



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI**

**ELC CASE NO. 882 OF 2017 (O.S)**

**ROSE AKEYO ONYUKA.....PLAINTIFF**

**VERSUS**

**MARTIN OMONDI OGWENO.....DEFENDANT**

**JUDGMENT**

1. This ruling in respect of a preliminary objection dated 23<sup>rd</sup> January 2018 and filed on 12<sup>th</sup> February 2018 by the defendant/respondent who is currently represented by learned counsel Mr. Ezra Odondi Awino of Odondi Awino and Company Advocates and formerly by Ombati Otieno and Opondi Advocates. The defendant/respondent is seeking that the plaintiff's originating summons dated 29<sup>th</sup> November 2017, be struck out on two (2) grounds;-

***a) That the defendant herein has no locus standi to be sued on behalf of George Ogweno deceased the registered proprietor of the suit property.***

***b) That the originating summons is incurably defective for failure to annex an abstract of title as mandatorily required by Order 37 Rule 7 (2) of the Civil Procedure Rules, 2010.***

2. By the said originating summons, the plaintiff is seeking to be registered as the proprietor of the suit land namely LR NO. WEST KARACHUONYO/KOKOTH "A"/88 measuring one (1) acre by way of adverse possession. The originating summons is premised on the plaintiff's supporting affidavit sworn on even date and the accompanying documents namely a copy of ruling in Oyugis Chief Magistrate's Court Criminal case number 104 of 2016 marked "RAO-1" and a certificate of official search dated 29<sup>th</sup> August, 2017 in respect of the suit land marked "RAO-2".

3. In his 15 paragraphed replying affidavit sworn on 23<sup>rd</sup> January 2018, the defendant who is represented by learned counsel Mr. S. O. Odingo of S. O. Odingo and Company Advocates, has opposed the originating summons and sought its dismissal with costs to the defendant. He averred, inter alia, that he has no locus standi to be sued on behalf of the late George Ogweno (Deceased), the registered owner of the suit land and that the late Onyuka Ogalo who was the plaintiff's husband was not a beneficiary of the suit land.

4. Learned counsel for the defendant filed submissions dated 27<sup>th</sup> November 2018, where he referred to the two (2) grounds of the preliminary objection, termed the originating summons incompetent and sought its dismissal with costs to the defendant. To buttress his submissions, counsel relied on this court's decision in **Susan Wanchara Acheri –v- Maurice Adek Oduogi Migori ELCC No. 304 of 2017** (formerly Kisii ELC case number 67 of 2014 (O.S.) and the decision by Kamaru J in case of **John Wambura and another –v- Anakletus Wambura (2017) eKLR**.

5. The plaintiff's counsel did not file any submissions herein.

6. I have carefully considered the preliminary objection, the parties' pleadings and the defendant's submissions in this suit. I proceed to determine whether the defendant has satisfied the grounds on the face of preliminary objection for this suit to be struck out as sought therein.

7. On the ground of the locus standi, questions 1 to 3 on the face of the originating summons and paragraphs 3,4,5 and 6 of the replying affidavit refer to George Ogweno (Deceased 1) as the owner of the suit land. A certificate of official search marked RAO -2 and annexed to the affidavit in support of the originating summons, shows that the said deceased 1 was registered as the proprietor of the suit land on 16<sup>th</sup> August 1976. The defendant confirmed that the deceased became the registered owner thereof in 1976.

8. In her affidavit in support of the originating summons, the plaintiff averred, inter alia, that she had been staying on the suit portion of land peacefully until April, 2016 when the defendant started to disturb her. That the defendant was charged before court as per ruling in Oyugis Chief Magistrate's Court Criminal Case number 104 of 2016 (RAO-1) where the court observed that :-

***“PW 1 identified the photograph in court. He did an official search for the parcel West Rachuonyo/Kokoth ‘A’/88 which shows the land is on the names of George Ogweno his father (Emphasis added)***

9. The question that follows is whether the defendant is the legal representative of deceased 1. I am conscious of the definition of the term “Legal Representative” under **Section 2 of the Civil Procedure Act (Cap 21)**. I take into account **Sections 79 and 82** of the **Law of Succession Act Cap 160**, that property of deceased to vest in personal representative and powers of personal representative respectively see; also the Court of Appeal decision in **Trouistick Union International and another –vs- Jane Mbeyu and another (1993) eKLR**.

10. In the instant suit, the plaintiff averred at paragraphs 5 and 6 of her affidavit in support of the originating summons that she is the surviving wife of Onyuka Ogalo (Deceased 2) who had established a homestead on the suit land where she has lived since 1999. The plaintiff has not adduced any document show that she is the legal representative of the estate of deceased 2 and that the defendant is the legal representative of the estate of deceased 1 herein. Therefore both the plaintiff and the defendant lack locus standi to sue and be sued respectively in this suit and I agree with Ongundi J in **Republic –v- Attorney General and another ex-parte John Mugo (2013) eKLR** on the role of the legal representatives.

11. In respect of second ground of the preliminary objection, **Order 37 Rule 7 (2) of the Civil Procedure Rules, 2010** provides that:-

***“The summons shall be supported by an affidavit to which a certificate of the title to the land in question has been annexed” (Emphasis supplied)***

12. The above legal provision is mandatory; see; **John Wambura and Susan Wanchara Acheri** cases (*supra*).

13. I note that the plaintiff annexed a certificate of official search dated 29<sup>th</sup> August 2017 (RAO -2) to her affidavit in support of the originating summons. I am aware of the terms “**certificate of title**” and “**proprietor**” as defined at **section 2 of the Land Registration Act 2016 (2012)** under which the document marked “RAO-2” was issued and it shows that deceased 1 is the proprietor of the suit land. Quite clearly, a certified extract of the title to the suit has not been annexed to the plaintiff’s affidavit going by aforesaid definition. Even the document marked RAO -2 is not certified in order to satisfy the aforesaid mandatory legal requirement.

14. The upshot is that the originating summons is incompetent. The defendant’s preliminary objection is full of merit. Thus, the plaintiff’s originating summons dated 29<sup>th</sup> November 2017 be and is hereby struck out with costs to the defendant.

**DELIVERED, DATED and SIGNED at MIGORI this 25<sup>th</sup> day of JUNE 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

Mr. Ojala holding brief for Mr. Odingo learned counsel for the plaintiff.

Mr. Odondi Awino learned counsel for the defendant.

Tom Maurice – Court Assistant.