



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA AT KITALE

LAND CASE NO. 152 OF 2014

FESTO WAKHUNGU SEFANA:::PLAINTIFF

VERSUS

MOODY ARADI:::DEFENDANT

R U L I N G

1. A Preliminary Objection was taken on behalf of the defendant on the ground that the suit herein is incompetent for having been filed against a person who is not a legal representative of the estate of the registered owner of a property which is in dispute. M/S Lumalass Advocate for the defendant argued that the defendant is son of the late Imbugua Kiziiri Aradi who was the registered owner of LR No. Kitale Municipality Block 17/230 (Bidii).

2. In the Plaintiff's statement of claim, it is pleaded that the defendant is son of the late Imbugua Kiziiri Aradi who was the registered owner of Kitale Municipality Block 17/Bidii/21 and that he is the one residing on the said land. The defendant has contended in his pleadings that he is a stranger to LR NO. Kitale Municipality Block 17/Bidii/21. He contends that he is only aware of LR NO. Kitale Municipality Block 17/230 (Bidii) which was and is still registered in the name of his late father. He contends that as he is not a legal representative to the estate of his father, he cannot be sued.

3. Mr Kiarie for the Plaintiff argued that the Preliminary Objection by the defendant is misconceived as there are certain facts which need to be ascertained and this can only be after evidence is adduced in the suit herein. In the plaint, the plaintiff is contending that the defendant has been utilising 5 acres belonging to him because there is a road which separates LR NO. Kitale Municipality Block 17/20 and 21 which has made the defendant to utilise 5 acres of the 8 acres belonging to the plaintiff.

4. The Plaintiff did not respond to the defendant's defence or seek to clarify on how the pleadings refer to Kitale Municipality Block 17/21 whereas the defendant has exhibited a copy of title showing that the property which was owned by his late father was Kitale Municipality Block 17/230 (Bidii). However be that as it may, the fact remains that the defendant's father is deceased and that the defendant has been sued in relation to the suit land which belonged to his late father. The question which then arises for determination is whether a person who is not a legal representative of the estate of a deceased person can be sued as a defendant in respect of property of the deceased. Section 2(1) of the Law Reform Act Cap 26 Laws of Kenya provides as follows:-

(i) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, the benefit of his estate.

5. In the instant case any cause of action as in the present case against the registered proprietor of LR Kitale Municipality Block 17/230 Bidii or any other property survived against him (deceased). The only person who can be sued or sue in respect of the said property is his legal representative.

The defendant herein is not the of legal representative of the estate the deceased. Section 2 of the Civil Procedure Act defines “legal representative” to mean a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

6. The Plaintiff is seeking that a surveyor be sent to the ground to align the boundary between the property owned by the deceased and that of the plaintiff. The only person who can be sued for that purpose is the legal representative of the deceased. It does not help to merely say that the defendant is sued in his individual capacity and that th suit is not against the estate of his late father. The fact remains that the bone of contention is the property which the deceased owned. That property can only be defended by a legal representative of the deceased. In this regard, I find that the defendant is not a legal representative of his deceased father and cannot therefore be sued. I find that the preliminary objection is well founded. It is upheld with the result that the suit against the defendant is hereby struck out with costs to the defendant.

It is so ordered.

Dated, signed and delivered at Kitale on this 5th day of February, 2015.

E. OBAGA

JUDGE

In the Presence of Mr Kiarie for Plaintiff. Court Clerk Kassachoon.

E. OBAGA

JUDGE

5/2/2015