



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII

BEATRICE MBHBAMBA ONYONKA

Civil Case 116 of 2009

ELIZABETH KWAMBOKA ONYONKA

(Both suing as personal and legal representatives of the estate of the Late DR. ZACHARY ONYONKA THEODORE ONYONKA OERI.....PLAINTIFFS/APP.

-VERSUS-

COMMITTEE MEMBERS OF MOSOCHO COMMUNITY HEALTH CENTRE PROJECT

JOHN BONSCO MBOGA

HELLEN ONDIEKI

AMBROSE OMATI

PAULINE BOSIRE MAKORI

ROSE NYAMWEYA

HELLEN RIVERTON1ST DEFENDANTS/RESPONDENTS

COUNTY COUNCIL OF GUSII.....2ND DEFENDANT

RULING

The plaintiffs have grant of Letters of Administration Intestate issued on 23/11/2006 by the High Court in Nairobi in respect of the estate of the late Zachary Theodore Onyonka Oeri who died on 22/10/1996. The two are widow and daughter of the deceased. On 30/10/1989 the deceased was registered as proprietor of leasehold interest in Wet Kitutu Bogusero/657 and issued with a Certificate of Lease. This was a 99 years lease from 1/1/1984. It measures 0.8 hectares and was registered to be free from any encumbrance.

It is alleged that sometimes in 2007 the 1st defendants unlawfully entered upon the land and begun depositing building materials thereon with the intention of putting up a permanent structure. This prompted the 1st plaintiff to go to the Land registry at Kisii where she surprisingly found that the 1st defendants had become the registered owners of the land. Her case is that the registration was fraudulent and fake as the deceased was the valid owner of the land. She obtained a Certificate of Official Search indicating that the 1st defendants had become owners on 30/10/2001. Her documents include letter of allotment issued to the deceased for the land on 6/9/1984 and the Certificate

of Lease in the same name.

The plaintiffs came to court for a permanent injunction against the defendants, after a declaration that the land belonged to the deceased. With the suit was filed an application for temporary injunction under *Order 39 rules 1(a) 2 and 2A of the Civil Procedure rules and sections 3 and 3A of the of the Civil Procedure Act* to restrain them from interfering with the land until the suit was heard and finalized.

The 1st defendants denied the deceased was the registered proprietor of the land. Further, it was pleaded that the deceased's Certificate of Lease had been rescinded and or revoked for non-payment of the requisite annual rents. The 1st defendants went on that the land was now registered in the name of Mosochi Community Health Centre Project which they are committee members of. They denied the registration was fake. Lastly, they contended that the suit was misconceived, bad in law and legally untenable.

The 2nd defendant's case is that the land was allotted to the deceased by but that the same was repossessed by it because the deceased did not acknowledge acceptance of the allotment. Further, the deceased did not develop it within 24 months as specified in the special conditions of allotment. Then that he did not remit annual rents. The land was repossessed and given to the 1st defendants as a gift.

When the application for injunction came up for hearing, the defendants raised a preliminary objection to the same and the suit. 1st defendants were represented by Mr. Oguttu and the

2nd defendant by Mr. Masese. Mr. Masese acts for the plaintiffs and opposed the objections.

Without following the order in which the points were urged, the court will deal with the objections as follows . Mr. Oguttu submitted that an injunction cannot be issued against a registered owner of land, whether such registration is fake or fraudulent. The answer to this is that whether or not an interlocutory injunction will be issued will depend on the applicants meeting the conditions set out in *Giella.V.CasmanBrown & Co. Ltd [1973] EA 358*. The court has to consider the facts of the application to be able to reach the conclusion whether to grant the injunction. The second point was that the suit was not legally tenable because the District Land registrar and the Attorney General had not been jointed as defendants, and yet the registration was being questioned. Under *Order 1 rule 9 of the Civil Procedure Rules*, However, a suit cannot be defeated by reason of misjoinder or non-jointer of the parties as the court is enjoined to deal with the matters in controversy in so far as regard the rights and interests of parties actually before it. Under rule 10(2) the court may order that the Registrar or Attorney General be added as defendants if that will enable the court to effectively and completely adjudicate upon the settle all questions involved in the suit.

The plaintiff alleged the registration to the 1st defendants was fake in view of the earlier registration to the deceased. The supporting affidavit of 1st plaintiff claimed this second registration was fraudulent. When Mr. Masese responded to the objection he contended that their case was that the registration was fake , and not fraudulent. Mr. Oguttu's position was that there was no cause of action based on "fake" and that if fraud was claimed, no particulars were given and that under *sections 7 of the Limitation of Actions Act (Cap.22)* the suit was time – barred. That was also the submission by Mr. Okemwa. Mr. Okemwa added that the suit was bad as it had been brought after 12 years. A look at the plaintiff reveals that the trespass that led to the suit occurred in 2007 (paragraph 7 of the supporting affidavit). If it is the alleged annexation of the land by the 1st defendants, that happened on 30/10/2001. 12 years have not passed since the cause of action occurred.

Mr. Oguttu argued that the 1st defendant have been sued and yet there was no cause of action against them. Plaintiffs are the legal representatives of the estate of the deceased. The deceased was the registered owner until it was discovered the entity the 1st defendants are a

committee of has since become the owner. The second registration was at the instance of the 2nd defendants. The plaintiffs are saying this registration (or the taking away of the deceased land and giving it to the 1st defendants) was illegal and done without their knowledge. The plaintiffs are saying the estate's property has been illegally taken away by the defendants. They have a legitimate complaint.

I agree with the defendant's counsel that there was no authority provided by 2nd plaintiff to 1st defendant to swear the verifying affidavit to the suit and the supporting affidavit to the application. *Order 1 rule 12 of the Civil Procedure Rules* is categorical that such authority needed to be provided and in writing, and should have been filed. Without such authority the suit and affidavit are defective. Secondly, it is admitted that there was a suit between the parties which was struck out. Yet the plaint filed did not disclose this as is mandatorily required by *Order 7 rule 1(e) of the Civil Procedure Rules*. I have carefully considered these two critical points which the defendants have validly raised. It is notable that among the documents filed by the plaintiffs is letter from the District Land registrar Kisii/Gucha dated 21/5/2008 which states that as far as they are concerned the land belongs to the deceased. There is also letter of Gusii County Council saying the same. The latter is the 2nd defendant who has defended the suit saying they passed on the land to 1st defendants. As to whether the deceased was notified that he had not met the conditions of allotment and that the land was being repossessed, are issues that require inquiry.

All these matters have caused me a lot of anxiety. I am mindful, as was stated by *Georges CJ (Tanzania) in the case of Essanjiand another .V.Solanki [1968] EA at page 224* and agreed by our Court of Appeal in *Trust Bank Ltd .V. Amalo Co. Ltd, Civil Appeal no. 215 of 2000 at Kisumu*, that the administration of justice should normally require that the substance of all disputes be investigated and decided on their merits and that errors should not necessarily deter a litigant from the pursuits of justice. Despite the defects in the plaint and application, in the particular circumstances of this case, I consider that the serious complaint by the plaintiffs about the deceased's entitlement to the land be inquired into during trial, and the same for the defendants claim to the lease hold property. To enable the effectual and complete adjudication upon all questions in controversy, I give leave of 14 days to the plaintiffs to make the necessary amendments of their papers and pleadings and to enjoin any necessary defendants. The defendants shall have corresponding leave to amend their papers and pleadings to meet the plaintiffs case. After that, the parties shall set down the injunction application for hearing. To that extent the objections taken out are sustained. Costs shall be borne by the plaintiffs who have been indulged.

Dated, signed and delivered at Kisii this 4th Day of November, 2009

A.O.MUCHELULE

JUDGE

4/11/2009

Before A.O.Muchelule-J

Mongare court clerk

Mr. Masese for Plaintiffs

Mr.Oguttu for 1st Defendants

Mr. Okemwea for 2nd Defendant

COURT: Ruling in open court.

A.O.MUCHELULE

JUDGE

4/11/2009