



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 31 OF 2019

GEORGE LOCH MBOYA.....PLAINTIFF

VERSUS

FLORENCE MURUNGA OKEA.....1ST DEFENDANT

ALLOYS OBUNGA OKEA.....2ND DEFENDANT

ABDIWELI ADAN KHALICHA.....3RD DEFENDANT

MOHAMMED KHEIR ISSAK ABDULLAHI.....4TH DEFENDANT

THE COUNTY GOVERNMENT OF MIGORI.....5TH DEFENDANT

RULING

1. The instant ruling is in respect of a preliminary objection dated 12th June 2019 and filed in court on 13th June 2019 by the 1st, 3rd and 4th defendants through M/S Oguttu, Ochwangi, Ochwal and Company Advocates with regard to the entire suit inclusive of the plaintiff/applicant's Notice of Motion dated 29th April 2020 (the application herein). The same is grounded on six (6) points of law namely:

- a) The issue pertaining to the ownership over and in respect of Plot Number 24, Migori Town, has been the subject of various proceedings inter alia ***Court of Appeal Civil Appeal No. 199 of 2001, between George Loch Ogola vs Elisha Okea and another.*** Consequently, the issues raised in the instant suit are res judicata and therefore barred by Section 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya.
- b) On the other hand, the transfer and registration of the suit property, that is, Plot Number 24, Migori Town, in favour of the 1st and 2nd defendants, was carried out, undertaken and/or sanctioned by a court of competent jurisdiction. In this regard, this Honourable Court has no mandate to superintend and/or supervise the actions of the Conventional High Court.
- c) The instant suit and the incidental application are inclined to invite this Honourable Court to exercise an appeal over the decision issued vide Migori HCC Succession Cause No. 95 of 2015, leading to the Certificate of Confirmation of Grant. In the circumstances, the instant suit is an abuse of the due process of the court.
- d) The instant suit is calculated to confer the Environment and Land Court with a supervisory/appellate responsibility over the Conventional High Court, which is a legal anathema.
- e) In any event, the claim founded on fraud/fraudulent acquisition of ownership of the suit property, which hitherto inhered in the name of Elisha Okea Ogola, now deceased, is barred by the Limitation of Actions Act, Chapter 22 Laws of Kenya.
- f) At any rate, the plaint and the Notice of Motion application by the plaintiff do not disclose any reasonable cause of action.
- g) The suit herein is premature, misconceived and bad in law.
- h) In the premises, the instant suit and the application amount to and/or constitutes an abuse of the due process of court.
- i) Besides, the plaintiff is non-suited.

2. The plaintiff, George Loch Mboya appears in person in this matter.
3. The 2nd defendant, Alloyce Obunga Okeya is not represented herein.
4. The 5th defendant, the County Government of Migori is represented by M/S Abisai and Company Advocates.
5. The background of the suit is that it was originated by way of a plaint dated 29th April 2019 lodged in court on 3rd May 2019 whereby the plaintiff has sued the defendants jointly and severally for:
 - a) A declaration that the transfer of ownership of the Plot No. 24 Migori Township to the names of the 1st and 2nd defendants was illegal.
 - b) A declaration that the transfer of ownership of Plot No. 24 Migori Township to the names of the 1st and 2nd defendants and subsequent disposal of the same to the 3rd and 4th defendants was illegal and be annulled and subsequently be transferred back in the name of the plaintiff.
 - c) Cost of the suit.
 - d) Any other relief this court would deem fit to grant to the plaintiff.
6. Briefly, the plaintiff laments that he is the registered owner of the suit property Plot Number 24 within Migori County. That the 1st, 2nd and 5th defendants did fraudulently change ownership of suit property and illegally transferred it to the 3rd and 4th defendants hence, precipitating the present suit.
7. Simultaneously filed with this suit was the application where the plaintiff/applicant is seeking, inter alia, conservatory orders restraining the defendants from interfering with the suit property pending the hearing and determination of the application and the suit. The application is anchored on grounds including that the defendants have fraudulently changed ownership of the suit property and that the plaintiff is bound to suffer irreparably as he had heavily invested on the suit property.
8. It is worthy to note that on 19th September 2019, this court ordered and directed, inter alia;

“That this file ELCC No. 31 of 2019 be consolidated with Migori ELCC No. 30 of 2019 subject to the outcome of the latter.”
9. On 25th June 2019, the court ordered and directed that the preliminary objection be argued by written submissions. Pursuant thereto, on 9th June 2020, learned counsel for the 1st, 3rd and 4th defendants filed submissions dated 6th June 2020 while the plaintiff filed submissions dated 7th June 2020 and 7th September 2020 as the 2nd and 5th defendants failed to file their submissions.
10. In their submissions, the 1st, 3rd and 4th defendants’ counsel gave the background of the suit and framed seven (7) issues for determination including that this court is devoid of jurisdiction over the instant suit. That by dint of the decision in Kisumu Court of Appeal Civil Appeal No. 199 of 2001; *George Loch Mboya Ogola vs Elisha Okea and Town Council of Migori* rendered on 8th May 2009, the suit is res judicata and statute barred by virtue of Section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya and Section 4 of the Limitations of Actions Act Chapter 22 Laws of Kenya respectively. That an abuse of the due process of the court since the issue under reference has been adjudicated upon before both the probate and the administration court in Migori HC Succession Cause No. 95 of 2015 as well as the Conventional Court, **Civil Appeal No. 199 of 2001 (supra)**.
11. To reinforce the submissions, counsel cited the case of *Esther Gachambi Mwangi vs Samwel Mwangi Mbiri (2013)eKLR*, at paragraphs 16 and 17 and *Republic v Business Premises Rent Tribunal and another and ex-parte Davies Motor Corporation Limited(2013)eKLR*, regarding jurisdiction of the court. Further reference was made to the case of *Daniel Kirui and another vs Monicah W. Macharia and another(2007)eKLR*, and *Muchanga Investements Ltd vs Safaris Unlimited (Africa) Limited and 2 others (2009)eKLR*, on res judicata and an abuse of the due process of the court respectively. That the preliminary objection be allowed with costs for being meritorious.
12. By his submission dated 7/6/2020 and 7/9/2020, the plaintiff admitted that the ownership of the suit land is not in dispute and that the issue has since been dealt with in courts of higher jurisdiction. That any expectation to gag his access to justice, equal enjoyment of protection and benefits of the law as stipulated in the Constitution is void ab initio.
13. The plaintiff also submitted that whereas his appeal in Civil Appeal No. 199 of 2001 (supra) was allowed, the suit property is not included in the estate shown in Succession Cause No. 95 of 2015 (supra). That he is entitled to the suit property hence this suit is tenable.
14. I have thoroughly considered the preliminary objection and the rival submissions including all authorities cited herein. The issues for determination at this stage are as set out on the grounds of preliminary objection which boil down to whether the instant suit is *res judicata*, statute barred and amounts to an abuse of the process of this court.
15. On *res judicata*, Section 7 of the Civil Procedure Act (supra) provides;

“No court shall try any suit or issue in which the matter directly and subsequently 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 subsequent raised, and has been heard and finally decided by such court” (Emphasis added)

16. The Concise Oxford English Dictionary 12th Edition at page 1224 defines the term “*res judicata*” thus:

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

17. Moreover, in the **Black’s Law Dictionary 10th Edition** at page 1504, “**res judicata**” means an issue that has been definitively settled by judicial decision. The same provides its essential elements as follows:-

- a) An earlier decision on the issue
- b) A final Judgment on the merits, and
- c) The involvement of the same parties or parties in privity with the original parties.”

18. In Civil Appeal Number 199 of 2001 (supra), the plaintiff was the appellant while the 5th defendant was the 2nd respondent therein. The subject matter thereof was the suit property in the present suit.

19. In that appeal, on 8th May 2009, the court observed about the suit property on page 8, of its judgment, inter alia;

“... To remain the property of Locho Ogola (deceased) the registered owner and comprises part of his estate.”

20. In the same appeal, the appellant’s (plaintiff’s) application for review of the court’s decision was found to be void of merits. Therefore, it was dismissed with costs to the 2nd respondent on 16th December 2016.

21. Similarly, by a ruling No.2 rendered on 4th March 2020 in Migori HC Succession Cause No.95 of 2015, the court found no merits in two (2) applications namely a summons for revocation of the grant dated 8th August 2016 and a Notice of Motion dated 17th November 2016 mounted by Job Oginga Ogola and the plaintiff herein respectively. Therefore, the applications were dismissed with an order that each party to bear own costs.

22. In view of the foregoing, I am satisfied that the issue of ownership of the suit property was determined on merits. Section 7 as read with the said definition in the **Black’s Law Dictionary, among others (supra)**, apply thereby. Simply put, this suit is *res judicata*.

23. By the finding that the instant suit is *res judicata*, the same contravenes Sections 4 and 7 of the Limitations of Actions Act Cap 22 Laws of Kenya regarding actions of tort and to recover land respectively. Furthermore, the suit is misconceived, incompetent, untenable and an abuse of the process of the court as held in **Muchanga Investments case (supra)** which applied the definition in Wikipedia, the free encyclopedia to the effect that:

“The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and the offends justice.”

24. The plaintiff submitted that he is entitled to access to justice, equal enjoyment of protection and benefits of the law. This court is aware of Articles 6(3), 25(c), 48, 50(1) and 159(2)(a) and (e) of the Constitution (supra). Nonetheless, the cardinal principle is that litigation has to come to an end; see **Halsbury’s Laws of England 4th Edition Volume 22 at page 273.**

25. It is trite law that a preliminary objection is a threshold question best taken at its inception. That it calls for a definitive, determinative and prompt pronouncement; see the Court of Appeal decision in the case of **Kakuta MaiMai Hamisi vs Peris Pesi Tobiko and 2 others (2013)eKLR.**

26. To that end, this court finds that the preliminary objection meets the threshold in **Hamisi case (Ibid)**, among other long line of authorities. Indeed, it is meritorious and I proceed to uphold the same.

27. A fortiori, the plaintiff’s suit mounted by way of a plaint dated 29th April 2019 and lodged in court on 18th June 2019, be and is hereby dismissed with costs to the defendants.

28. It is so ordered.

Delivered, Signed and Dated at Migori in open Court and 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 22nd day of SEPTEMBER, 2020.

G.M.A ONGONDO

JUDGE

In presence of :

Mr. Ochwangi learned counsel for 1st, 3rd, and 4th defendants.

Plaintiff – Present in person

Tom Maurice – Court Assistant