



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL CASE NO.123 OF 2007

JOB OKUNA OYUGI.....
PLAINTIFF

(Suing as personal representatives and administrator of the estate of LUCAS ONDINGA OGONYO

VERSUS

DR. JOHN OUMA ODONDI.....
.....1STDEFENDANT

PAUL OWUOR
OGONYO.....2NDDEFENDANT

CHARLES PETER OTIENO OGONYO.....3RD
DEFENDANT

RULING

1. Paul Owuor Ogunyo and Charles Peter Otieno Ogunyo, the 2nd and 3rd Defendants, filed the Notice of Preliminary Objection dated 23rd July 2014 on points of law raising four grounds as follows:

- " 1. That the plaintiff herein has no locus standi to bring this suit.**
- 2. That the suit/plaint as drafted is misconceived and an abuse of the process of this honourable court.**
- 3. That this honourable court has no jurisdiction to hear and determine this matter.**
- 4. That by dint of the foregoing, the plaint herein be struck out with costs."**

2. The preliminary objection came up for hearing on 29th October 2015. Mr Omollo, Karanja and Anyul advocates for the 2nd and 3rd Defendants, 1st Defendant and the plaintiff respectively made their submissions.

3. The counsel for the 2nd and 3rd Defendants submitted on two main grounds.

That the plaintiff lacks the locus standi to bring this suit and that the court is without jurisdiction. The counsel submitted that **Lucas Odinga Ogunyo**, who was one of the administrators of the estate of **Martin Ogunyo Odinga**, died before he could have any registrable interest over

Kisumu/Pandpieri/1398, the suit land. That the plaintiff as the administrator of **Lucas Odinga Ogunyo's** estate, has no locus standi to file suit for the estate of **Martin Ogunyo Odinga**. That the suit is therefore an abuse of the court's process. The counsel further submitted that according to the plaintiff, the administration of the estate of **Martin Ogunyo Odinga** is not yet complete, and therefore the forum to which the plaintiff would have lodged his claim was the Succession Court dealing with the administration of the estate, that is Succession Cause No.136 of 1992. The counsel prays for the suit to be dismissed with costs.

4. The counsel for the 1st Defendant associated himself with the submissions by counsel for 2nd and 3rd Defendants. He added that the plaintiff has not disclosed what his claim was and its basis. That the claim by plaintiff that the administrators of the estate of **Martin Ogunyo Odinga** had illegally transferred the suit property can only be determined by the Succession Court. The counsel ended his submissions by saying that the suit is frivolous.

5. The counsel for the plaintiff disagreed with the Defendants counsel submission pointing out that no issues of law had been raised. He submitted that the beneficial interest of the late **Lucas Odinga Ogunyo** in the estate of **Martin Ogunyo Odinga** can only be ascertained after taking of evidence and therefore the plaintiff has locus standi to file this suit. That the suit could not have been filed in the Succession Court as the suit property was in the names of 1st Defendant who was neither a claimant nor a beneficiary of the estate of **Martin Ogunyo Odinga**. That it is only this court that can order cancellation and rectification of the title to the suit land. The counsel added that the plaintiff, as an administrator of the estate of **Lucas Odinga Ogunyo**, has locus standi to lodge any claim on behalf of the estate and that the death of **Lucas Odinga Ogunyo** did not extinguish his family's interest in the estate he (deceased) was administering.

6. That following are the issues for determination:

- a) Are the questions of locus standi and jurisdiction issues of law or facts?
- b) Does the plaintiff, as the administrator of the estate of Lucas Odinga Ogunyo, have locus standi to file this suit?
- c) Is this court the right forum to deal with the issue raised herein?
- d) Should the preliminary objection be upheld or rejected?
- e) Who pays the costs?

7. The court has carefully considered the grounds on the notice of preliminary objection dated 23rd July 2014 and the rival submissions by the counsel and come to the following determinations:

a) That indeed the grounds 1 and 3 of the notice of preliminary objection raises the issue of the plaintiff's locus standi and the court's jurisdiction to hear and determine this suit. The issues of capacity to sue and defend a suit and jurisdiction are matters of the law and determinable from the pleadings and the law without any evidence being offered. Jurisdiction is conferred by the law and superior court's have held that a court down its tools where it forms the opinion that it is without jurisdiction. [See the case of **Owners of the Motor Vessel " Lilian " Case -V- Caltex Oil Ltd (1989) KLR**].

b) That issues to do with administration of estates of deceased persons is the province of the Succession Courts as provided for in **Section 2(1) of the Law of Succession Act Chapter 160** of the Laws of Kenya. The court has taken note of the Grant and Certificate of Confirmation of Grant issued by the High Court in Kisumu Succession Cause No.136 of 1992 attached to the list of documents dated 9th July 2009 filed by the 2nd and 3rd Defendants. The suit property was among the ten properties in the schedule attached to the certificate of confirmation of Grant issued and dated 2nd November 1992. The court has also noted the copy of memorandum of understanding dated 2nd March 2009 and signed by the four administrators of the estate of **Martin Ogunyo Odinga** on how to sell the suit property, among

others, and share the proceeds thereof. The foregoing shows that the Succession Court had completed the motions necessary to distribute the estate of the late **Martin Ogonyo Odinga**. There is nothing on record or in the pleadings to suggest that the Succession Court had granted the suit property to **Lucas Odinga Ogonyo**, who was one of the administrators. What comes out clearly is that the four administrators of the estate of **Martin Ogonyo Odinga** had consented to sell the suit property and share the proceeds. Should the plaintiff's claim be that the share that was meant to be given to **Lucas Odinga Ogonyo** was not given, then there is no doubt as the administrator of the estate of **Lucas Odinga Ogonyo**, he has an obligation to collect all the assets of that estate. The provision of **Section 82 and 83 of the Law of Succession Act** sets out the power and duties respectively of a duly appointed administrator of an estate of a deceased person. The plaintiff, as the administrator of the estate of **Lucas Odinga Ogonyo**, has no capacity to file suit for the estate of **Martin Ogonyo Odinga** as that responsibility is bestowed on the administrators appointed by the Succession Court to administer that estate, and the plaintiff is not one of them. The fact that the plaintiff is the administrator of the estate of **Lucas Odinga Ogonyo**, who was one of the administrators of the estate of **Martin Ogonyo Odinga** does not make him an administrator of that estate. The provision of **Section 81 of the Law of Succession Act** provides as follows;

" 81. Powers and duties personal representatives to vest in survivor on death of one of them Upon the death of or more of several executors or administrator to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them;

Provided that, where there has been grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing of such trust until the court has made one or more persons jointly with him."

The plaintiff, as a person interested in the estate of **Martin Ogonyo Odinga**, either as an individual or administrator of the estate of **Lucas Odinga Ogonyo**, may move the Succession Court through, for example, **Section 83 (i) of the Law of Succession Act** for the administrators to account for their dealings with the estate, as that appears to be his intention in this case. This court is not the right forum for matters relating to administration of a deceased estate, as can be discerned in **Sections 2(1), 47 and 48 of the Law of Succession Act**.

8. That from the foregoing findings, it is clear the plaintiff has no locus standi to file suit for the estate of the late **Martin Ogonyo Odinga**, as such capacity is bestowed on the personal representatives appointed in Succession Cause No.136 of 1992. This claim has also been filed in the wrong court, as matters to deal with administration of the estate of a deceased person lies with the Succession Court in accordance with Section 2(1) of the Law of Succession Act. The preliminary objection raised by counsel for the 2nd and 3rd Defendants is therefore upheld and the plaintiff's plaint dated 10th September 2007 is hereby struck out with costs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

Dated and delivered this **10TH day of February 2016**

IN PRESENCE OF

DEFENDANTS/APPLICANTS Absent

PLAINTIFF/RESPONDENT Present

COUNSEL Mr Anyul and Karanja for the Plaintiff and 1st Defendant respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

10/2/2016

Civil 123 of 2007

LAND 55 OF 2013

10/2/2016

S.M. Kibunja J

Oyugi Court Assistant

Plaintiff present

Mr Anyul for Plaintiff

Mr Karanja for 1st Defendant

Court: Ruling delivered in open court in presence the plaintiff, of Mr Anyul for the Plaintiff and Mr Karanja for 1st Defendant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

10/2/2016