



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELCC NO. 676 of 2017

(formerly Kisii Elc case No. 472 of 2015)

TOBIAS OOKO OJALA.....PLAINTIFF

VERSUS

1. GORDON ODHIAMBO NG'ANG'A1ST DEFENDANT

2. FELCIAN OMONDI OMOLO.....2ND DEFENDANT

3. NELSON OHENGA.....3RD DEFENDANT

4. BENARD OMAYO4TH DEFENDANT

5. DALTON OWUOR PAUL.....5TH DEFENDANT

6. JOHN YONGO OCHARO.....6TH DEFENDANT

JUDGMENT

1. This suit was originated by way of a plaint (FAST TRACK) dated 21st October, 2015 and filed on even date through C.R Sagwa and Company Advocates. The plaintiff has sued the defendants jointly and severally for:-

i. An order of eviction from the suit land.

ii. An order of a permanent injunction restraining the defendants from trespassing on the suit land.

iii. Costs.

2. Briefly the plaintiff's claim is that he is the registered proprietor of the suit land, LR Number Suna East/Wasweta1/20983 measuring approximately 9.52 hectares in area. That the defendants unlawfully entered upon the suit land and built houses as well as planted trees thereon without the plaintiff's consent. That the defendants threatened him with violence and caused his arrest and detention in police cells in a bid to have him sign transfer documents of the suit land in favour of the defendants thus precipitating the present suit.

3. In their joint statement of defence and counter claim dated 29th November, 2015 and filed on 30th November, 2015, the defendants through Omondi Kisera and Company Advocates denied the plaintiff's claim and sought its dismissal with costs. That the proceedings herein be stayed until succession is carried out in respect of the estate of deceased Arum Ojala, Ojala Arum and Maucha Arum.

4. The defendants stated that the registration of the plaintiff as the owner of the suit land was fraudulently and illegally obtained. That the original land was number Suna East/Wasweta 1/645. They pleaded particulars of fraud on the part of the plaintiff at paragraph 4 of the counterclaim.

5. The defendants further stated that they are lawfully entitled to the suit land as some of the defendants are descendants of the late Ng'ang'a who was the original equitable owner of the land. That they are lawful beneficiaries of the suit land where they have developed, settled and occupied for many decades. Thus, they have jointly and severally counterclaimed against the plaintiff for:-

1) Declaration that the Transfer/Registration of LR NO. SUNA EAST/WASWETA 1/645 and all the subsequent subdivision including LR NO. SUNA EAST/WASWETA 1/20983 measuring 9.52 hectares and registered in the name of the plaintiff are illegal,

null and void as no succession was undertaken as by law required and same be revoked.

2) The plaintiff holds title NO. SUNA EAST/WASWETA 1/20983 in trust for himself and the counter claimers and should therefore transfer to each of the counter claimers their respective shares and should be permanently enjoined from interfering with quiet possession of counter claimers.

3) Registration of title numbers SUNA EAST/WASWETA 1/645 and an order that appropriate succession process be initiated in the Estate of ARUM OJALA, OJALA ARUM, MAUCHA ARUM and OJALA ARUM all deceased.

4) Costs of the suit.

5) Interest.

6. By his reply to the defendant's joint statement of defence and defence to counter claim dated 11th January, 2016, the plaintiff essentially reiterated his claim per the plaint and denied the defendants' counter claim. He admitted that the counter claimers have carried out developments on the suit land, but they are trespassers thereon. He sought dismissal of the defence and the counter claim herein.

7. The defendants and counter claimers did reiterate every content of the counter claim in their reply to defence to counter claim. They stated that they are lawful beneficiaries of the suit land and are entitled to the reliefs sought in the counter claim. They crave for dismissal of the defence to counter claim with costs.

8. By an authority dated 16th May, 2018 and filed on even date, the 2nd, 3rd, 4th 5th and 6th defendants authorized the 1st defendant to swear the affidavit and statement herein.

9. The plaintiff (PW1) testified that the 1st to 6th defendants are in unlawful occupation of the suit land which was originally registered in the name of his deceased father and two (2) others. He relied on the following documents;

a) Title deed in respect of the suit land (P Exhibit 1).

(b) A certificate of official search dated 12th October, 2015 regarding the suit land (P Exhibit 2)

(c) A copy of mutation form dated 14th September, 2012 (P Exhibit 3)

(d) A copy of record dated 24th April, 2014 in respect of the suit land (P Exhibit 4).

10. The 1st defendant (DW1) relied on his statement dated 16th July, 2018 as his evidence in chief and list of documents dated 29th November, 2015 (D Exhibits 1 to 7). He stated, inter alia, that he has lived on the suit land since his childhood and that there has been no succession process in respect of the suit land.

11. In her submissions dated 7th March, 2019, learned counsel for the plaintiff, set out the parties' respective pleadings in brief. Counsel analysed the plaintiff's case as well as defendants' case and proposed issues for determination thus:-

i. Whether or not the defendants have trespassed on the suit land.

ii. Whether or not the defendants have the requisite locus to instate the counterclaim

iii. Whether or not prayers in the counterclaim are tenable

12. Counsel submitted that the plaintiff's case has been proved on a balance of probability and that the counter claim is want of merit. She cited **section 82 of the Law of Succession Act (Cap 160)** and the case of **Isaya Masira Momanyi- Vs- Daniel Omwoyo and another (2017) eKLR** to the effect that the counter claimers have no capacity and/or Locus Standi to file suit on behalf of the estate of the late Mzee Ng'ang'a. She urged the court to allow the plaintiff's claim and strike out the counter claim with costs.

13. Learned counsel for the defendants/counter claimers filed his submissions dated 2nd April, 2019 wherein he provided the facts of the suit and urged the court to dismiss the plaintiff's case and grant the orders sought in the defendant's counter claim. He testified and analysed five (5) issues for determination including whether the plaintiff holds a lawful and valid title over the suit land and whether the defendants have locus standi to defend and counter claim in this case.

14. Counsel relied on sections 2 and 45 (1) of the Law of Succession Act (Cap 160). He further relied on authorities including the Court of Appeal decision in **Trouistik Union International and another-vs-Jane Mbeyu and another (1993) eKLR**.

15. I have examined the entire pleadings, evidence and submissions in this suit. I bear in mind the decision in **Great Lakes Company (U) Limited -vs- Kenya Revenue Authority (2009) KLR 720** and all issues for determination framed in the parties' respective submissions. In that regard, the issues for determination are condensed to whether the parties have locus standi to institute their respective pleadings and whether they are entitled to the orders sought therein.

16. On the issues of locus standi, the plaintiff (PW1) testified that the 1st to 6th defendants are unlawfully on the suit land which belongs to

him. In examination in chief, he stated, inter alia:-

“I have sued the 1st to 6th defendants who are unlawfully on my land. They have entered onto the land, planted trees, cultivated and some are staying thereon. It was originally LR NO. Suna East/Wasweta 1/645 registered in the name of the late Ojala Arum who was my father, Maucha Arum who was my step father (deceased) and Richard Onyango.”

17. During cross examination, PW1 stated in apart that:

“The suit land was originally LR NO. 645 in the names of two people who are alive while three of them are dead”

18. On further cross examination, PW1 admitted that he has not been registered as administrator of the estate of Ojala Arum or appointed as such by any court. That he was not aware of any succession carried out in respect of the estate of Maucha Arum.

19. It was submitted by the plaintiff’s counsel that the estate of a deceased person can only be represented in a legal procedure by a person who is duly authorized to do so on behalf of the estate. Reference was made to paragraphs 2 and 3 of the counter claim and **section 82 of the Law of Succession Act (Cap 160)**. Counsel submitted that the defendants/counter claimers have no capacity and or locus standi to file suit on behalf of the estate of the late Mzee Ng’ang’a.

20. On the part of the defendants/ counter claimers, the 1st defendant (DW1) testified in examination in chief, inter alia;-

“The former registered proprietors are deceased. There has been no succession process in respect of the suit land or any parcel as shown on DExhibit 2.

The original suit land, LR NO.Suna East/Wasweta 1/645 is a home of several people. Only two of them have been given title deeds without succession process.” (Emphasis added)

21. During cross examination, DW1 told the court that he lives on the original suit land. He also stated that he did not obtain letters of administration in this matter.

22. Learned counsel for the defendants/counter claimers submitted that the plaintiff has denied the defendants’ succession process by securing transfer and registration of the suit land in his (plaintiff) favour and others without the due process of the law. That even the plaintiff lacks locus standi to deal with the property of the deceased without a grant of letters of administration in respect of the suit land.

23. It is notable from paragraphs 2(a), 2(b), 3 and 8 of the defendants’ joint statement of defence as well as paragraphs 1,2,5 (a), 5 (b), 6, 8 (i), 8 (iii) and prayers (a) and (c) of the counterclaim that the suit land is part of the estate of deceased persons; Mzee Ng’ang’a Arum Ojala, Ojala Arum Maucha Arum and Ojala Arum. PW1 confirmed that there has been no succession process carried out in respect of their respective estate.

24. It is quite evident that neither the plaintiff nor the defendants/counter claimers are legal representative (s) of the estate of the said deceased persons; see **Section 2 of the Civil Procedure Act Cap 21 and also Trouistik Union international case (supra)**.

25. In that regard, I fully approve the position taken by Wanjiru Karanja J (as she then was) in the case of **Omari Kaburu –v- Industrial and Commercial Development Corporation (2007) eKLR** where she held that :-

“The law is that the grant is what clothes a person with locus standi on behalf of the estate of the deceased”.

26. Similarly, I absolutely endorse the decision by Hedwig Ongundi J in **Republic –v- Attorney General and another ex-parte John Mugo (2013) eKLR** on the role of legal representative and she held, inter alia;-

“And a legal representative is a person who has been issued letters of grant..... The Law of Succession is clear that it must be legal representative. The applicant has not shown that he is the legal representative. He therefore lacks locust standi specific to this estate” (Emphasis laid)

27. Applying the above authorities to the facts and evidence in this case, I find that the plaintiff and the defendants/counter claimers lack the required capacity and or locus standi to originate their respective claims in this matter; see also **Isaya Momanyi case (supra)**. In the circumstances, they are not entitled to the orders sought therein.

28. A fortiori, I strike out the plaintiff’s suit commenced by a plaint dated 21st October 2015 and the defendants’ counterclaim dated 29th November 2015.

29. As regard costs, in view of the circumstances of this case and borrowing from the Court of Appeal decision in **Kamau –v- Mungai and another (2006) 1KLR 150 at 160**, I order that each party will bear his own costs in this case.

DELIVERED SIGNED and DATED in open court at MIGORI this **25TH** day of **June 2019**.

G.M.A. ONGONDO

JUDGE

In the presence of:

Mr. Oguttu Mboya holding brief for Sagwe a learned counsel for the plaintiff.

Mr. Kisera learned counsel for the defendant.

Court Assistant – Tom Maurice