



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 158 OF 2014.

1. EMMANUEL OPORIA

2. NICHOLAS IKOL ADUNGO.....PLAINTIFFS

VERSUS

1. PHILIP OKIRU

2. JOHN ODONGO

3. KANOTI OKUBE

4. PAUL OKWARE..DEFENDANTS

5. ELIKASIO ETYANG

6. CHARLES OKEPA.

7. ODAUYA ILIKUNYA.

RULING.

1. PHILIP OKIRU, JOHN ODONGO, KANOTE OKUBE, PAUL OKWARE, ELIKASIO ETYANG, CHARLES OKEPA and ODAUYA ILIKUNYA, hereinafter referred to as the Defendants, through their advocates M/S. A.G. Aburili & company advocates, filed the Notice dated 16th June, 2015 to raise preliminary objection on one ground that *“the suit as filed is bad in law.”* This notice was filed and served on the same date that the matter was coming up for the hearing of the main suit. Mr. Ipapu held brief for M/S.Aburili & company advocates for the Defendants, and Mr. Juma advocate appeared for Emmanuel Oporia and Nicholas Ikol Adungo, hereinafter referred to as the Plaintiffs. The notice to raise the preliminary objection had also been given under paragraph 4 of the Defendants’ joint statement of defence dated 16th September, 2014. Both counsel presented their rival submissions on the preliminary objection.

2. That the main contention of the Defendants is that one of the suit land, South Teso/Chakol/345, is not registered in the names of the 3rd and 4th Defendant as alleged by the Plaintiffs. Their counsel submitted that the land is registered in the names of a deceased person and to deal with such a property would amount to intermeddling with the deceased person’s estate as the Defendants have not been appointed administrators of the estate. The counsel therefore submitted the suit is bad in law and the plaint should be struck out with costs.

3. The Plaintiffs' counsel countered the Defendants' counsel's submission by pointing out that the suit is based on the tort of trespass. The counsel submitted that the father to the defendants, who is deceased, is not a party to this suit. The counsel further submitted that the deceased is incapable of being in trespass of the suit land and that the estate is not trespassing on the land. It is the Plaintiffs submission that the Defendants have been sued for failing to confine their actions on their parents land and instead encroaching onto the Plaintiffs land.

4. The main issue for determination is whether Defendants have been sued in their capacities as registered owners of South Teso/Chakol/345 or for their acts of trespassing onto Plaintiffs land parcels South Teso/Chakol/1281 and 1282. Secondly whether the Defendants have been wrongly enjoined in this suit.

5. The court has carefully considered the submission by both counsel on the preliminary objection, the plaint dated 7th August, 2014, the joint statement of defence dated 16th September, 2014 and the reply to the defence dated 28th November, 2014 and come to the following conclusions;

- a. That paragraph 6 and 7 of the plaint dated 7th August, 2014 shows that the 1st to 4th Defendants are described as “ **Owners and or occupiers of**” the specified parcels of land. The 7th Defendant is described as the owner of South Teso/Chakol/347 while the 5th and 6th Defendants are described as occupiers thereof at paragraph 8 of the said plaint. The fact that the 3rd and 4th Defendants deny owning the land parcel South Teso/Chakol/345 does not make the plaint defective or bad in law. Further, the fact that any of the parcels of the land mentioned in the plaint is registered in the names of a deceased person does not preclude those in possession of the land or using the same from facing legal action in case they trespass into neighbouring parcels.
- b. That it will be upon the Plaintiffs to discharge the duty placed on them under **section 107 of the Evidence Act, Chapter 80 of Laws of Kenya**, to prove their allegation that the Defendants have trespassed onto the suit lands. The court cannot at this stage pronounce itself on whether there has been misjoinder or non-joinder of parties in this suit. In any case **Order 1 Rule 9 of the Civil Procedure Rules**, provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties as the court would deal with the matter in dispute as far as regards the rights and interests of the parties actually before it.
- c. That the court has a constitutional duty to sustain, rather than throw out, cases that come before it so as to have the cases decided on merit. [**see article 50 of the constitution 2010**]. In the case of **D.T. Dobie & company (Kenya) ltd., -vs- Muchina** (1982) KLR 1, Madan J.A (as he then was) held;

“ The power to strike out should only be exercised only after the court has considered all facts, but it must not embark on the merit of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”

That having found as above, the court finds no merit in the Defendants' preliminary objection and the same is rejected with costs to the Plaintiffs.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 8th DAY OF July, 2015.

IN THE PRESENCE OF;

1ST PLAINTIFF.....Present.....
2ND PLAINTIFF.....Absent.....
1ST DEFENDANT..... Present
2ND DEFENDANT..... Present
3RD DEFENDANT..... Present
4TH DEFENDANT..... Present
5TH DEFENDANT..... Present
6TH DEFENDANT..... Present
7TH DEFENDANT..... Present
COUNSEL...Mr. Juma Advocate for Plaintiffs.....
JUDGE.