



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC MISC CASE NO. 46 OF 2017 (O.S)

IN THE MATTER OF THE FINDINGS OF THE NYANZA LAND DISPUTE APPEALS COMMITTEE

IN CASE NO. 89 OF 2011 BETWEEN ROBERT OBADHA ONYANGO (APPELLANT) AND

CHARLES ORUKO OBADHA & ALFRED OMBUS ORUKO (RESPONDENTS)

AND

IN THE MATTER IF THE SIAYA PRINCIPAL MAGISTRATES COURT

LAND DISPUTE TRIBUNAL CASE NUMBER 98 OF 2008 ROBERT ONADHA ONYANGO

(CLAIMANT) VERSUS CHARLES ORUKO OBADHA AND ALFRED OMBUS ORUKO (OBJECTORS)

BETWEEN

CHRISTABEL MBOGO OBADHA.....APPLICANT

VERSUS

ALFRED OMBUS ORUKO.....RESPONDENT

RULING

1. Alfred Ombus Oruko, the Respondent, filed the notice of Preliminary Objection dated the 16th March 2015 raising the following four (4) grounds to the Applicant's, Christabel Mbogo Obadha, Originating summons dated the 29th December 2014;

1. "That the suit herein is time barred by virtue of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya.
2. That the Court herein lacks jurisdiction in determining a dispute whose form of determination should be in the family division.
3. That the repealed Land Disputes Tribunal and the Land Disputes Appeals Committee did not have jurisdiction to determine disputes relating to land ownership.
4. That the application is incurably defective, incompetent, void ab initio, untenable and an abuse of the court process."

2. The Applicant's prayers in the originating summons are as follows:

1. "This honourable Court be pleased to declare that Christabel Mbogo Obadha is entitled to a portion of Land Parcel Number North Gem/Ndere/856 measuring approximately 0.75 ha as the Administrator of the estate of Robert Obadha Onyango (Deceased).
2. The Respondent be ordered to transfer a portion of Land Parcel Number North Gem/Ndere/856 measuring 0.75 ha to the Applicant, and in default the Deputy Registrar be allowed to sign the necessary forms of transfer of the portion of Land Parcel Number North Gem/Ndere/856 measuring approximately 0.75 ha.

3. The costs of this application be granted to the Applicant.”

3. The originating summons came up for hearing on the 27th February 2018, but upon court reminding the Counsel for the parties of the Preliminary Objection that was still pending, they agreed to file and exchange written submissions on it. The learned Counsel for the Respondent then filed their submissions dated the 12th September 2018 on the 17th September 2018, while that for the Applicant filed theirs dated the 6th February 2018 on the 6th February 2019. The submissions are as summarized herein below;

A: RESPONDENT’S SUBMISSIONS:

- That paragraph 4 of the Applicant’s supporting affidavit confirms that the sale agreement upon which this suit is based was of 28th November 1982 and as this suit was filed on 14th January , which is about thirty five (35) years after the cause of action arose, then it is time barred by virtue of **Section 7 of the Limitation of Actions Act, Cap 22 of Laws of Kenya**. The Learned Counsel referred to the cases of **Bosire Ongero vs Royal Media Services [2015] eKLR** and **Beatrice Wambui Kiarie vs Beatrice Wambui Kiarie & 9 others [2018] eKLR**.
- That as the Applicant has sued in her capacity as administrator of the estate of her late husband, and has sued the Respondent in his capacity as the administrator of his late father’s estate, over land that he inherited, then the claim is a purely succession dispute which should have been filed at the Family Court. That the Applicant’s claim is over a suit property as a beneficiary of the estate of her late husband within the meaning of **Sections 47 and 48 of the Law of Succession Act and Article 165 (2) (a) and (5) of the Constitution** and not in respect of use and occupation of land as contemplated by **Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act**. The Learned Counsel referred to the case of **Beatrice Wambui Kiarie vs Beatrice Wambui Kiarie & 9 others [2018] eKLR** where the suit was struck out following a preliminary objection on court’s jurisdiction that was upheld.
- That the Land Disputes Tribunal and the Appeals Committee had been established under **Section 4 of the now repealed Land Disputes Tribunal Act 1990**. That **Section 3 (1) of the said Act** restricted the tribunal powers or jurisdiction to disputes as to the division of, or the determination of boundaries to land including land held in common, claim to occupy or work land or and trespass to land. That the tribunal and Appeals Committee did not have jurisdiction over the claim herein. That the observation that there seems to have been an agreement was not an award and was beyond their powers.
- That the suit is incompetent, untenable, an abuse of the court process, void ab initio and should fall like a bundle of loose cards with costs to the Respondent.

B: APPLICANT’S SUBMISSIONS:

- That the Preliminary Objections by the Respondent raises issues of facts that require prove by way of evidence instead of points of law. That the Respondent’s objection to a claim of adverse possession can only be decided after evidence is tendered and not at this stage. The learned Counsel referred to the cases of **Samuel Waweru vs Geoffrey Muhoro Mwangi [2014] eKLR** which cited the case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributor Ltd [1969] E.A 696** on the definition of a preliminary objection.
- That the Applicant and her late husband having been in exclusive possession of the suit land from 1982 have acquired it through adverse possession. The learned counsel referred to the case of **Titus Mutuku Kasure vs Mwaani Investments Limited & 4 Others [2004] eKLR**.
- That the Respondent as the administrator of the estate of the late vendor holds the land in trust of the estate and is the right party to be sued by the Applicant. The learned Counsel referred to the case of **Anne Murambi vs John Munyao Nyamu & Another [2018] eKLR**.
- That this claim is based on adverse possession and hence cannot be defeated by limitation as the Applicant has been in possession for more than 12 (twelve) years. That accordingly, this court has jurisdiction to deal and determine the claim in terms of **Section 13 (1) of the Environment and Land Court Act**. The Learned Counsel referred to the case of **Stephen Konga vs Symon Kipruto Rop [2017] eKLR**.
- That the originating summons is not based on the decision of the Land Disputes Tribunal and Appeals Committee. That the Respondent should have filed a judicial review application to challenge the Appeal Committee’s decision but did not do so and is therefore raising the issue in the wrong forum. That as equity aids the vigilant and not the indolent the preliminary objection should be rejected with costs and the suit fixed for hearing.

4. The following are the issues for the determination by the court;

a) Whether the Respondent has established the four (4) points of preliminary objection, or any of them.

b) Whether the preliminary objection should be upheld or rejected.

c) Who pays the costs of the preliminary objection.

5. The Court has carefully considered the four (4) points in the notice of preliminary objection, the written submissions and decided cases cited therein and come to the following determinations;

a) That the heading of the originating summons shows it is brought pursuant to Article **40 of the Constitution and Order 37 Rules 1 and 3 of the Civil Procedure Rules, 2010**. That **Article 40 of the Constitution 2010** provides for protection of right to property, while **Order 37 of the Civil Procedure Rules** specifies the matters that may be commenced through originating summons. That **Rule 1** of the said **Order 37** provides the party (person) **“who may take out originating summons and in respect of what matters”** while **Rule 3** provides for **“summons by vendor or purchaser of land”** That the three prayers and ground (c) in the originating summons and paragraphs 4, 6 and 8 of the supporting affidavit leaves no doubt that the Applicant’s claim against the Respondent is for specific performance of the sale agreement of 28th November 1982 that was entered between the late Robert Obadha Onyango, and the late Charles Oruko Obadha. That there is nothing in the originating summons and the affidavit in support to suggest that the claim is in any way based on adverse possession. That had the claim been based on adverse possession, even as an alternative prayer, the originating summons would have stated as much and referred to **Order 37 Rule 7 of Civil Procedure Rules 2010**, which provides for adverse possession applications.

b) That the Applicant’s claim is not as a beneficiary or dependent of the estate of the late Charles Oruko Obadha, whose estate has already been distributed to the Respondent as shown by the certificate of confirmation of Grant dated 4th July 2013 and issued in Siaya P.M. Succession Cause No. 47 of 2012. The Applicant’s claim is not challenging the appointment of the Respondent as the administrator, or seeking for a share of the estate. That the Applicant’s claim is for a portion of approximately 0.75 hectares out of North Gem/Ndere/856 which has been transmitted (distributed) to the Respondent already, on the basis of the sale agreement of 28th November 1982. The Applicant claim is therefore one of entitlement to that portion of the land and falls on all four under the jurisdiction of this court as sanctified by **Article 162 (2) (b) of the Constitution 2010** which provides;

“162 (2) Parliament shall establish court with the status of the High Court to hear and determine disputes relating to-

(a).....

(b) the environment and the use and occupation of, and title to, land.”

That further the heading of the Environment and Land Court Act No. 19 of 2011 leaves no doubt on the purpose of the Legislation. It states as follows:

“An Act of Parliament to give effect to Article 162 (2) (b) of the Constitution; to establish a superior Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.”

c) That the Land Disputes Tribunal Act No. 18 of 1990 under which the Land Disputes Tribunals and the Provincial Land Disputes Appeals Committees had been established was repealed by **Section 31 of the Environment and Land Court Act No. 19 of 2011** on 30th August 2011. That even though the proceedings and award of the Land District Tribunal have not been availed to the court, the Nyanza Land Disputes Appeal Committee proceedings and judgment that has been attached to the Applicant’s affidavit confirms that it was the Applicant’s late husband who had filed the appeal. That it further shows the appeal was heard on 10th November 2011 and the judgement (award) delivered on the same date, which date fell about two (2) months and ten (10) days after the Appeals Committee had ceased to exist. That the Applicant appears to place a lot of emphasize on the Appeal committee observation in one of its findings that **“There existed a land sale agreement within the family members which evidently has been confirmed through documentary proof”**. That finding amounts to nothing as the Appeals Committee had ceased to exist from 30th August 2011. That the said Appeals Committee proceedings, findings and judgment were void ab initio and hence a nullity.

d) That the Applicant obtained the Grant Ad litem on the 16th October 2014 issued in Kisumu H. C. Probate and Administration Cause No. 985 of 2014, which shows that her late husband passed on the 26th June 2013, which is about a week before the Respondent was issued with the certificate of confirmation of Grant in respect of the estate of Charles Oruko Obadha, the alleged vendor. That the pleadings by the parties are incapable without evidence being adduced to confirm or ascertain, whether the Applicant’s claim is statute time barred. That it is therefore desirable that the claim be allowed to go to hearing to be determined on merit.

6. That flowing from the foregoing, the Court finds no merit in the Preliminary Objection raised by the Respondent and the same is rejected with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 12TH DAY OF JUNE 2019

In the presence of:

Applicant Absent

Respondent Absent

Counsel Absent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE