



Athuman & 4 others v Said (Sued as beneficiary of the Estate Of Said Saleh Sherman Alias Said Swaleh Nguru); Kassim & another (Interested Parties) (Environment & Land Case 58 of 2015) [2023] KEELC 17272 (KLR) (10 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17272 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 58 OF 2015
SM KIBUNJA, J
MAY 10, 2023**

BETWEEN

**SULEIMAN JAMBIA ATHUMAN 1ST PLAINTIFF
MISHECK KAMAU 2ND PLAINTIFF
HAMISI SALIM MWAJASI 3RD PLAINTIFF
CHARO KONDE BOJO 4TH PLAINTIFF
HELLEN MAERE (SUIING ON BEHALF OF ALL 450 RESIDENTS OF UTANGE SECTION 1 MAINLAND NORTH) 5TH PLAINTIFF**

AND

AWADH SALEH SAID (SUED AS BENEFICIARY OF THE ESTATE OF SAID SALEH SHERMAN ALIAS SAID SWALEH NGURU) DEFENDANT

AND

**HAMMAD MOHAMED KASSIM INTERESTED PARTY
OMAR SALEH SHERMAN INTERESTED PARTY**

RULING

[Notice Of Preliminary Objection Dated The November 8, 2022]

1. The defendant filed the notice of preliminary objection dated the November 8, 2022 raising four (4) grounds that the suit does not disclose any reasonable cause of action; the suit fails within the perimeters set in Order 2 of the Civil Procedure Rules; orders sought in the Amended Originating Summons are unavailable in law and do not lie; and the suit is otherwise an abuse of the court process and should therefore be dismissed with costs.



2. The court gave directions on filing and exchanging submissions on the November 9, 2022. The learned counsel for the defendant and plaintiffs filed their submissions dated the January 27, 2023 and March 20, 2023 respectively which the court has carefully considered.
3. The following are the issues for the court's determinations;
 - a. Whether the plaintiff suit complies with the law and or discloses a reasonable cause of action.
 - b. Whether the orders sought in the suit are available in law or the suit is an abuse of the court process.
 - c. Who pays the costs in the preliminary objection.
4. The court has carefully considered the grounds on the notice of preliminary objection, submissions filed by both counsel, the superior courts decisions cited therein and come to the following findings;
 - a. From the court record, the Plaintiffs' suit was initially filed against Said Swaleh Nguru vide the originating summons dated the April 2, 2015. The pleadings were later amended after the passing on of the initial defendant. That vide the amended originating summons dated the March 7, 2016 Awadh Swaleh Nguru, sued as beneficiary of the estate of Said Saleh Sherman alias Said Swaleh Nguru was substituted as the defendant. The pleadings in the amended originating summons poses the following three questions for determination;
 1. 'Whether the Applicants themselves, their ancestors and families be declared to have become entitled by virtue of adverse possession of 65 years ALL THAT PIECE OF LAND containing an area of 73.16 acres or thereabout registered under the registration of Titles Act (Chapter 281) Laws of Kenya in the name of SALEM SAID SHERMAN And compromised in Title CR 7805/1.
 2. Whether the plaintiffs/Applicants are entitled to be duly registered as proprietors of the suit lands by virtue of adverse possession.
 3. THAT costs of this application be provided for.'

The plaintiffs' claim is premised on the following grounds;

 - a. 'THE Plaintiffs/Applicants herein have been in occupation of the parcel of land known as PLOT NO 373/398 (being CR7805/1) and hence openly, peacefully and as of right been in possession and occupation of the said land over 65 years.
 - b. The more than 458 members have been in exclusive possession of the parcel of land containing an area of 73.16 Acres and comprised in CR No 7805/1 situate at Utange within Bamburi and the said land is used for the benefit of the Applicants.
 - c. That the Respondent is the eldest son and hence a beneficiary of the estate of SAID SALEH SHERMAN alias SAID SWALEH NGURU, the registered proprietor of the said Parcel of land.'

To the supporting affidavit is annexed among other a copy of the title marked 'SJA3'.

 - b. Upon being served with the amended originating summons, Awadh Saleh Said, the defendant, responded by filing the replying affidavit sworn on the



January 15, 2017 in which he conceded being the eldest son of the registered proprietor of the suit land. He further deposed inter alia that;

- ' 4. That it is therefore clear that I am not the registered proprietor of the suit property and that the orders sought cannot in law be made against me.
 5. That the estate of the deceased is yet to be distributed as a lawful administrator Is yet to be determined and/or issued with the requisite Grant due to a pending case being Succession cause No 375 of 2010 relating to summons for Revocation of Grant.
 6. That it is clear from the foregoing that no Grant has been issued to me to enable me defend the estate as an administrator.
 24. That the foregoing notwithstanding, I have been advised by my advocate that the plaintiffs' suit herein against me is a sham, incurably defective and an abuse of the process of the court and ought to be struck out.
 25. That I have further been advised by my advocate that the suit as framed against me does not lie in law, does not disclose any reasonable cause of action against me and/or offends the mandatory provisions of the Civil Procedure Rules, *Law of Succession Act* and Limitations of Actions Act relating to capacity and locus, pleadings, tainted with misjoinder and is indeed an abuse of the court process. I shall at the opportune time raise a objection on a point of law and/or apply to have the Applicants'/Respondents' suit as against me struck out.'
- c. The learned counsel for the defendant has primarily submitted on whether the plaintiffs' pleadings discloses a cause of action, whether the suit is fatally defective and whether the grounds raised in their notice of preliminary objection are points of law. They have reemphasized that the defendant is merely the eldest son to and one of the beneficiaries of the estate of the registered proprietor of the suit land. That as such a cause of action meant to be directed to the said estate cannot be made against him, and the plaintiffs' suit as presented is fatally defective and or an abuse of the court process. In their rejoinder, the learned counsel for the plaintiffs submitted that the defendant had entered unconditional appearance, replied to the originating summons without objecting to his joinder, has sought for revocation and for his appointment as administrator in Mombasa HC Succession Cause NO 375 of 2010, and is the petitioner in Mombasa Const Pet No 28 of 2015. That the grounds on the notice of preliminary objection would require evidence to be taken and the defendant is estopped from denying capacity. That the preliminary objection is without merit and should be disallowed with costs.



- d. That having considered the relevant parties' pleadings as summarized in (a) and (b) above, it is apparently clear that contrary to the plaintiffs' submissions that the defendant did not raise any objection when entering appearance and filing a reply to the Amended Originating Summons, he had indeed taken issue with his joinder and indicated his intention to seek for the claim against him to be struck out. That is indeed what the defendant actualized through the notice of preliminary objection subject matter of this ruling.
- e. That the issue about the capacity the defendant was sued in is apparent from the pleadings filed by the plaintiffs and his reply. Going by the heading of the amended originating summons dated the March 7, 2016 and ground (c) thereon, there is no doubt the defendant is sued 'as a beneficiary of the estate of Said Saleh Sherman alias Said Swaleh Nguru'. The same position is apparent from the heading of the defendant's replying affidavit sworn on the January 15, 2017, in addition to paragraphs 3 and 7 among others. That though an administrator in an estate may also be a beneficiary, the defendant herein has not been sued as an administrator of the registered proprietor of the suit property's estate, but as a beneficiary. As a beneficiary, the defendant responsibility or liability cannot go beyond the share that will be ascertained and distributed to him after the legal processes in the Succession Cause are completed and executed.
- f. That as a beneficiary of the estate, the defendant is not the legal owner of the suit. The plaintiffs' claim is essentially for the defendant's title to the suit property to be revoked/cancelled or declared to have been terminated due to their adverse possession for a period of over 12 years. However, the copy of the title attached to the supporting affidavit to the originating summons as required by Order 37 Rule 7(2) of the Civil Procedure Rules, is not in the name of the defendant, but another. The Law of Succession Act chapter 160 of the Laws of Kenya at section 3 states 'administrator' means a person to whom a grant of letters of administration has been made under this Act'. That the pleadings being clear that the defendant is sued or was joined in the suit as a beneficiary of the estate to which he is not the legal administrator, and has no title to the suit property, it follows there is a misjoinder of the party and the orders sought cannot issue against him.
- g. Though the plaintiffs seem to take the defendant to be with authority to be sued in their claim from his representation and or conduct in other litigations, and therefore estopped from claiming otherwise, capacity is a vital question of the law, and where it has become apparently clear to the court that a wrong person has been sued, it would be a waste of time for the court to continue with the remaining processes and or to issue orders that the person before the court cannot legally execute or comply with due to lack of capacity. The plaintiffs could have been on safer grounds had they filed their claim against Omar Saleh Sherman to whom the documents availed in this record from Mombasa HC Succession Cause No 375 of 2010 indicates had a grant issued to him on the April 19, 2011, which the defendant herein is seeking to be revoked. That until the revocation order is made and another person is appointed in his place, the said Omar remains the legal administrator of the estate of the deceased, and it



is only a legal administrator that could, as it were, fill the shoes of the deceased registered proprietor of the suit land.

- h. The plaintiffs claim against the defendant, who is not the legal owner or administrator of the estate of the deceased owner, is therefore defective in law and an abuse of the court process. This is a suit ripe for striking out and pursuant to the provisions of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, the defendant is entitled to costs in the suit.

5. That flowing from above the court finds and orders as follows;

- a. That the defendant preliminary objection dated the November 8, 2022 is upheld with costs.
- b. The plaintiffs' suit vide the amended originating summons dated the March 7, 2016 be and is hereby struck out with costs to the defendant.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 10th DAY OF MAY 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of;

Plaintiffs: Absent

Defendant: Absent

Interested Parties : Absent

Counsel : Mr Ngonze for Plaintiffs, M/s Abdalla holding brief for Olouch Wambi for Defendant and Mr. Oloo for 2nd Interested Party.

Wilson – Court Assistant

S. M. KIBUNJA, J.

ELC MOMBASA.

