



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 299 OF 2016

JOHN FRANCIS ODERA WACHIAYA.....PLAINTIFF

VERSUS

JOSEPH OJWANG OKEYO.....DEFENDANT

RULING

1. The Plaintiff filed the motion dated the 13th July 2017 seeking for leave to amend the plaint in terms of the annexed draft and costs. The application is based on the seven (7) grounds on its face and supported by the affidavit sworn by the Plaintiff on the 13th July 2017.
2. The application is opposed by the Defendant through his one ground in the notice of Preliminary Objection dated 2nd October 2017.
3. The application came up for hearing on the 25th February 2019 when Mr. Orengo and Anyul, learned Counsel for the Plaintiff and Defendant respectively, made their submissions for and against the application.
- 4 The issues for determination by the court are as follows;
 - a) **Whether the amendment sought is necessary for determining the issues raised exhaustively.**
 - b) **Whether the Plaintiff is with capacity to seek the prayer in the application.**
 - c) **Who pays the costs.**
5. The Court has carefully considered the grounds on the motion, affidavit evidence by the Plaintiff, ground in the notice of preliminary objection, oral submissions by both counsel, the record and come to the following conclusions;

a) That the Plaintiff commenced these proceedings through the plaint dated 14th November 2016 seeking for mandatory injunction against the Defendant in respect of North Gem/Marenyo/1098 and costs. That at paragraph 3 to 6 of the plaint, the Plaintiff averred that the said land belonged to the late Odalo Mahodho, who before his death had appointed him a personal representative and had given him a power of attorney over the land. That he had filed Siaya Magistrate's Courts Succession Cause No. 6 of 2010 over the estate of the late Odalo Mahodho and after confirmation he was registered with the suit land.

b) That the copy of the green card attached to the Plaintiff's supplementary affidavit sworn on the 13th March 2017 and marked "JFOW-1" shows that the title for North Gem/Marenyo/1098 was closed on the 9th January 2017 upon being subdivided into parcels 2201 to 2203. That position has further been confirmed by paragraphs 7 to 10 of the Plaintiff's supporting affidavit sworn of the 13th July 2017, which the court takes to be evidence of the completion of distribution of the estate of the late Odalo Mahodho to which the Plaintiff was the administrator.

c) That paragraphs 8 to 10 of the Plaintiff's supporting affidavit sworn on the 13th July 2017 has shown clearly the persons now registered as proprietors of the three parcels subdivided from North Gem/Marenyo/1098. That parcel North Gem/Marenyo/2201 and 2203 are registered with Rose Akinyi Bwanga (deceased), Willis Ojwang' Bwanga, Jackline Adhiambo Bwanga and Benta Achieng. That North Gem/Malenyo/2202 is registered with Dorcas Kalee Ochieng and Valentine Mutua Ochieng. That though the Plaintiff at paragraphs 14 to 18 of the said affidavit claims that he still has an interest over a portion of North Gem/Malenyo/2203 that he had been given by the late Odalo Mahodho, his name does not appear among the proprietors from his own deposition. That as the certificate of death No. 496657 dated 7th July 2017, shows Rose Akinyi Bwanga died on the 22nd February 2017, which is over one and a half month after the subdivision of the original parcel North Gem/Malenyo/1098, there is no explanation tendered why the Plaintiff's interest, if any was subsisting, was not provided for during that subdivision. That **Section 26 (1) of the Land Registration Act No. 3 of 2012** requires courts to take those appearing on the certificate issued by the Land Registrar as proprietors

of the land to be the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and endorsed conditions. That it is not possible for the court to take the Plaintiff as one with any registerable interest over North Gem/Malengyo/2203 after 9th January 2017 when it was registered in the joint name of the four (4) named proprietors.

d) That flowing from the foregoing, it is clear that the Plaintiff lost all interest over North Gem/Maleny/1098, the suit land, the moment it was subdivided, title closed and the subdivisions thereof transferred to third parties who are not parties in these proceedings. That the Plaintiff is therefore without any legal or equitable interest over both North Gem/Malengo/1098, or the subdivisions thereof including North Gem/Maleny/2203 since 9th January 2017. That the Defendant preliminary objection that the Plaintiff is without capacity to sustain the application dated 13th July 2017 is therefore upheld and the motion struck out with costs.

e) That though the Defendant's preliminary objection to the main suit dated 14th March 2017 was not heard during the hearing of the motion, the court having come to the findings above, and in view of **Article 159 (2) (b) and (d) of the Constitution 2010**, and **Sections 1A, 1B and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya** finds that any further retention of the suit in the registry when it is obvious the suit land, North Gem/Maleny/1098, ceased to exist on the 9th January 2017, and that the Plaintiff no long has any legal or equitable rights and interests over it, or the subdivisions thereof, will not serve any justifiable purpose. That if anything, it will only continue to add to the courts backlog, and escalate the costs to the parties and the court. That accordingly, the court finds the Plaintiff has since 9th January 2017 been without capacity to continue with this suit and the same is struck out.

f) That in view of the fact that the Plaintiff lost the interests and rights he had over the suit land and the subdivisions thereof on the 9th January 2017, and did not take steps to terminate the proceedings immediately, he should pay the Defendant's costs.

6. That flowing from the foregoing, the court orders as follows;

a) That the suit commenced through the plaint dated the 14th November 2016, and filed on the 15th November 2016, be and is hereby struck out for reasons that the Plaintiff lost interests and rights over the suit land and all its subdivisions on the 9th January, 2017.

b) The Plaintiff do pay the Defendant's costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 26TH DAY OF JULY 2019

In the presence of:

Plaintiff Present

Defendant Present

Counsel Mr. Orengo for the Plaintiff

Ms. Oroni for Anyul for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE