



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 330 OF 2016

SAMWEL ONYANCHA OMARIBA.....1ST PLAINTIFF

PAMELA BONARERI OMURWA.....2ND PLAINTIFF

VERSUS

EDWIN ARERI NYAUMA.....1ST DEFENDANT

ENOCK MOKUA.....2ND DEFENDANT

MARY KEMUNTO KEGORO.....3RD DEFENDANT

COUNTY LAND REGISTRAR, KISII COUNTY.....4TH DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs are the legal representatives of the estate of Josephine Moraa Onyancha (deceased), who was the wife of Lucas Okioma Nyauma (deceased). The 1st Plaintiff is the father while the 2nd defendant is the sister of the late Josephine Moraa Onyancha. Lucas Okioma Nyauma was the son of Nyauma Osamo (deceased) who was the registered owner of land parcel number CENTRAL KITUTU/MWAMOSIOMA/406. Before his demise, Nyauma Osamo divided land parcel number CENTRAL KITUTU/MWAMOSIOMA/406 equally between his two sons namely Lucas Okioma Nyauma and Mwembi Nyauma. The said Lucas Okioma Nyauma lived on his portion of land with his wife Josephine Moraa Onyancha and their children upto the time of his death. After his death the 1st defendant who is one of the brothers of the late Lucas Okioma Nyauma chased away his late brother's widow - Josephine and her children and they moved back to the plaintiff's home until Josephine's death.

2. After Josephine's death, the Plaintiffs discovered that the 1st defendant had wrongfully registered the suit land in his name without obtaining a grant of letters of administration in respect of the estate of Nyauma Osamo. He had subsequently sub-divided the suit land into several portions namely CENTRAL KITUTU/MWAMOSIOMA/2569, 2570, 2571, 2572/ 3872, 3873, 3874, and 3875 and transferred titles no. 2571 and 2572 to the 2nd and 3rd Defendants.

3. The plaintiffs therefore pray that the said titles which were wrongfully transferred to the Defendants be cancelled and the register be rectified so that the original title reverts to the name of Nyauma Osamo.

The 1st defendant filed a defence dated 30th November 2016 in which he denied the plaintiffs claim and stated that the late Josephine Moraa Onyancha was not married to the late Lucas Okioma Nyauma. He maintained that he was the lawful owner of land parcel no. CENTRAL KITUTU/MWAMOSIOMA/406.

4. Later on 29th December 2016 the 1st, 2nd and 3rd Defendants filed a joint defence in which they stated that they would raise a preliminary point of law that the Plaintiffs have no locus standing to sue on behalf of the estate of the late Nyauma Osamo who was the registered owner of land parcel no. CENTRAL KITUTU/MWAMOSIOMA/406 and hence the suit ought to be struck out. It is this Preliminary objection that is the subject of this ruling.

5. The Preliminary Objection was argued orally and Mr. Soire, learned counsel for the defendants submitted that the plaintiffs have no locus standi. He submitted that the suit property was registered in the name of Nyauma Osamo – deceased who was married to the late Josephine Moraa Onyancha. He stated that even though the plaintiffs had annexed a grant of letters of administration in respect of the estate of

Josephine Moraa Onyancha, the said Josephine Moraa Onyancha was not the registered owner of the suit land nor was she administrator of the estate of Nyauma Osamo Deceased.

6. In his response Mr. Ombachi learned counsel for the Plaintiffs submitted that the P.O was not a pure point of law as contemplated by the celebrated case of **Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited 1969 EA 696**. He submitted that the Plaintiffs had raised the issue of fraud and illegality in the transfer of the suit property. He said that contrary to their P.O, the defendants are currently registered as the owners of the suit property and they have prayed that the plaintiffs be evicted for the suit property. He submitted that if the P.O was a proper P.O it should not have required any reference to documents. He urged that the matter goes to full trial so that the issue of fraud could be determined.

7. In his brief rejoinder Mr. Soire submitted that the issue in dispute is L.R NO. CENTRAL KITUTU/MWAMOSIOMA/418. This is the title that the 1st Defendant fraudulently dealt with. The said title is in the name of Nyauma Osioma. He submitted that it is trite law that the property of a deceased person can only be dealt with after obtaining a grant of Letters of administration. In the instant case the plaintiffs had failed to produce the grant in respect of Nyauma Osamo. All they have is the grant in respect of the estate of Josephine Moraa Onyancha. They have therefore not laid any material before the court to show that the said Josephine Moraa had any share in the estate of the late Nyauma Osamo. He maintained that locus standi is a Preliminary point of law.

ISSUES FOR DETERMINATION

8. The singular issue for determination is whether the plaintiffs have locus standi to bring this suit against the defendants.

ANALYSIS AND DETERMINATION

9. The starting point is to define what a Preliminary point of law is.

In the case of **Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited 1969 EA 696** the court held as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.

Justice Newbold in the said suit argues that;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”

10. Locus standi is the right to be heard or appear in court or other proceedings. This is a point of law that should be resolved at the earliest possible opportunity. I am guided by the case of **Mary Wambui Munene v Peter Gachuki Kingara & 6 Others. Supreme Court Petition No 7 of 2013 (2014) eKLR**.

11. It is trite law that a party is bound by his pleadings. Nowhere in the plaint do the plaintiffs mention that a grant of letters of administration in respect of the estate of Nyauma Osamo has been issued. Even when the defendants raised this issue in their defence, the plaintiffs did not deem it fit to respond to it.

12. It is not in dispute that the subject matter of this case is land parcel no CENTRAL KITUTU/MWAMOSIOMA/418 which is registered in the name of Nyauma Osamo deceased. The plaintiffs claim that the late Josephine Moraa was entitled to a share of the suit property by virtue of the fact that she was married to one of the sons of the said Nyauma Osamo who was entitled to a share of his late father's estate. That may be so, but before they can stake a claim on behalf of the said Josephine Moraa, they must demonstrate that the said Josephine Moraa was an administrator of her late husband's estate. Having failed to do so they have failed to demonstrate the nexus between the late Josephine Moraa and the suit property. In the circumstances, I find and hold that the plaintiffs have no locus standi to sue the defendants. This does not preclude the Children of the late Josephine Moraa from passing their interest in their late father's estate through Succession proceedings.

13. The upshot is that the Preliminary Objection is upheld and the suit is hereby struck out. This being a suit involving members of the same family, I make no orders as to costs.

Dated, signed and delivered at Kisii this 18th day of **October 2019**.

J.M ONYANGO

JUDGE