



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MIGORI

E.L.C CAUSE NO. 860 OF 2017

JOSEPH OKECH NYAMANGA.....PLAINTIFF

VERSUS

PHILIP ODERO MAKABONGO

THE LAND REGISTRAR – MIGORI COUNTY

THE HON. ATTORNEY GENERAL.....DEFENDANTS

RULING

1. This ruling is in respect of a notice of preliminary objection dated 12th March 2018 filed in court on even date. The 1st defendant, Philip Odero Makabong'o through learned counsel, Mr. S. M Sagwe is seeking that:

I. The plaintiff has no capacity to file a suit concerning this suit property for reasons that he had, in Kisii Succession Cause No. 13 of 1997, filed affidavit disqualifying from being a beneficiary of the suit property and instead introduced his sisters.

II. The suit is time barred due to Limitation of Actions Act, Section 7 of Cap 22 Laws of Kenya, on the ground that it is over 17 years since the title first accrued to the 1st defendant.

III. The Plaintiff's Kisii Misc. Application Cause No. 249 of 2012 seeking among others, orders to adopt the Tribunals' ruling, was dismissed on 22nd March 2017 under Order 17 Rule 2(1) of Civil Procedure Rules, 2010.

2. The parties to this suit argued the preliminary objection by way of written submissions. This was pursuant to this court's order of 14th May 2018.

3. Learned counsel for the 1st defendant filed submissions dated 12th February 2018 whereby he gave an outline of the suit and termed the same bad in law. He made reference to Kisii High Court Succession Cause No. 13 of 1997 now Migori High Court Succession Cause No. 24 of 2018 and Kisii ELC Misc Application Cause number 249 of 2012. Counsel, therefore, sought dismissal of the suit on the grounds as set out in the preliminary objection.

4. By submissions dated 21st February 2020 and filed in court on 24th February 2020, the plaintiff through learned counsel M/S Oguttu, Ochwangi, Ochwal and Co Advocates, gave the background of this matter, cited section 7 of the Civil Procedure Act Cap 21 Laws of Kenya, Article 40 (1) of the Constitution of Kenya 2010, section 4 of the Limitations of Actions Act and Order 17 Rule 2 of the Civil Procedure Rules 2010. Counsel framed and analysed in the negative, three (3) issues for determination namely:

I. Whether the plaintiff herein is seized and/or possessed of the requisite locus standi to commence, maintain and/or originate the instant suit.

II. Whether the instant suit is barred by the Limitations of Actions Act, Section 7 of the Limitations Act.

III. Whether the suit is barred by the doctrine of res judicata.

5. To buttress the said submissions, counsel also relied on authorities, inter alia, **Mukisa Biscuits Ltd-vs-West End Distributors Ltd 1969 EA at page 791, Kamunye and others-vs-Pioneer General Assurance Society Ltd (1971)EA 263 and Muruo Matemu-vs-Trusted Society of Human Rights Alliance and 5 others (2013) eKLR.** Counsel termed the preliminary objection misplaced, and untenable hence sought its dismissal with costs to the plaintiff.

6. The 2nd and 3rd defendants failed to file submissions herein.

7. It is worthy to note that the plaintiff generated this suit by way of a plaint dated 27th October 2017 and filed in court on 31st October 2017 seeking the following reliefs:

I. Declaration that the cancellation and/or nullification of the plaintiff's title to and/or in respect LR NO. KAMAGAMBO/KANYAJUOK/1640 (The suit land herein), and the issuance of the secondary title in favour of the 1st defendant, was fraudulent, unlawful, illegal, null and void.

II. An order cancelling and nullifying the title in respect of the suit land, in the name of the 1st defendant and restoration of the Register in respect of the suit land to and in favour of the plaintiff, as the lawful and legitimate proprietor thereof.

III. Permanent injunction restraining the 1st defendant either by himself, agents, servants and/or anyone claiming under the said defendant from entering upon, re-entering, taking possession, trespassing onto, cultivating, building structures, interfering with and/or in any other manner dealing with the suit land, and/or any portion(s) thereof.

IV. General damages for trespass.

V. Costs of this suit be borne by the defendants.

VI. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.

8. Briefly, the plaintiff claims that he is the lawful registered proprietor of the suit land and was issued with the requisite title deed on 9th October 2016. Subsequently, the 1st and 2nd defendants illegally and fraudulently cancelled and or nullified the said title deed and further proceeded to issue a separate and secondary title deed to the suit land in favour of the 1st defendant without following due process of the law or at all. That the 1st defendant was thereafter registered as the proprietor accordingly. It thus evoked the instant suit.

9. In his statement of defence dated 27th February 2018 and filed in court on 28th February 2018, the 1st defendant denied the plaintiff's claim as well as mounted a counter-claim against the plaintiff seeking orders:

I. That the ruling of RONGO DISTRICT LAND TRIBUNAL (the defunct tribunal herein) as well as the decree of RONGO SRMCC vides MISC. APPLICATION No. 20 of 2011, are illegal, unlawful and/or a nullity in the circumstance and are therefore set aside.

II. That the 1st defendant/counter-claimant is the absolute owner/proprietor of the suit land measuring approximate of 1.4 Ha.

III. Permanent injunction restraining the plaintiff either by himself, agents, servants and/or one claiming under the plaintiff from entering upon, taking possession, trespassing onto, cultivating, erecting structures, interfering with and/or any other manner or dealing with the suit land and/or portions thereof.

IV. Costs of the counter-claim suit and interests thereupon at court rate be provided for.

10. The 1st defendant stated that title deed was issued to him through normal process as shown in the green card. That it is the plaintiff who procured the secondary title deed illegally and unlawfully as the decisions rendered by the defunct tribunal and Rongo Magistrate's Court were a nullity or the basis that the Tribunal and court lacked the requisite jurisdiction over the dispute. That the plaintiff moved to the High Court and filed Kisii Misc. Application No. 249 of 2012 which was dismissed under Order 17 Rule 2 (1) of the Civil Procedure Rules (supra). That he is an innocent purchaser for value who was excluded from the family succession dispute regarding the suit land.

11. In their joint statements of defence dated 11th January 2018 and filed in court on 22nd May 2018, the 2nd and 3rd defendants averred inter alia, that due process of the law was followed in the issuance of title deed to the 1st defendant. They denied the plaintiff's claim and sought its dismissal with costs.

12. In his reply to defence and defence to counter-claim dated 22nd March 2018, the plaintiff reiterated most contents of his plaint. That the ruling of the defunct Tribunal and the adoption of the same by the Rongo magistrate's court has never been reviewed or appealed against by the defendants. That the allegation touching on Kisii Misc. Application No. 249 of 2012 is mere guesswork as the 1st defendant has never availed its contents for verification.

13. The plaintiff denied the counter-claim and sought its dismissal. He termed the same incompetent on the grounds;

I. That the instant suit constitutes and/or otherwise amounts to abuse of the due process of the court.

II. That the orders sought vide the counter-claim, are unmaintainable.

III. That the counter-claim against the counter-claim, personally, is misconceived.

14. The plaintiff also filed his statement of agreed issues dated 22nd March 2018. I note the same accordingly.
15. I have thoroughly considered the preliminary objection, pleadings in their entirety and the parties' respective submissions including the issues and authorities cited therein. So, the issues for determination are as disclosed on the grounds of the preliminary objection and the parties' respective submissions.
16. On whether the plaintiff is seized of the requisite locus standi to mount the present suit, the 1st defendant contended that the plaintiff did disqualify himself from being a beneficiary in respect of the estate of the deceased in Kisii High Court Succession Cause No. 13 of 1997. That he said that he had no right to lodge any document except the objectors who had priority thereof.
17. The 1st defendant contended further that by a letter dated 5th November 2012; the plaintiff stated that the two beneficiaries of the estate are the ones who can file a suit and not himself. That the plaintiff was not given power of attorney to file and proceed with this suit.
18. On the other hand, the plaintiff asserted that owing to the actions of the 1st and 2nd defendants, the plaintiff's rights and or interests over the suit land were affected. That by virtue of Article 40 (1), **Mumo Matamu and Mukisa cases (supra)**, the 1st defendant is entitled to commence this suit and that the 1st defendant is not invited to produce evidence to fortify his allegations at this stage of the trial.
19. It is well settled that the estate of the deceased person is vested in the legal representative; see the Court of Appeal decision in **Trouistik Union International and another v Jane Mbeyu and another (1993)** and this court is guided accordingly.
20. In that regard, is the plaintiff possessed of the locus standi to commence this suit? A plain look at the plaint reveals the plaintiff has not lodged the suit for or on *behalf of estate of a deceased person*. The allegations relating to Kisii Succession No. 13 of 1997 are facts that have to be ascertained at the hearing of this suit as held in **Mukisa Biscuits case (supra)**. On that score, I find that the plaintiff has locus standi to lodge the present suit.
21. As regards the application of the Limitation of Actions Act Chapter 22 Laws of Kenya to this suit, the 1st defendant complained that this suit is statute barred. That the title deed to the suit land first accrued to the 1st defendant over 17 years ago. He made reference to title deed issued to him on 25th September 2003. That he bought a portion of the suit land from the deceased, Anton Ochieng Okal.
22. On the other hand, the plaintiff asserted that Section 7 (supra) makes provision for timelines for recovery of land and paves way for the inception of the doctrine of adverse possession. That the suit land concerns the tort of fraud hence he instituted the suit within three (3) years from the discovery of the offensive tort that occurred on 10th April, 2017 as required under **Section 4 of the Limitation of Actions (supra)**.
23. I take into account Sections 7 and 4 (supra) and the Court of Appeal decision in **Jared Tobal Abdub Rahman and another v Benard Alfred Wekesa Sambu and another Civil Appeal No. 11 of 2001 of NBI** cited in respect of the second ground of the preliminary objection. The plaintiff stated at paragraph 7 of his plaint that the alleged fraud occurred on 10th April 2017. The defendants merely denied the said allegations.
24. Bearing in mind Section 57 of the Statutory Interpretation and General Provisions Act Chapter 2 Laws of Kenya and Order 50 Rule 8 of the Civil Procedure Rules, 2010 on computation of days as read with the pleadings in their entirety, it cannot be concluded that this suit is statute barred. Therefore, this ground of the preliminary objection also fails.
25. The third ground is whether the present suit is barred by res judicata doctrine anchored under Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya which reads:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

26. The **Black's Law Dictionary 10th** Edition at page 1504 defines the term “**res judicata**” as an issue that has been definitively settled by judicial decision. It sets out the three essential elements thus:-

i. An earlier decision on the issue.

ii. A final judgment on the merits, and

iii. The involvement of the same parties ,or parties in privity with the original parties

27. Similarly, the Concise English Oxford Dictionary 9th Edition at page 1224 fashioned the definition of “res judicata” as follows:

“A matter that has been adjudicated by a competent court and may not be pursued further by the same parties”

28. The 1st defendant asserted that the plaintiff filed the same matter in Kisii ELCC No. 249 of 2012. That it was dismissed under **Order 17 Rule 2(1) Civil Procedure Rules, 2010** on 22nd March 2017.

29. The plaintiff contended that this suit does not meet the salient features of res judicata doctrine. In view of the ingredients of res judicata doctrine as disclosed at paragraphs 25, 26 and 27 hereinabove and **Kamunye case (supra)**, this suit is clearly not barred by res judicata as there was no final judgment on merits in the instant matter.

30. To that end, it's the finding of this court that the three (3) grounds of the preliminary objection sit on quick sand and definitely fail. Therefore, the Preliminary Objection dated 12th March 2018 and filed on even date lacks merit. The same be and is hereby dismissed with costs in the cause.

Delivered, Signed and Dated at Migori through email pursuant to, inter alia, Articles 7 (3) (b), 159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic, challenge this 10TH day of JUNE, 2020.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. D. Adawo learned counsel for the plaintiff

Mr. S.M. Sagwe learned counsel for the 1st defendant.

Court Assistant – Tom Maurice