



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

CASE NO. 176 OF 2017

JULIA ALUOCH WESONGA.....PLAINTIFF/RESPONDENT

= VERSUS =

DORCAS ODUNGA OGOYE...1ST DEFENDANT/RESPONDENT

EDWARD OMONDI MOLA.....2ND DEFENDANT/RESPONDENT

R U L I N G

1. The application before me for determination is the Notice of Motion Application dated 24th May 2018 by the Defendants, - **DORCAS ODUNGA OGOYE** and **EDWARD OMONDI MOLA**. It is brought under Order 2 Rule 15 (1) (d) of the Civil Procedure Rules 2010 seeking that the Originating Summons dated 27th October 2017 by which the Plaintiff - **JULIA ALUOCH WESONGA** - instituted this suit be struck out and the suit dismissed with costs to the Defendants. The Application is based on grounds that this Court lacks jurisdiction to entertain the Plaintiff's claim.

2. The Application is supported by the Affidavit of the Defendants' Advocate on record, **FRANCIS OMONDI**. He depones that the prayers sought by the Plaintiff in her Originating Summons are by nature a succession dispute that does not relate to the use and occupation of the suit property but to its administration and distribution, which make it fall within the jurisdiction of the High Court, not that of the Environment and Land Court. The Plaintiff in her Originating Summons seeks *inter alia* cancellation of registration of **LR Nos BUKHAYO/MUNDIKA/13084** and **13085** to revert back to the original **BUKHAYO/MUNDIKA/10419**. After the titles are cancelled she prays for the original **BUKHAYO/MUNDIKA/10419** to be properly, fairly and equally distributed or, in the alternative, that she be given equal share of the suit property which was not disclosed at the time of confirmation of grant.

3. The Application is opposed vide the replying affidavit of **JULIA ALUOCH WESONGA**. She admits that the 1st Defendant is her sister and they engaged in a tussle over their deceased mother's properties in **BUSIA HIGH COURT SUCCESSION CAUSE NO. 356 OF 2010** after the 1st Defendant tried to disinherit her. She succeeded and was declared the 1st Defendant's co-administratrix. Consequently she was awarded half the properties namely **LR NO BUKHAYO/MUNDIKA/8694, 8595, 8593** and **8598** but later realized that the suit property herein had been fraudulently left out in the schedule of assets for distribution.

4. The Plaintiff's reason for filing this suit for cancellation of the titles **BUKHAYO/MUNDIKA/13084** and **13085** and rectification of the register to **BUKHAYO/MUNDIKA/10419** is that the register erroneously indicates the name of the registered proprietor as **DORCAS ODUNGA OGOYE**, the 1st Defendant, and the same was done without authority from succession documents, yet it originated from their deceased mother's parcel of land. Once the register reflects the correct ownership, the matter of its redistribution in accordance with the succession process can then be carried out at the High Court. She states further that since the suit property was never subjected to the succession process, her claim cannot be termed an abuse of Court process. The Plaintiff further faults the Defendants for having their Application supported by an Affidavit sworn by their Advocate yet it bears contentious facts and issues.

5. Parties canvassed the Application by way of written submissions. The Applicants' submissions were filed on 7th December 2018. After reiterating their version of events counsel for the Defendants submitted that the singular question to be answered is whether this Court has jurisdiction to entertain the Plaintiff's claim as set out in her originating summons. He quoted Article 162 (b) and 162 (3) of the Constitution as read with Section 150 of the Land Act and sections 4 and 7 of the Environment and Land Court Act. He contended that this Court is vested with authority to determine disputes relating to the environment and the use, occupation, and title to land and relied on the Court of Appeal case of **Co-operative Bank of Kenya Limited Vs Patrick Kangethe Njuguna & 5 Others (2017) eKLR**. On the aspect of a Court downing its tools once it holds that it lacks jurisdiction he quoted the case of **Mohammed Abdi Mahamud Vs Ahmed Abdullahi Mohamad & 3 Others (2018) eKLR**.

6. The Plaintiff's submissions were filed on 5th November 2018. Interestingly, the Plaintiff dwells more on the fact that the Supporting

Affidavit to the Application was sworn by the Defendants' Advocate as opposed to the Defendant's themselves. Counsel for the Plaintiff opines that the aforesaid action offends the provisions of Order 19 rule 3(1) of the Civil Procedure Rules whose import is that an Advocate is only allowed to swear an affidavit in interlocutory applications without contentious matters. He reiterates that the Succession Court can only redistribute the suit property after the title is rectified by this Court. The Plaintiff has quoted two authorities, **Republic Vs Attorney General & 2 Others Exparte South and Central (Thika) Investments Limited (2015) eKLR** and **Albany Taylor & Another Vs Christopher Taylor & Another (2008) eKLR** both supporting his assertion that an Advocate should not swear an Affidavit on behalf of his clients except in certain cases.

7. I have read the respective parties pleadings, submissions and the applicable law. The central issue for determination is the question of jurisdiction. As held in the celebrated case of **Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd [1989] eKLR**,

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

8. The Originating summons by the Plaintiff lists the following questions verbatim:

"1. THAT the registration of Land parcel No. LR BUKHAYO/MUNDIKA/13084 and LR BUKHAYO/MUNDIKA/13085 be cancelled and be reverted back to the original LR BUKHAYO/MUNDIKA/10419 for proper, fair and equal distribution

2. THAT entirely without prejudice to the foregoing, the Applicant and the 1st Respondent be given equal share in the parcel that was not disclosed to the Court at the time of confirmation

3. THAT the 1st Respondent be ordered to give the 2nd Respondent his share from the share belonging to the 1st Respondent since he is a purchaser on the 1st Respondent's share"

9. It is evident from the prayers sought that the Originating Summons as worded is delving into issues of administration and distribution of the deceased's estate that are wholly within the jurisdiction of the High Court. In the High Court Ruling delivered on 25th November 2015 and annexed as Exhibit JAW 4 to the Plaintiff's supporting affidavit, the Court not only revoked the 1st Defendant's confirmed grant but also ordered cancellation of transfers made in her favour pursuant to the impeached grant, with reference to the suit properties mentioned therein. He further made the Plaintiff a joint Administratrix of the deceased's estate including all the deceased's declared and undeclared assets, not only the portion presented to it. Paragraph 13 thereof states as follows:

"It is the hope of this Court that going forward, the two will agree on distribution failing which either Administratrix is at liberty to seek the Court's intervention"

Moreover, in his submissions, counsel for the Plaintiff by his own admission and revealing that he knows how the case should be dealt with categorically states thus;

"In any event the Succession Court still has immense powers to revoke the existing Certificate of Confirmation of grant under Section 76 of the Law of Succession Act and re-open confirmation proceedings to include all property of the deceased person"

10. Informed by the foregoing pronouncements, it is beyond comprehension why the Plaintiff would seek redress in a separate forum. This Court is usually tasked with succession matters only to determine issues of land ownership after the file is referred to it by the High Court handling the main succession claim; not by parties *suo moto*. I take cognisance of the fact that the Plaintiff was initially acting in person and may not have been sufficiently informed and aware of the intrinsic legal matters involved. However, having acquired representation later on and before the filing of the current Application by a qualified legal professional, Counsel for the Plaintiff should have informed his client, corrected her mistakes and proceeded with the case in the correct forum. The authorities quoted by the Plaintiff have little bearing on the matter at hand. Having found that this Court lacks jurisdiction to entertain this claim, the question of swearing of an Affidavit by the Defendants' Advocate is immaterial and cannot cure the glaring defects in the Plaintiff's claim. This is clearly a matter for probate and administration court.

11. The upshot of the foregoing is that the Notice of Motion Application dated 24th May 2018 is hereby allowed in terms of prayer (a). Since the parties are closely related, to avoid further strain each shall bear their own legal costs.

Dated, signed and delivered at Busia this 24th day of July 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff/Respondent: Absent

Defendant/Applicants: Absent

Counsel of the Plaintiff/Respondent: Absent

Counsel of the Defendant/Applicants: Absent

Court Assistant: Nelson Odame

Ruling delivered on notice