



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC O.S NO. E028 OF 2020

FRANCO STEPHEN OPANGA.....PLAINTIFF

-VERSUS-

DANIEL MILTON OPANGA.....DEFENDANT/RESPONDENT

BARCLAYS BANK OF KENYA.....1ST INTERESTED PARTY

CROWN PAINTS KENYA PLC.....2ND INTERESTED PARTY

THE CHIEF LAND REGISTRAR.....3RD INTERESTED PARTY

RULING

BRIEF FACTS

The Plaintiff FRANCO STEPHEN OPANGA approached this Court by way of originating summons dated 30/11/2020 and filed on 04/12/2020 against the defendant, DANIEL MILTON OPANGA in respect of the property known as KISUMU/MUNICIPALITY/BLOCK 7/183 (hereinafter the suit property) and has asked the Court to determine the following questions:

1. Whether the property in the Estate of the late Christopher Oboka Opanga was already distributed to all his beneficiaries and whether all the beneficiaries thereunder virtually took ownership of their respective properties as distributed.
2. Whether the property known as KISUMU/MUNICIPALITY/BLOCK 7/183 was devolved to the plaintiff and the late Paul Opanga pursuant to distribution in the matter of the Estate of the Late Christopher Oboka Opanga in Succession Cause No. 109 of 1995.
3. Whether the suit property was jointly owned by Franco Stephen Opanga and Paul Opanga before the latter's demise on 14/12/2016 and if so, whether the doctrine of survivorship became applicable after the demise of the said Paul Opanga.
4. Whether the defendant has any legal claim on the suit property on account of being an administrator of the Estates of the late Christopher Oboka Opanga and Paul Opanga and therefore whether there is any legal justification in the defendant's interference with peaceful, beneficial and quiet possession of the suit property.
5. Whether the suit property virtually and effectively became the defendant's property pursuant to a similar process to how the plaintiff and the late Paul Opanga obtained the suit property.
6. Whether there existed a family memorandum of understanding governing the distribution of the property of the late Christopher Oboka Opanga and whether it was binding on all parties therein.
7. Whether the 1st interested party should release the title to the suit property to the plaintiff.
8. Whether the 2nd interested party should forthwith pay all outstanding rent from January 2019 to date directly to the Plaintiff and whether it should continue to pay the rent to the Plaintiff during the tenancy period.
9. Whether the 3rd Interested party should register the title to the suit property in the name of the plaintiff.

The originating summons was filed simultaneously with an application under certificate of urgency seeking for among others, orders of

injunction against the defendant to restrain him from ordering or issuing instructions or demanding rent from the tenants on the suit property, the 2nd interested party included, an order to compel the 2nd interested party to immediately pay the applicant all rental dues owing from January 2019 to November 2020 and that the 1st interested party discloses the account status and any other relevant information concerning the charge registered in respect of the suit property. On 21/01/21, parties recorded a consent in respect of the application, with the only prayer remaining uncompromised being that requiring the 2nd interested party to pay the plaintiff/applicant rental dues as the Court had on 16/12/20 directed that the moneys held by the 2nd interested party be deposited in Court.

Preliminary Objection

The defendant filed a notice of preliminary objection on 28/01/21 in which he stated that:

1. The Honourable Court lacks jurisdiction to determine the fate of a proprietary interest of a deceased person (PAUL OPANGA); particularly where there is an active High Court Succession cause no. 7 of 2019 Kisumu where all such arguments and applications can be canvassed and responded to by all beneficiaries.
2. The suit herein suffers from non-joinder of all the beneficiaries of the estate of PAUL OPANGA who have been disclosed in Succession cause no. 7 of 2019 Kisumu and injustice will definitely result to them.

When the preliminary objection was still pending determination, the plaintiff/applicant filed an application dated 4/03/21 seeking orders that;

- a) The application be certified urgent (spent)
- b) The Honourable Court order that Kshs. Nine Million Eighty-seven Thousand Nine Hundred one (Kshs. 9,087,901.00) deposited in Court by the 2nd Interested party be immediately released to the Plaintiff/Applicant.
- c) An order issues directing the 2nd interested party to deposit in this Honourable Court the rent for the first quarter of 2021 being Kenya Shillings One Million Two Hundred Seventeen Thousand Seven Fifty-Nine (Kshs. 1,217,759.00); in consort with and all future rental income from the second quarter of 2021 onwards until this application and the underlying suits are determined.
- d) The registrar to facilitate and ensure compliance with prayers (b) and (c) as the case may be by generating invoices timeously but in any event not later than five (5) days after they become due.
- e) Costs

When the matter came up before Court on 15/03/21, the Court directed the defendant and the plaintiff to file their submissions on jurisdiction and appear before Court for highlighting of submissions on 24/03/21. On the said 24/03/21, the matter was given a ruling date.

While the ruling in respect of the preliminary objection was still pending, the parties (plaintiff and defendant) filed a consent on 09/08/21, which consent had the effect of essentially disposing of the plaintiff's application dated 04/03/21 as the parties agreed on the mode of distribution of the rental income from the suit property. Clause 4 of the said consent further states;

4. THAT the terms of this consent shall automatically cease to apply upon the judgement in the suit herein being rendered.

It is my view that the wording of clause 4 above can be taken to mean that both parties have submitted to the Court's jurisdiction to hear and determine this suit. The said consent was adopted as an order of the Court on the 09/08/21. The above consent notwithstanding and the parties having filed their submissions in respect to jurisdiction, the Court is of the view that it would be prudent to make a finding as to whether this Court has jurisdiction or no to hear and determine this matter. This is because it is trite law as has been held by the Courts time and again that jurisdiction is everything. If a court is not seized of jurisdiction, it cannot make one step and should down its tools. It is important that if the issue of jurisdiction is raised, the court must decide on it first as per Nyarangi J in *The Owners of the Motor Vessel Lilian 'S' -vs- Caltex Kenya Limited [1989] KLR 1*.

Defendant's Submissions on the Preliminary Objection

The defendant filed their submissions on 24/03/21 which submissions can be summarized as;

That the plaintiff in this suit is seeking a declaration that he is entitled to assume ownership of PAUL OPANGA'S (now deceased) proprietary interest in the suit property and that such declaration can be made in a succession Court in the succession cause of the estate of PAUL OPANGA. That the plaintiff himself filed High Court Succession Cause no. 7 of 2019 Kisumu (Estate of Paul Opanga) where he listed the suit property as the property where the deceased had a share and the plaintiff sought that the deceased's share be given to him.

That there are objections filed in the succession cause by other beneficiaries who include Edwin Opanga and Selizer Opanga, which beneficiaries have not been enjoined to this case to enable them defend their interests and that the matter is pending determination. Consequently, the current suit has been filed before a Court without jurisdiction and the suit suffers the terrible malady of non-joinder of parties and should therefore be struck out with punitive costs.

Plaintiff's Submissions on the preliminary Objection

The plaintiff filed his submissions in respect on the 22/03/21 and has stated that;

The this Honourable Court as established under Article 162 (2)(b) as read together with sections 4 and 13 of the Environment and Land Court Act has jurisdiction to hear and determine the present applications and underlying suit. That the broad jurisdiction is donated by section 13 (1) which provides that **‘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.’** Furthermore, the jurisdiction is wide and as to allow the Court to hear any other dispute relating to environment and land (section 13(2)(e)).

That the plaintiff has not sought orders seeking to determine the fate of proprietary interest of a deceased person, but is merely asking the court to make declarations on the face of the summons. Furthermore, the matter of the estate of Paul Opanga is ongoing in succession cause number 7 of 2019 where all the defendant’s grievances can be canvassed and the argument on non-joinder is therefore misplaced. That the argument of proprietary interest of Paul Opanga is misplaced because the defendant basis it on an alleged finding made by the lower court in an application for limited grant and which was subsequently varied by the superior court in any event.

ANALYSIS AND DETERMINATION

Section 13 of the Environment and Land Court Act provides for the jurisdiction of this Court. Section 13 (2) thereof provides;

(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

The plaintiff has submitted that the Court’s jurisdiction is wide as to allow the Court to hear any other disputes relating to environment and land under section 13(2) (e) of the Environment and Land Court Act.

I have looked at the prayers sought by the plaintiff/applicant in the originating summons instituting this suit. With regard to the suit property, being KISUMU/MUNICIPALITY /BLOCK 7/183, the plaintiff/applicant is essentially asking this Court to make a determination as to whether the Defendant has any legal claim on the suit property either as the administrator of the Estates of the Late Christopher Oboka Opanga and Paul Opanga or by virtue of being a beneficiary of the estate of the Late Christopher Oboka Opanga. From my reading of both parties’ pleadings herein, I am of the view that the plaintiff/applicant is aggrieved by the defendants’ act of interfering with the suit property, specifically interfering with the collection of the rent from the tenants therein as it is his view that the said property was jointly owned by him (the plaintiff) and the late Paul Opanga, and that upon the demise of the said Paul Opanga, then the property solely belonged to the Plaintiff under the doctrine of survivorship.

The Court has also taken notice of the undisputed fact that there have been filed in Court two successions proceedings being cause no.109 of 2015 (Estate of the Late Christopher Oboka Opanga) and Cause No. 7 of 2019 (Estate of the late Paul Opanga). Particular importance is attached to the ruling dated 22nd October 2020 at page 25 to 31 of the applicant’s originating summons in which the Court in Succession Cause No. 7 of 2019 (Estate of Paul Opanga) held that the suit property can only be distributed in the matter of the estate of Christopher Oboka Opanga in whose name the asset is registered.

Based on the above, it is my view that the applicant’s question as to whether the suit property was jointly owned by the plaintiff and the late Paul Opanga as per the terms of the certificate of confirmation of grant in Succession Cause No. 109 of 2015 (Estate of the Late Christopher Oboka Opanga), whether distribution had already taken place and whether the doctrine of survivorship applies following the death of Paul Opanga can only be correctly answered by the Court in the succession proceedings. The applicant ought to have filed an application in Succession Cause No. 109 of 2015 to enable the Court make a determination as to whether joint ownership and doctrine of survivorship applies to the distribution of the suit property.

Disputes arising from the distribution of property in Succession proceedings of the Estate of a Deceased person do not fall within the realm of this court as set out in section 13 of the Environment and Land Court Act. Therefore, the suit cannot be entertained before this court. It lies within the courts responsible to hear and determine any dispute arising from Succession proceedings including the pending dispute namely Kisumu High Court in Succession Cause No. 109 of 2015.

As regards the consent order filed in Court on 09/08/2021, it is in respect of the distribution of rental income from the suit property, the said funds therefore also form part of the estate of the deceased, Christopher Oboka Opanga. It is therefore my view that parties should take steps to have it filed in the Succession proceedings pending the determination of the dispute as to who is entitled to the same by virtue of Succession.

CONCLUSION

Having found that this Court lacks jurisdiction, the preliminary objection is upheld and the suit is hereby dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE