



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 312 OF 2016 (O.S)

JOHN AGWENGE CHUMBE.....PLAINTIFF

VERSUS

ANDREW MATOKA OKOKO.....DEFENDANT

RULING

1. Andrew Matoka Okoko, the Defendant, filed the notice of preliminary objection dated the 22nd December 2016 raising three (3) grounds as set out below;

- a) That the High Court has no Jurisdiction to hear the matter.**
- b) That the matter is res Judicata.**
- c) That the application contravenes Section 30 of the Land Adjudication Act and is an abuse of the process of court.**

2. The court gave directions on filing and exchanging written submissions on the preliminary objection on the 20th February 2018. The Learned Counsel for the Plaintiff filed theirs dated 10th July 2018, while that for the Defendant filed theirs dated the 23rd April 2019.

3. The following are the issues for the court's determinations;

- a) Whether the court has Jurisdiction to hear and determine the issues raised in this suit.**
- b) Whether the issues raised herein have already been determined, i.e., whether the suit is res Judicata.**
- c) Whether the suit land is under adjudication, and if so, whether consent to file suit was obtained as required by Section 30 of the Land Adjudication Act.**
- d) Who pays the costs.**

4. The Court has considered the three (3) grounds of preliminary objection, the written submissions by Counsel, the pleadings filed and come to the following conclusions;

a) That it is evident from the originating summons and supporting affidavit filed with it that the parties' predecessors, (relatives), have had the disputes over the land described therein since the 1960, when land case No. 80 of 1960 was heard and decided before the elders. That dispute was settled before the Land Adjudication exercise in the area. That come the Land Adjudication, another dispute rose again and was heard by the Land Committee in Land Case No. 35 of 1982, before being escalated to the Land Arbitration Board as Case No. 21 of 1982. That objection case No. 87 was then reportedly filed but before it could be heard and determined, Tamu Magistrate's Court Misc. App. No. 4 of 1989 was filed. That the Tamu Court Case was heard and determined. That the Plaintiff's brother filed an appeal to the Minister being Appeal no. 388 of 1996 which was also heard and determined. That it is in view of the foregoing that the Defendant has raised the ground of res judicata. The Plaintiff's position is that the disputes ranging from that of 1960 were over the parcel described as Wawidhi Adjudication Parcel No. 2415, and not 2429 which is subject matter of this suit commenced through the originating summons dated 22nd November 2016. That as that issue cannot be determined without taking evidence, the court directs that the issue of whether or not this suit is res judicata be taken up by the parties during the trial of the matter should it reach that stage.

b) That the questions set out for the court's determination especially (a) and (b) are aimed at ascertaining and collecting the estate of the late Alex Chumbe Omolo. The Plaintiff has exhibited a copy of a Gant of Letters of Administration dated the 15th March 2016,

issued in Kisumu H.C. succession Cause No. 168 of 2015. That as there is no doubt or dispute that pursuant to **Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act No. 19 of 2011**, that this is the court with jurisdiction to hear and determine disputes concerning **“the environment and the use and occupation of, and title to land”**, then the two prayers being about ownership or entitlement and occupation to land are before the correct or right forum. That as the questions in (c) and (d) will flow from the decisions made in (a) and (b), and in any case relates to entitlement and occupation of the land, they are also before the correct or right forum as dictated by the Constitution and statute law. That if this court determines the issue of ownership of the land in favour of the Plaintiff, then the issue of the land’s distribution will fall under the Succession Court in accordance with the provisions of the **Law of Succession Act Chapter 160 of Laws of Kenya**.

c) That the pleadings filed by the Plaintiff in the nature of originating summons, verifying and supporting affidavit have described suit land as **“Land Parcel No. 2429 Wawidhi Adjudication Section.”** That the other land, presumably belonging to the Defendant’s side is described as **“Land parcel 2415 Wawidhi Adjudication Section”**. That these description leads to only one conclusion, that the parcels are situated in an adjudication Section, and are yet to be registered. That the court has perused the court record and noted that there are no copies of the title deeds, green cards or certificates of official searches, certified or not, annexed by the Plaintiff to the affidavits filed to date. There is therefore no documentary evidence availed by the Plaintiff upon which, the Plaintiff’s Counsel submission at the second last paragraph that **“it is worth noting at this point that the title deeds for this area have been issued”** could be based. That in the absence of evidence that the suit lands had been registered by the time this suit was filed, then the same falls a foul to the provisions of **Section 30 of the Land Adjudication Act Chapter 284 of Laws of Kenya** as it is apparent that the Plaintiff did not obtain, and exhibit to the court a consent to sue from the Adjudication Officer. That inspite of the other findings above, the defendant preliminary objection on this score, which is definitely a prime point of law, is upheld.

d) That the Defendant having succeeded in having one of the three (3) grounds of preliminary objection upheld is pursuant to **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya** is entitled to costs.

5. That in view of the findings above, the Defendant’s preliminary objection is upheld and allowed with costs. That it is therefore ordered as follows;

a) That the Plaintiff’s/Applicant’s suit commenced through the originating summons dated the 22nd November 2016 and filed on the 28th November 2016 is hereby struck out with costs to the Defendant/Respondent.

b) That the file be closed.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26TH DAY OF JULY, 2019

In the presence of:

Plaintiff Absent

Defendant Absent

Counsel Mr. Odhiambo B. F. for the Plaintiff

Ms. Oroni for Odeny for the Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE