



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 57 OF 2020

NORAH OTIENO OLWENY[Suing on behalf of the Estate of the late
ELIAKIM WASHINGTON OLWENY (deceased)].....PLAINTIFF

VERSUS

ELIJAH KIPLANGAT.....1ST DEFENDANT

ELIJAH KIBET.....2ND DEFENDANT

UASIN GISHU, LAND REGISTRAR.....3RD DEFENDANT

UASIN GISHU, LANDS SURVEYOR.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

[NOTICE OF PRELIMINARY OBJECTION BY 1ST AND 2ND DEFENDANTS DATED 19TH OCTOBER, 2020]

1. The 1st and 2nd Defendants raised two grounds in their Notice of Preliminary Objection dated the 19th October, 2020 to the Plaintiff's suit. First, that the subject matter of the suit is non-existent, and secondly, that the Plaintiff lacks locus standi and the Limited Grant of Letters of Administration Ad Litem was obtained fraudulently.

2. The Court gave directions on 9th December, 2020 on filing and exchanging written submissions.

A. The learned Counsel for the 1st and 2nd Defendants and that for the Plaintiff filed their written submissions dated the 18th December, 2020 and 1st February, 2021 respectively. The Counsel for the 1st and 2nd Defendants cited the following cases in their submissions; *Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Company Ltd [1969] E. A. 696*, *Oraro Vs Mbaja [2005] 1 KLR 141*, *Kalpana Rawal & Others Vs Judicial Service Commission & Another [2016] eKLR* and *Njoya & 6 others Vs Attorney General & Another [2004] 1 KLR 232*, and submitted that for a preliminary objection to hold, it must satisfy the following ingredients;

“(a) It has to be a pure point of law.

(b) It is raised on the understanding that the facts pleaded by the other side are not disputed. The fact pleaded by the opposite party must be agreed.

(c) It must not be one which requires evidence to establish it.

(d) It must be one if successful will dispose off the proceedings.

(e) It must be one which has been pleaded or one which has arisen on the course of proceedings.”

The Counsel submitted that as they have demonstrated through their Defence and Replying Affidavit that the suit land subject matter of the

Plaintiff's suit, that is **Uasin Gishu/Ngenyilel Settlement Scheme/448**, does not exist and the title was long ago closed, then the Court is without jurisdiction to make any orders concerning it. That the Plaintiff lacks locus standi and the Limited Grant of Letters of Administration Ad Litem was obtained fraudulently as the Plaintiff had purported to be the only widow and or beneficiary to the late **Eliakim Washington Olweny**, who had been survived by three widows and several adult children. That as the other widows and children had not consented to the application for the limited grant, as required under **Rule 26 (1) of the Probate and Administration Rules**, no grant of representation should have been issued to the Plaintiff.

B. The learned Counsel for the Plaintiff submitted that the Plaintiff obtained the grant of letters of administration ad litem on 14th March, 2019 in **Eldoret CMCC No. 43 of 2019**. That there is filed Nakuru Succession Cause No. 243 of 2017 which is the main Succession cause for the distribution of the estate, including the suit land herein. That the grant has not been challenged in the Succession cause as required by **Section 76 of the Law of Succession Act Chapter 160 of Laws of Kenya**, and this Court is without jurisdiction to determine whether or not it was fraudulently obtained. That land parcel Uasin Gishu/Ngenyilel Settlement Scheme/448 does exist and the Plaintiff has possession of the original title deed. That the issue of whether or not the said land exists is an issue to be determined by the Court upon full hearing.

3. The following are the issues for the Court's determinations;

(a) Whether land parcel Uasin Gishu/Ngenyilel Settlement Scheme/448, the suit land, exists.

(b) Whether the Plaintiff is with capacity, locus standi in this suit.

(c) Who pays the costs of the preliminary objection?

4. The Court has carefully considered the grounds on the Notice of Preliminary Objection, the learned Counsel's submissions, the superior Court's decisions cited therein and come to the following determinations;

(a) That from the Plaint dated 2nd September 2020, especially paragraphs 7 and 18, the subject matter of the suit is land parcel Uasin Gishu/Ngenyilel Settlement Scheme/448, the suit land. That paragraph **11(a)** and **18 (c)** of the said Plaint leaves no doubt that the suit land has been registered in the names of the 1st and 2nd Defendants.

(b) That the 1st and 2nd Defendants' defence dated the 19th October, 2020 at paragraphs 4, 5, 6 and 9 confirms that the suit land described as Uasin Gishu/Ngenyilel Settlement Scheme/448 belonged to the late **Wilson Kibor Mutai**, and has since been subdivided into parcels 1751 and 1752, and that parcel 1751 has further been subdivided into 1760 to 1763. That averment of the suit land's title being subdivided into the said parcels has not been challenged through a reply to the 1st and 2nd Defendants' defence and the Court takes it as not a contested fact.

(c) That the 3rd to 5th Defendants are yet to file their statements of defence which would be useful in shedding light on who was the person registered and entitled to the suit land after it was discharged by the Settlement Fund Trustees. That in view of the different positions taken by the Plaintiff on one part and the 1st and 2nd Defendants on the other part, the matter would require evidence to be tendered before it can be determined. That is because according to the Plaintiff, the suit land was after discharge registered with her late husband while according to the 1st and 2nd Defendants it was registered with the late **Wilson Kibor Mutai**.

(d) That on the issue of the Plaintiff's capacity and whether or not the Plaintiff obtained the Limited Grant of Letters of Administration Ad Litem fraudulently and without the consent of her co-widows and their adult children, the Court finds favour with the Plaintiff's learned Counsel's submissions that the Court with jurisdiction to entertain and determine a challenge on the said grant is the succession court, and not this court. That there is nothing to suggest that the other widows and or adult children of the late Eliakim Washington Olweny have taken any steps towards challenging the grant issued to the Plaintiff and on the basis of which she has filed this suit "**as the legal representative and administrative (sic) of the estate of the late Eliakim Washington Olweny (deceased)**".

(e) That the findings in (c) and (d) above leads the Court to find that the grounds in the notice of preliminary objection fails to satisfy the requirements in **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Co. Ltd** as they would need evidence to be tendered before determinations one way or the other can be made. That the facts surrounding the two issues though pleaded by one party are disputed by the other.

5. That flowing from the foregoing, the Court finds no merit in the 1st and 2nd Defendants' preliminary objection and the same is rejected with costs to the Plaintiff.

Orders accordingly.

DELIVERED VIRTUALLY AND DATED AT ELDORET THIS 21ST DAY OF APRIL, 2021

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: No appearance.

Defendants: No appearance.

Counsel: M/s Muonga for Monari for Plaintiff.

Court Assistant: Christine and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.