



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 197 OF 2017

JORAM ADALA OKUBI.....APPLICANT

VERSUS

SAMUEL MALERA LUKIRI (suing for and on behalf

of the estate of MUSA OUNDO MUSALA).....RESPONDENT

R U L I N G

1. The application before me for determination is a motion on notice dated 7/9/2018 and filed on 14/9/2018. It is brought under Order 2 Rule 15(1) (b) (c) and (d) of Civil Procedure Rules and seeks, in the main, to have the Plaintiff's suit struck out. Costs of the suit are also asked for. The Applicant – **JORAM ADALA OKUBI** – is the Defendant in the suit. The Respondent – **SAMUEL MULERA LUKIRI** – is the Plaintiff. It is the capacity in which the Respondent has filed the suit that is under focus. The Respondent states that he has brought the suit **“for and on behalf of the estate of MUSA OUNDO MUSALAMA”**. The Applicant avers that the Respondent has no capacity, the same being the exclusive entitlement of one LUKIRI MUSA MUSALAMA by dint of a grant of letters of administration dated 26/5/2015.

2. The legal tussle between the parties relate to land parcel SAMIA/LUCHULULO/BUKHULUNGU/1269 which the Applicant is accused of illegally subdividing into land parcels Nos. SAMIA/LUCHULULO/BUKHULUNGU/1596 and SAMIA/LUCHULULO/BUKHULUNGU/1597. The Respondent's position is that the Applicant was a purchaser of a portion of the land but he was refunded his money and was supposed to vacate the land. The Respondent denies these allegations and avers that he has lawful interests in the land.

3. But the issue at hand does not involve consideration of the merits of the case. It is all about the Respondent's legal capacity to bring the action.

4. The Respondent made a response vide a replying affidavit dated 1/10/2018 filed on the same date. He stated, *inter alia*, that he has the requisite capacity as he has a grant Ad Litem issued to him on 26/6/2014. He also stated that he is challenging the grant issued to LUKIRI MUSA MUSALAMA.

5. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 18/10/2018. The submissions reiterate and amplify what the application contains. In addition, the relevant Statutory Provisions – **like Sections 82 and 80 (2) of the Succession Act (cap 160)** – were cited to explain and back-up the Applicant's position on the issue. The decided case of **OTIENO Vs OUGO & Another: [1986 – 1989] EAL R 468** was cited as a further back-up measure.

6. The Respondent's submissions were filed on 30/10/2018. The Respondent made reference to the prayers in his suit and some contents of his replying affidavit. The rest of his submissions seem to relate to the merits of his suit, with him ultimately asking that the suit be heard instead of it **“undergoing a forced abortion in the hands of the Defendant ...”**.

7. I have considered the application, the response made, and the rival submissions. I have had a look at the pleadings too. The issue for determination is rather straightforward. And the issue is: Does the Plaintiff, who is the Respondent, have the requisite capacity to bring this suit here? The applicable law is as stated by the Applicant. And it is as follows: **You cannot bring a case in respect of an estate of a deceased person without first obtaining the requisite grant from a competent court of law enabling you to bring the case or take other intended action.** The Respondent herein says he has such a grant. But what he avails is a grant Ad Litem dated 26/6/2016 expressly stating that it was issued to him for the **“purposes only for defending case number ELC No. 80/2011 and CMCC No. 32/2002”**. The suit herein is not one such case. And it is clear that the grant was purpose – specific.

8. The Respondent is labouring under a serious misdirection to think that the grant he has entitles him to file this suit. The purpose of the grant he possesses is express and clear on the face of it. It appears to me that the Respondent is knowingly misleading himself or he is in serious want of comprehension of the contents of the grant he possesses. He has talked much about what is obviously related to the merits of his suit but that is not for consideration at this stage. The crucial issue is whether he has capacity to bring the suit. And it is clear he does not.

9. The upshot is that the application herein is merited. The response of the Respondent is ineffective, unfocussed, and rather jumbled. The grant he has availed is the wrong one. It is also not right for him to say he is opposing the grant given to someone else in respect of the estate of the deceased. He needed to show that he has the right grant.

10. Without much ado therefore, I allow the application herein. This suit is therefore struck out (prayer 1) and the Respondent is to pay the costs of this suit (prayer 2).

Dated, signed and delivered at Busia this 16th day of July, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant/Defendant: Absent

Respondent/Plaintiff: Present

Counsel for the Applicant/Defendant: Present

Counsel for the Respondent/Plaintiff: Absent

Court Assistant: Nelson Odame