parties to the suit and to indicate that the new parties had brought the suit in their capacities as the administrators of the owners of the original parcel and against Dorcas Liech and Elizabeth Liech in their capacities as the administrators of the estate of Enock Liech Ochara, deceased. As I mentioned earlier in the judgment, the said amendment was effected without leave of the court. It was therefore irregular and inconsequential. This is an irregularity that the court could ignore for the sake of substantive justice if Dorcas Liech and Elizabeth Liech had assumed the new capacities in which they had been sued in the amended plaintiff and had participated in the hearing of the suit.
19. Since the Plaintiffs had brought a new suit through the amended plaintiff in which they sued in new capacities against Dorcas Liech and Elizabeth Liech also in new capacities, even if they had obtained leave to amend the plaintiff, they were required to take out summons to enter appearance and to serve the same afresh upon Dorcas Liech and Elizabeth Liech who could then decide to defend the suit or not. Dorcas Liech and Elizabeth Liech had no obligation to defend the new suit brought through the amended plaintiff if they were not the administrators of the estate of Enock Liech Ochara, deceased. It is not surprising therefore that their advocates who were representing them in their personal capacities did not participate in the hearing of this suit.
20. Where am I heading with all these? It is my finding that the Plaintiffs’ amended plaintiff dated 6th February 2023 filed on the same day having been filed without leave of the court was irregularly filed. The same is accordingly struck out. That leaves me with the original suit filed by Eliud Juma Kisero (Juma) in his personal capacity against Dorcas Liech and Elizabeth Liech (the widows of Liech) in their personal capacities. Was this case proved? In the Court of Appeal case of Virginia Edith Wambui Otieno v. Joash Ochieng Ougo & Another (1982-88) 1 KAR 1049, it was held per incuriam that an administrator is not entitled to bring an action as administrator before he has taken out letters of administration and if he does so, the action is incompetent from the date it was instituted.



21. In the text, Law of Succession by W.M. Musyoka published by Law Africa, the author has stated as follows at page 205 concerning suits by administrators:
- “Case law shows that no person has a right to enforce any cause of action, or defend any suit which survives the deceased or arises out of his death without a grant of letters of administration”.
22. As I have already mentioned, Juma’s claim in respect of land parcels, South Nyakach/West Koguta/2549 and South Nyakach/West Koguta/2984 could only be brought by the administrators of the estates of Benard Kisero Owenda, James Oloto Owenda and Jacob Oyanda (the owners of the original parcel) against the administrators of the estate of Enock Liech Ochara, deceased.
23. The evidence on record shows that Juma was appointed as the administrator of the estate of Benard Kisero Owenda on 10th June 2009. He was however not the administrator of the estates of James Oloto Owenda and Jacob Oyanda. Juma could not therefore maintain a suit on behalf of the two. In any event, Juma did not sue in his capacity as the administrator of the estates of Benard Kisero Owenda, James Oloto Owenda and Jacob Oyanda. Dorcas Liech and Elizabeth Liech (the widows of Liech) could also be sued only in their capacities as administrators of the estate of Enock Liech Ochara, deceased. They were not sued in those capacities and no evidence was placed before the court showing that the said widows of Liech had at any time been appointed as the administrators of the estate of Enock Liech Ochara, deceased.
24. It is my finding from the foregoing that Juma had no locus standi to bring a suit in respect of land parcels South Nyakach/West Koguta/2549 and South Nyakach/West Koguta/2984, and that Dorcas Liech and Elizabeth Liech had no legal capacities to be sued in respect of the said parcels of land. Given the said findings, I have concluded that the suit that was brought herein by way of a plaint dated 6th September 2012 is incompetent. I will therefore not consider the merit of the claim.
25. In the final analysis and for the foregoing reasons, the appropriate order to make in the matter is to strike out the defective suit. The suit is accordingly struck out. Each party shall bear its costs since the Defendants did not participate in the hearing of the suit. It is so ordered.

Delivered and Dated at Kisumu on this 2nd day of May 2024

S. OKONG’O,

JUDGE.

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Odeny for the Plaintiffs

N/A for the 1st and 2nd Defendants

N/A for the 3rd and 4th Defendants

Ms. J. Omondi-Court Assistant

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