



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NUMBER 30 OF 2019

WILLIAM OUKO OGOLA.....PLAINTIFF

VERSUS

FLORENCE MURUNGA OKEA1ST DEFENDANT

ALLOYS OBUNGA OKEA2ND DEFENDANT

ABDIWELL ADAN KALICHA3RD DEFENDANT

MOHAMMED KHEIR ISSAK ABDULLA.HI.....4TH DEFENDANT

RULING

A) INTRODUCTION

1. This ruling is in regard to the 1st, 3rd and 4th defendants' preliminary objection dated 27th May 2019 and filed in court on 6th June 2019 concerning the instant suit which was generated by way of a plaint dated 21st May 2019 duly lodged on even date and the Notice of Motion dated 2nd May 2019. The preliminary objection is premised on points of law that:-

- a) The Honourable Court is devoid and/or bereft of jurisdiction to determine the issue of a beneficiary of the estate of a deceased person, which exclusively inheres in the Probate and Administration Court.
- b) The plaintiff herein lacks and/or is devoid of the requisite locus standi to commence, mount and/or maintain the instant suit.
- c) The issue of alienation/distribution of the estate of Daniel Ogola Siger alias Loch Ogola, now deceased and issue of trustee, have been variously determined by courts of competent jurisdiction.
- d) 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.
- e) The instant suit is contrary to the provisions of Section 82 of the Law of Succession Act, Chapter 160, Laws of Kenya.
- f) 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.
- g) In any event, the claim founded on fraud based on defrauding the Estate of Daniel Ogola Siger, alias Loch Ogola, now deceased, is barred by the Limitation of Actions Act, Chapter 22, Laws of Kenya.
- h) At any rate, the plaint by the plaintiff does not disclose any reasonable cause of action.
- i) The suit herein is pre-mature, misconceived and bad in law.
- j) In the premises, the instant suit amounts to and/or constitutes an abuse of the due process of court.
- k) Besides, the plaintiff is non-suited.

2. The 1st, 3rd and 4th defendants namely Murunga Okea, Abdiweli Adan Kalicha and Mohammed Kheir Issak Abdullahi respectively are represented by M/S Oguttu, Ochwangi, Ochwal and Company Advocates.

3. The plaintiff, William Ouko Ogolla is represented by G.M Nyambati and Company Advocates.

4. The 2nd defendant, Alloys Obunga Okea is not represented herein.

5. The property in dispute is plot number 24, Migori Town within Migori County (The suit land herein).

B) THE GIST OF THE PLAINTIFF'S CASE

6. The plaintiff's case as per the plaint include that he is the beneficiary to the estate of Daniel Ogola Siger alias Loch Ogola (Deceased 1) whose estate comprised of the suit land and three (3) other parcels of land. That upon the confirmation of grant in Migori High Court Succession Cause No. 14 of 1994, Elisha Okea Ogola (Deceased 2) was registered a main administrator of the estate of Deceased 1 and a trustee of all the beneficiaries of the said estate. That Deceased 2 started to distribute the estate but passed on before completion of the distribution.

7. The plaintiff further claims that upon the death of deceased 2, the 1st and 2nd defendants were appointed as administrators of the estate of deceased 2 in Migori High Court Succession Cause No. 95 of 2015. That the 1st and 2nd defendants colluded with the 3rd and 4th defendants and fraudulently sold and transferred the suit land causing loss and damage to the plaintiff. Thus, it precipitated the present suit whereby the plaintiff is seeking inter alia, a declaration that the sale and transfer of the suit land was contrary to the confirmed grants, an order of cancellation and rectification of the register in the suit land to read as confirmed in the grant as well as general and extemporary damages for loss and mesne profits and breach of trust.

C) THE GIST OF THE DEFENDANTS' CASE

8. The 2nd defendant failed to file and serve any statements of defence or at all in this suit.

9. By a statement of defence of even date and simultaneously filed with the preliminary objection, the 1st, 3rd and 4th defendants denied the plaintiff's claim. They raised the preliminary objection at paragraph 26 thereof, denied the jurisdiction of this court and sought that this suit be struck out and or dismissed with costs.

D) HEARING OF THE PRELIMINARY OBJECTION

10. On 27th July 2020, this court ordered and directed that at the outset the preliminary objection be argued by way of written submissions; see the Court of Appeal decision in **Kakuta MaiMai Hamisi v Peris Pesi Tobiko and 2 others (2013)eKLR**, where it was observed that a preliminary objection;

- a) Is a threshold question and best taken at it's inception.
- b) Calls for a definitive, determinative and prompt pronouncement.

11. Counsel for the 1st, 3rd and 4th defendants filed submissions dated 6th June 2020 giving the background of the suit, termed the preliminary objection meritorious and urged this court to allow it with costs. Counsel argued that the plaintiff obtained the letters of administration in respect of the estate of the deceased hence he has no legal capacity to mount the instant suit and that this court is not seized of the jurisdiction over the suit. That the issue of jurisdiction needs to be addressed beforehand.

12. To reinforce the issue of jurisdiction, counsel referred to and relied on the Court of Appeal decision in **Esther Gachambi Mwangi vs Samwel Mwangi Mbiri(2013)eKLR**, as well as persuasive decisions in **Albert Kigera Karume and 2 others vs Kungu Gatabaki and Margaret Nduta Kamithi(sued as trustees of the John Njenga Karume Trust) and 5 others(2015)eKLR**, and **John Ongudi Oyoo vs Japheth Ogolo Oyoo(2017)eKLR**. That this court lacks jurisdiction to entertain the present suit in view of Article 162(2) of the Constitution of Kenya, 2010 and that the estate of the deceased 1 was succeeded as revealed in Migori Principal Magistrate's Court Succession Cause No. **14 of 1994**.

13. Counsel also argued that the plaintiff is not the legal administrator of the estate of the deceased 1 hence he is devoid of capacity to allege fraud in the alienation, transmission and transfer of the suit land. Counsel cited Section 76 of the Law of Succession Act Chapter 160 of the Laws of Kenya and the decision in **Charles Ratemo Nyambati vs Jacton Ocharo and 4 others (2016)eKLR**, in support of the argument.

14. Counsel further argued that the instant suit is res judicata pursuant to the decisions in Migori HCC Succession Cause No. 95 of 2015, in respect of the estate of deceased 2 and Kisii High Court Misc Probate and Administration Cause No. 173 of 2005, regarding the estate of the estate of Deceased 1. Counsel invoked and relied on the case of **Daniel Kirui and another vs Monicah W. Macharia and another (2007)eKLR** to fortify the proposition.

15. Counsel further asserted that the plaintiff's claim is statute barred in light of Section 4 of the Limitation of Actions Act Chapter 22 Laws of Kenya and the common ground that the suit land was confirmed to and thereafter transmitted in the name of Deceased 2. To reinforce the submissions, counsel cited the Court of Appeal decision in **Jared Iqbal Abdul Rahman and another vs Benard Alfred Wekesa Sambu and another Civil Appeal No. 11 of 2001 at Nairobi**.

16. The plaintiff's submissions **and supplementary affidavit of 18th September 2020 noted** . The plaintiff argued inter alia, that the suit property was not solely owned by deceased 2. They urged this court through their counsel to exercise its inherent jurisdiction and order this suit to go for full trial in lieu of determination of it at a preliminary stage

E) ISSUES FOR DETERMINATION

17. I have thoroughly considered the entire preliminary objection, the gist of the plaintiff's pleadings and the defendants' pleadings in brief as well as the submissions including the issues set out and the authorities cited therein. The issues for determination at this stage are compressed to the four (4) issues namely jurisdiction, legal capacity, res judicata and limitation as framed in the 1st, 3rd and 4th defendants' submissions which I approve accordingly.

F) ANALYSIS AND DETERMINATION

18. In respect of the issue of jurisdiction, I bear in mind the 1st, 3rd and 4th defendants' assertion that the present matter was the subject of succession proceedings in Migori PM's Court Succession Cause No. 14 of 2014 in regard to the estate of deceased 1. That it was also the subject in Migori High Court Succession No. 95 of 2015 commenced by the plaintiff regarding the estate of deceased 2. That jurisdiction is not vested upon this court in view of Article 162(2)(b) of the Constitution of Kenya, 2010 and the Supreme Court of Kenya decision in **Republic vs Karisa Chengo and others (2017)eKLR**.

19. Paragraphs 5, 6 and 8 of the plaint reveal that deceased 2 commenced but did not complete the distribution of the estate of deceased 1 which included the suit land herein. Quite clearly, the instant suit is concerning a grant as provided for under **Sections 55 and 71 of the Law of Succession Act (Supra)**.

20. It is settled law that this court cannot arrogate itself jurisdiction over the issue of grant issued to deceased 2 and any subsequent grant(s) thereof; see **Gachambi Mwangi and Karisa Chengo cases (supra) and also Desai v Warsama (1967)EA 351**.

21. In the Black's Law Dictionary 10th Edition, at page 980 the term "**jurisdiction**" means;

" A court's power to decide a case or issue a decree"

22. The Halsbury's Laws of England 4th Edition volume 9 at page 350, defines "jurisdiction" as hereunder:

"...The authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for decision....." (see also John Breecroft Saunders in his treatise words and phrases legally defined volume 3 at page 113).

23. From the foregone, I subscribe to the Supreme Court of the Republic of Kenya case of **Samwel Kamau Macharia and another v Kenya Commercial Bank Ltd and others (2012) eKLR (supra)**, where it was held;

"A court's jurisdiction flows from either Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..."

24. In the celebrated case of **Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (1989)KLR 1, the late Nyarangi JA** reasoned, inter alia;

"...jurisdiction is everything. Without it a court has no power to take one more step..."

25. To that extent, what is the effect of lack of a court's jurisdiction? Precisely, such an act is automatically null and void. That the act will collapse as held by Lord Denning in the case of **Macfoy v United Africa co Ltd (1961)3 ALLER 1169** by and applied in **Karisa Chengo case (supra)**.

26. The 1st, 3rd and 4th defendants have raised the preliminary objection to the present suit anchored it on points of law. Examples include jurisdiction and a plea on limitation as held in the celebrated case of **Mukisa Biscuits Manufacturing Company Ltd v West End Distributors (1969) EA 696**.

27. It is not in dispute that the plaintiff has chiefly questioned the distribution and subsequent transfer and registration of the suit land which formed part and parcel of the estate of deceased 1. In that scenario, I find that this court is devoid of jurisdiction over the suit land and cannot make one more step as well settled by the decision in **"Lilian S" case (supra)**.

28. Besides, the plaintiff is not the legal representative of the estate of deceased 1, taking into account the definition of the term **"legal representative"** at Section 2 of the Civil Procedure Act chapter 21 Laws of Kenya. Furthermore, Sections 3, 76, 79, 82 and 83 of the Law of Succession Act (supra) cannot be overlooked herein.

29. Similarly, in **Kothari v Quaresh (1967)EA 364** , it was held the estate of a deceased person is vested in the legal representative; see also **Otieno v Ougo (1986-89)EALR 466 and Rajesh Pranjivan ChudaSama v Sailesh Pranjivan ChudaSama (2014)eKLR**.

30. I do not lose sight of the definition of the term “*res judicata*” at page 1504 of the Black’s Law Dictionary (supra). Indeed, *res judicata* doctrine under **Section 7 of the CPA (supra)**, is applicable to this suit.

31. Article 159(2)(b) of the Constitution of Kenya, 2010 prohibits delay of justice. This court is also conscious of Section 3 Environment and Land Court Act, 2015 (2011) and Sections 1A, 1B, 3 and 3A Civil Procedure Act Cap 21 laws of Kenya, on overriding objective of this court.

32. In *Muchanga Investments Ltd –vs- Safaris Unlimited (Africa) Ltd and 2 others (2009) KLR 229* the Court of Appeal defined the term “**abuse of process of the court**”. That it has the same meaning as “abuse of Judicial process”.

33. Clearly, the present suit is *res judicata*. Moreover, the plaintiff’ is not possessed of legal capacity to originate it. The same is an abuse of Judicial process in the circumstances.

34. In the foregone, it is the finding of this court that the preliminary objection was properly initiated. It is sound and merited. I proceed to uphold the same.

35. Wherefore, the present suit commenced by way of a plaint dated 2nd May 2019 be and is hereby dismissed with costs to the 1st, 3rd and 4th defendants.

36. Orders accordingly.

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 :-

Ms. M.I. Makori holding brief for Nyambati learned counsel for plaintiff

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

Tom Maurice – Court Assistant