



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 165 OF 2016

IRINE MWANGO ANASI

Suing as the legal administratrix of the estate of

ABIGAEL KEMUNTO OPANDE, Deceased.....PLAINTIFF

VERSUS

JARED TOM NGITI OPANDE.....1ST DEFENDANT

STEVE NYAGAKA ORORA.....2ND DEFENDANT

BEDI KENYA LIMITED.....3RD DEFENDANT

THE LAND REGISTRAR, KISII COUNTY.....4TH DEFENDANT

THE HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. The plaintiff, Irine Mwango Anasi in the plaint dated 7th June 2016 filed in court on 8th June 2016 indicates that she is suing as the legal administratrix of the estate of Abigael Kemunto Opande (deceased). In the 2nd paragraph of the plaint she pleads thus:-

2. Besides, the plaintiff herein and one George Morara Opande are duly appointed and constituted legal administrators of the estate of one Abigael Kemunto Opande, now deceased, who passed on the 24th day of August 2011 same having been issued with grant of letters of administration on the 7th day of April 2016 vide Kisii Misc. Application No. 187 of 2012.

2. The plaintiff simultaneously with the plaint filed a Notice of Motion application seeking injunctive orders touching on the various subdivisions curved out of land **parcel No. Nyaribari Chache/Keumbu/3017** said to have been owned and registered in the name of Abigael Kemunto Opande (deceased). The court granted an interim order of injunction at the ex parte stage. Upon being served with the suit and the Notice of Motion the 1st, 2nd and 3rd defendants separately filed notices of preliminary objections challenging the competency of the suit and application filed by the plaintiff.

3. The 1st defendant's preliminary objection dated 20th June 2016 set out the following grounds:-

1. The application and the entire suit are void abinitio for being in breach of the provisions of section 82 (a) of the Law of Succession Act Cap 160 Laws of Kenya.

2. It is the 1st defendant's objection to the suit that the plaintiff lacks the locus standi to bring this suit in the absence of taking out a grant of representation prior to the filing of suit over the estate of a deceased person.

3. That the entire suit be struck out for being void abinitio and costs of the application and suit be awarded to the 1st defendant.

4. The 2nd defendant's preliminary objection is dated 30th June 2016 and is virtually similar to the 1st defendant's. It is on the following grounds:-

1. The plaintiff's Notice of Motion dated 7th June 2016 and the entire suit are void abinitio as it has been commenced by the plaintiff on behalf of the estate of a deceased person without first obtaining a grant of letters of administration and therefore lacking the locus standi to commence the said proceedings.

2. The 2nd defendant contends that the suit is a non-starter in the light of the provisions of Sections 82 (a) of the Law of Succession Act Cap 160 Laws of Kenya as read with Section 80 (2) of the same Act.

3. The 2nd defendant applies that the entire suit be struck out with costs.

The 3rd defendant's preliminary objection dated 20th June 2016 is on the following grounds:-

1. That the suit is incurably defective as the same does, not disclose any reasonable cause of action against the 3rd defendant and flies in the face of Order 2 Rule 15 (1) and (2) of the Civil Procedure Rules.

2. That this suit and pleadings hereto offend the provisions of Order 2 Rule 3, Rule 4 (1) and Rule 10 and Order 3 Rule 2 (c).

5. As the preliminary objections basically challenged the competency of the suit, the court on 22nd June 2016 gave directions that the preliminary objections be heard and disposed first. The court further directed that the preliminary objections be argued by way of written submissions. The 1st, 2nd and 3rd defendants filed their respective submissions. The Attorney General for the 4th and 5th defendants did not file any submissions. The plaintiff filed her submissions in response to the submissions filed in support of the preliminary objections.

6. I propose to deal with the preliminary objection by the 3rd defendant first. The 3rd defendant's preliminary objection is predicated on Order 2 Rule 15 (1) and (2) of the Civil Procedure Rules and is to the effect that the suit as instituted does not raise a reasonable cause of action against the 3rd defendant and is therefore incurably defective. Additionally the 3rd defendant faults the suit on the ground that it offends Order 2 Rules 3, 4 (1) and 10 as relates to the format, content and structure of pleadings. Further the 3rd defendant contends the plaintiff's suit did not comply with Order 3 Rule 2 (c) as relates to filing of witness statements.

7. The 3rd defendant in support of its preliminary objection that the suit discloses no reasonable cause of action against it submits that the pleading is scandalous, frivolous and vexatious and the same ought to be struck out. In support of this submission reference is made to the text **Bullen and Leak's Precedents of Pleadings** at page 145 where the authors state:-

“...A pleading or an action is frivolous where it is without substance or groundless or fanciful and it is vexatious where it lacks bonafides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense...”.

8. The 3rd defendant avers that no fraud has been alleged or pleaded against if nor has it been pleaded that it had knowledge of any fraud or forgery as relates to the parcel of land the subject matter of the suit. The 3rd defendant points out that Order 2 Rule 4 and 10 of the Civil Procedure Rules are clear as to what particulars require to be specifically pleaded in the pleadings and asserts that the plaint does not contain such particulars in respect to the claim against the 3rd defendant. In the case of **Kenya Airports Authority –vs- Queen Insurance Agency [2001] KLR 414** the court considered what constitutes a frivolous and scandalous suit when it stated:-

“A pleading tending to embrace or delay a fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matter and so raises irrelevant issues which may involve expenses, trouble and delay that will prejudice the fair trial of the action and so is the pleading which contains unnecessary or irrelevant allegations. It is scandalous if it is abusive or annoying and is an abuse of the court process if all that it seeks is to misuse the machinery or process of the court. A frivolous or vexatious suit can be said to be an abuse of the process of the court.”

9. The 3rd defendant has further contended that it is a bonafide purchaser for value without notice and as such the titles it holds are absolute and indefeasible in terms of Sections 24, 25 and 26 of the Land Registration Act, 2012. In regard to this submission the 3rd defendant places reliance on the case of **Gitwany Investments Ltd –vs- Tajmal Limited & 3 Others [2006] eKLR**.

10. I have perused the plaint in this matter and the plaintiff states she has brought this suit as the legal administratrix of the Estate of Abigael Kemunto Opande (deceased) who was the registered owner of land parcel **Nyaribari Chache/Keumbu/3017**. The plaintiff by the plaint states that the 1st defendant obtained a certificate of grant to the estate of the deceased vide Keroka SRMCC Succession Cause No. 4 of 2012 which was confirmed by that court on 4th May 2012. The 1st defendant used this grant to cause land parcel **Nyaribari Chache/Keumbu/3017** to be transferred to himself which he subsequently sold and transferred to the 2nd defendant.

11. The plaintiff further avers that following a challenge of the confirmed grant issued to the 1st defendant the same was ordered revoked vide Kisii HCC Misc. App. No. 187 of 2012 and that the High Court in the said application had on 23rd May 2012 issued a prohibitory order restraining sale, alienation and/or appropriation of the property **LR No. Nyaribari Chache/Keumbu/ 3017** which order was registered against the land register at the lands office. The plaintiff asserts that notwithstanding the prohibitory order the 2nd defendant unlawfully caused the said property to be subdivided into land parcels **Nyaribari Chache/Keumbu/3303 to 3308** and subsequently unlawfully and illegally transferred to the 3rd defendant. The plaintiff avers the transactions between the 1st defendant and the 2nd defendant and between the 2nd defendant and the 3rd defendant were fraudulent and therefore null and void for all intent and purposes.

12. Although the 3rd defendant has not filed any defence as yet it is evident from the replying affidavit sworn by one Dipen Dodhia, a director of the 3rd defendant on 20th June 2016 in opposition to the plaintiff's application for injunction and from the submissions in support of the preliminary objection that the 3rd defendant is claiming to be an innocent purchaser for value without any notice of any defect in title and further asserts that as the holder of a registered title, the title is absolute and indefeasible.

13. The plaintiff in response to the 3rd defendant's submissions on its preliminary objection submits that the court before exercising its power to strike out a suit on account of not disclosing any reasonable cause of action or for being scandalous or frivolous, the court must be satisfied that the suit is hopeless and

irredeemably bad and that not even amendment could cure or redeem the same. The plaintiff in her submissions relies on the case of **DT Dobie & Company [Kenya] Ltd –vs- Muchina [1982] KLR 1** where the court stated thus:-

“...A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows mere semblance of a cause of action provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

14. Having perused the pleadings and having considered the preliminary objection by the 3rd defendant and the submissions in support and in opposition, I am not persuaded the plaintiff's suit as against the 3rd defendant does not disclose a reasonable cause of action and/or that the same is so weak or hopeless as to be beyond redemption even by amendment. The plaintiff has pleaded that the transfers to the 2nd defendant and consequently to the 3rd defendant were irregular and illegal and therefore null and void. The plaintiff has further pleaded that the transaction by the 1st defendant to the 2nd defendant was effected using a grant that was revoked for having been obtained fraudulently while the transactions from the 2nd defendant to the 3rd defendant were executed when there was a court order restraining such transactions. The plaintiff has challenged the titles registered in the name of 3rd defendant on the ground that the titles were acquired fraudulently and/or irregularly. Under Section 26 (1) (a) and (b) of the Land Registration Act, 2012 a title can be challenged on the grounds outlined thereunder. The 3rd defendant has argued that no fraud has been alleged against him and hence the suit is unsustainable.

15. My view is that if the 3rd defendant was to be shown to have been party to any fraud perpetrated by the other parties, fraud need not to be alleged directly against him. The totality of the evidence would need to be evaluated to determine whether the 3rd defendant was party to any such fraud. That would be within the province of the trial court to make a determination. Besides the plaintiff still has the opportunity to amend the plaint to plead particulars of fraud against the 3rd defendant. I therefore hold and find the preliminary objection by the 3rd defendant is unsustainable and I dismiss the same with costs to the plaintiff.

16. The preliminary objections by the 1st and 2nd defendants basically are to the effect that the plaintiff lacks the locus standi to institute the instant suit by reason that she is not the personal legal representative of Abigael Kemunto Opande (deceased) and/or she has not obtained and has not been issued with grant of letters of administration to represent the estate of the deceased. The 1st and 2nd defendants have argued that the plaintiff initiated this suit without letters of administration as envisaged under Section 82 (a) as read with Section 80 (2) of the Law of Succession Act Cap 160 Laws of Kenya and consequently she lacked the authority to represent the deceased estate and that rendered the suit incompetent and liable to be struck out.

Section 82 (a) provides thus:

82. Personal representatives shall subject only to any limitation imposed by their grant, have the following powers:-

(a) to enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arise out of his death for his estate.

Section 80 (2) provides:-

(2) A grant of letters of administration, with or without the will annexed shall take effect only

as from the date of the grant.

17. The 1st and 2nd defendants contend that owing to the fact that the plaintiff had not taken out any grant of representation in regard to the deceased estate she had no locus standi to commence the instant suit on behalf of the estate. The 2nd defendant has in particular referred the court to the various cases set out in his list of authorities where the courts have in unison held that a party who has not taken out grant of letters of administration to a deceased estate that he seeks to represent lacks the capacity or locus standi to initiate a suit on behalf of the deceased estate. See the cited cases of **John Kasyoki Kieti –vs- Tabith Nzivulu Kieti and Annah Ndivele Kieti 2001] eKLR, Otieno –vs- Ongo & Another [1987] KLR 407, Tronistik Union International & another –vs- Jane Mbeyu & Another [1993] eKLR and Elizabeth Ndulu Mathua & 2 Others –vs- Joseph Mbiu Muthiani & Another [2008] eKLR**. In all these cases the plaintiffs had commenced suits on behalf of deceased persons without first obtaining grant of letters of administration to the deceased estates and the court rightly held they lacked the locus standi to do so and the suits were accordingly struck out.

18. In the instant suit the plaintiff in response to the 1st and 2nd defendants' preliminary objection contended that following the hearing of the application for revocation of grant in Kisii HCC Misc. Application No. 187 of 2012, the grant issued in favour of the 1st defendant was pursuant to a ruling delivered by the court on 7th April 2016 revoked and the court ordered that:-

“A fresh grant do issue formally in the joint names of the applicant, Irine Mwangi Anasi and the interested party, George Morara Opande, and be brought up for confirmation within a period of 4 months from this date hereof.

The Deputy Registrar to recall the revoked grant and certificate of confirmation for necessary cancellation and/or destruction”.

The plaintiff contends that by reason of the said ruling of the court, she was constituted an administrator of the deceased estate as from the date of the court's ruling and thus she acquired the capacity to act for and on behalf of the deceased estate.

19. I have considered the rival submissions and arguments by the 1st and 2nd defendants on one part and the plaintiff on the other part. I agree that a party cannot initiate a suit on behalf of a deceased person's estate unless such party has obtained grant of letters of administration to the estate of the deceased. It is the grant that confers authority on the appointed administrator to represent the estate and without the grant of letters of administration the person lacks the locus standi to sue for and on behalf of the estate.

20. The peculiarity of the present case is that the plaintiff challenged the grant of the letters of administration issued to the 1st defendant which she successfully got revoked and at the same time the court directed that a fresh grant of representation to the deceased estate be issued to the plaintiff jointly with one George Morara Opande. My view is that with effect from 7th April 2016 when the ruling was delivered the plaintiff became a co-administrator of the estate of Abigael Kemunto Opande, deceased and henceforth she acquired the capacity to represent the estate. It has not been demonstrated that the court's order of 7th April 2016 was either reviewed or set aside or varied on appeal. There is nothing else the plaintiff was required to do in order to be appointed as an administrator of the deceased estate. The court had made an order and henceforth the process of issuing a fresh grant was administrative. *Ipsa facto* the plaintiff became a co-administrator of the deceased estate as soon as the court issued the order and she therefore henceforth had capacity to act for and represent the deceased estate as such.

21. It is my view therefore that the plaintiff had the locus standi to initiate the suit herein by virtue of the court's order of 7th April 2016 which constituted her an administrator of the deceased estate. Consequently I therefore hold and find the 1st and 2nd defendants' preliminary objection to be without any merit and I order the same dismissed with costs to the plaintiff.

Orders accordingly.

Ruling dated, signed and delivered at Kisii this 11th day of November, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Mamboga h/b for Oguttu for the plaintiff

Mr. Nyandieka h/b for Mr. Mutua for the 1st defendant

Mr. Nyandieka for the 2nd defendant

Mr. S. M Onyango for the 3rd defendant

N/A for 4th and 5th respondents

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE