



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO114 OF 2016

ALPHONSE ODHIAMBO AKA

ALPHONSE ODHIAMBO.....PLAINTIFF

VERSUS

GEORGE AWITI ADHOLA.....1ST DEFENDANT

EDWARD ONGAYA.....2ND DEFENDANT

JOTHAM OKOME ARWA.....3RD DEFENDANT

MAURICE ONYANGO AIDI.....4TH DEFENDANT

WIFRIDA ANYANGO OCHAR.....5TH DEFENDANT

JARED OCHIENG AJWANGA.....6TH DEFENDANT

LAND REGISTRAR BOND/RARIENDA DISTRICT...7TH DEFENDANT

RULING

1. The notice of motion dated 13th April 2017, and filed on the 19th April 2017 through M/S Rachiel & Amollo Advocates for the 2nd to 6th Defendants, seeks for the amended plaint filed herein on 8th July 2016 to be struck out for failure to disclose a cause of action against the said Defendants. The application is based on the thirteen (13) grounds marked (i) to (xiii) on its face summarized as follows;

a) That the 2nd Defendant died on the 28th June 2013, long before filing of this suit.

b) That the land parcel **West Asembo/Siger/3319**, subject matter of this suit, does not exist and the estate of 2nd Defendant and the 3rd to 6th Defendants do not have any interest in it.

c) The letters of administration ad colligenda bona granted to the Plaintiff in respect to the estate of Peter Adhola Okelo do not give him locus standi to sue in connection of land parcels **West Asembo/Siger/3396, 3394, 3479, 3505 and 3531** owned by the estate of the 2nd Defendant and 3rd to 6th Defendants as they do not comprise part of the said estate.

d) That the 3rd to 6th Defendants purchased their parcels from the 1st Defendant as innocent purchasers of legal estate for value without notice of any fraud or improprieties and their titles cannot be impeached.

e) That the widow, Angelina Adhola, is still alive and the Plaintiff's suit is therefore premature. That the suit property would only be availed for distribution after her death and that this court do not have jurisdiction to entertain a purely succession dispute.

f) That the amended plaint is totally defective for failure to comply with **Order 4 Rule 2** of the Civil Procedure Rules.

2. The application is opposed by the Plaintiff through the four grounds of opposition filed through M/S M.A. Ochanji – Opondo & Company Advocates dated 17th May 2017 summarized as follows;

- a) The application is bad in law, incurably defective, abuse of the court process and an affront to the overriding objectives of the court.
- b) That the matters raised in the notice of motion should be decided after full hearing of the suit.
- c) That the issue concerning the 2nd Defendant is a matter of procedure and law and hence does not warrant striking out of the suit.

That the Plaintiff also filed undated replying affidavit on the 17th May 2017 in which he deponed to the following among others;

- i) That no evidence has been availed to prove the assertion that the 2nd Defendant is dead.
- ii) That he is aware that the suit property West **Asembo/Siger/3319** does not exist due to the meddling and fraudulent actions of the Defendants.
- iii) That the parcels of land registered in the Defendants names came after multiple subdivisions of the suit property and the subdivisions thereof.
- iv) That the grant of letters of administration ad litem granted to him allows him to preserve the estate of his late father by filing and or defending suits for the estate, which comprises the suit property which has since been subdivided and registered in the names of 1st to 6th Defendants.
- v) That the amended plaint outlines the fraudulent activity of all the Defendants transacting on his late father's estate without taking out letters of administration.
- vi) That the suit is not for determination of the heirs of the estate of the deceased but for restoring the parcel of land to the estate.

3. The Plaintiff filed the notice of motion dated 17th May 2017 seeking for striking out of the 2nd Defendant's statement of defence for being an abuse of the court's process. The application is based on the four grounds on its face and supported by the affidavit sworn on the 17th May 2017 by the Plaintiff.

4. That in reply to the Plaintiff's application, the 3rd Defendant, namely Jotham Okome Arwa, filed the affidavit sworn on the 2nd October 2016 in which he among others annexed a copy of certificate of death No.242490 in respect of Edward Ogaya Ngoma, the 2nd Defendant, which indicates that he died on the 28th June 2013. That also filed with the said affidavit is a notice headed "**NOTICE OF WITHDRAWAL OF APPLICATION**" which states as follows;" take notice that the 2nd Defendant's statement of defence dated 28th June 2016 is hereby withdrawn." The notice is drawn and filed by M/S Rachier & Amollo LLP Advocates for the 3rd to 6th Defendants.

5. The court issued directions on the 3rd October 2016 for among others that the two applications be dealt with together through written submissions. The counsel for the 2nd to 6th Defendants had by then filed their written submissions dated 2nd October 2016 on their notice of motion dated 13th April 2017. The Plaintiff's counsel then filed their written submissions on the applications dated 13th April 2017 and 17th May 2017 on the 7th March 2018. That on the same date they filed a further affidavit sworn by the Plaintiff on the 7th March 2018.

6. The two applications came up for mention on the 8th March 2018 when counsel for the 2nd to 6th Defendants informed the court that they had not filed any summations on the Plaintiff's notice of motion dated 17th May 2017 as they had instead filed a notice dated 8th November 2016 to withdraw the 2nd Defendant statement of defence. The ruling date was then fixed.

7. The following are the issues for determination by the court;

- a) Whether the amended plaint discloses a reasonable cause of action against the 2nd to 6th Defendants
- b) Whether this court has jurisdiction on the suit.
- c) Whether the 2nd Defendant, Edward Ongaya, was alive or dead when this suit was filed.
- d) Who pays the costs of the two applications.

8. The court has carefully considered the grounds on the two applications, affidavit evidence, the written submission filed and the authorities cited therein, and come to the following determinations;

- a) That this suit was commenced by the Plaintiff through the plaint dated 20th May 2016 and filed on the 24th May 2016. That the Plaintiff then filed the amended Plaint on the 8th July 2016 in which he indicated and averred that he was suing as the legal administrator of the estate of Peter Adhola OKelo (deceased) vide the grant of letters of Administration Ad litem issued on 30th March 2016 in Siaya H.C. Succession Cause No.21 of 2015. The Plaintiff further avers at paragraph 4 that the said deceased was at all material times the registered proprietor of **West Asembo/Siger/3319**. The Plaintiff has in paragraphs 6 to 8 of the Amended

Plaint pleaded illegality, collusion and fraud in the process that the 1st and 7th Defendants transferred the title from the names of the deceased to that of 1st Defendant, who after sub dividing it into 14 parcels transferred some to the 2nd to 6th Defendants.

b) That the copy of the green card from West Asembo/Siger/3319, which is the suit property, indicates that the parcel is a subdivision of Plot No.176. The title was closed on the 13th November 2008, upon being subdivided into parcels 3392 to 3398. The copy of the said green card is attached to the Plaintiff's list of documents dated 20th May, 2016. That the copies of the green cards for parcels subdivided thereof, that is, West Asembo/Siger/3392 to 3398 are all attached to the said list of documents and were all first registered in the name of George Edward Awiti Adhola, who the court takes to be the 1st Defendant herein.

c) That the green card for parcel **West Asembo/Siger/3392** shows that it was closed on the 27th February 2014 upon being subdivided into parcels 3530 and 3531. That the latter parcel was on the 7th April 2014 transferred to Jared Ochieng Ajwanga, the 6th Defendant.

d) That the green card for parcel **West Asembo/Siger/3393** shows that the title was closed on the 20th March 2013 upon being subdivided into parcels 3478 and 3479. That the latter parcel was transferred to Maurice Onyango Aidi, the 4th Defendant, on the 16th April 2013. That the green card for parcel 3478 shows that it was further subdivided into parcels 3504 to 3506 and title closed on the 25th September 2013. That parcel **West Asembo/ Siger/3505** shows that it was on 24th October 2013 transferred to Wilfrida Anyango Ochar, the 5th Defendant.

e) That the green cards for **West Asembo/Siger/3394 and 3396** shows that they were transferred to Jotham Okome Arwa and Edward Ongaya Migoma, the 3rd and 2nd Defendant respectively, on the 22nd January 2009.

f) That the foregoing findings clearly confirms the Plaintiff's averment that the parcels of land registered in the names of the 2nd to 6th Defendants are subdivisions from **West Asembo/Siger/3319** which was registered in the name of Peter Adhola Okelo, the deceased, by the time he died on the 31st March 2000. That the subdivisions occurred from 2008 to 2014, which is after the death of the first registered proprietor. That as the Plaintiff has pleaded illegality, collusion and fraud in the process involving the 1st and 7th Defendants, and knowledge of the same by the 2nd to 6th Defendants, the court finds that the Plaintiff's amended plaint has disclosed reasonable cause of action against the 1st, 3rd to 7th Defendants. The suit should be allowed to hearing to be decided on merit.

g) That as the evidence availed, especially the certificate of death annexed to the affidavit of the 3rd Defendant, confirms that the 2nd Defendant passed on the 28th June 2013, then the Plaintiff's suit against the 2nd Defendant was a non starter ab initio and should be struck out. That it follows that the statement of defence dated 28th June 2016, which was drawn and filed by M/S Rachier & Amollo Advocates for the 2nd Defendant, cannot also stand as the 2nd Defendant, having died in 2013, could not have instructed counsel to file the defence on his behalf three years later in 2016. The notice to withdraw the said statement of defence cannot also stand for lack of instructions as a dead person is incapable of issuing such instructions, unless through his estate's legal representative.

h) That the suit before this court is not about administration and distribution of the estate of Peter Adhola Okelo, the deceased. The suit is about the Plaintiff's efforts to trace the estate of the said deceased, which has been allegedly illegally and fraudulently taken by 1st Defendant and after some subsequent subdivisions, some of it reportedly transferred to 2nd to 6th Defendants. The suit therefore falls squarely within the jurisdiction of this court.

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

a) That the Plaintiff's notice of motion dated 17th May 2017, seeking to strike out the 2nd Defendant's defence is hereby settled with an order that the Plaintiff's claim against the 2nd Defendant be and is hereby struck out with no orders as to costs, for reason that the said Defendant had died about three years before the filing of the suit.

b) That the notice of motion dated 13th April 2017 and filed on the 19th April 2017, that was drawn and filed through M/S Rachier Amollo Advocates for the 2nd to 6th Defendants, is without merit and is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 2ND DAY OF MAY 2018

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Mr. Indimuli for Opondo for Plaintiffs

M/s Odeny for Munyua for 3rd to 5th Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE