



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC CASE NO. 290 OF 2017**

**(Formerly Kisii ELC case No. 96 of 2016)**

**GRACE ADHIAMBO OGAGA (Suing as legal**

**representative of the estate of**

**TURUFENA KEMUNTO OGAGA -DECEASED.....PLAINTIFF**

**VERSUS**

**WILLIAN OCHIENG OGAGA.....1<sup>ST</sup> DEFENDANT**

**TOM OCHIENG OGAGA.....2<sup>ND</sup> DEFENDANT**

**ELKANA OKOTH AJUOGA.....3<sup>RD</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff filed this suit against the defendants by way of a plaint (Multi-Track) dated 11<sup>th</sup> April, 2016. She is seeking orders hereunder:-

**i. A declaration that the insertion of the names of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants on the suit land parcel LAMBWE WEST/LAMBWE WEST 'B'/855 was done irregularly, illegally, unlawfully, procedurally and therefore null and void.**

**ii. An order directing the Land Adjudication officer Homa- Bay county & Land Registrar Ministry of Lands Homa- Bay Land Registry to cancel the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the land adjudication record and land registry records with respect to the suit property.**

**iii. An order directed at the Land Adjudication officer & Land Registrar Ministry of Lands Homa- Bay Land Registry to have the suit land parcel revert back into the name of TURUFENA KEMUNTO OGAGA as the sole and absolute owner.**

**iv. Costs of the suit.**

**v. Any other relief that the honourable court may deem fit and just to grant.**

2. Briefly the plaintiff's claim is that the deceased, Trufena Kemunto Ogaga alias Turifena Ogaga was the absolute owner of plot number 855 now known as land parcel number Lambwe West/Lambwe West "B"/855 approximately 13.67 Ha (hereinafter referred to as the suit land). The said deceased died on 2<sup>nd</sup> March, 2002.

3. The plaintiff further claims that on 19<sup>th</sup> September, 2005, the 4<sup>th</sup> defendant inserted the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants un-procedurally, irregularly, fraudulently and or illegally in the adjudication record. As a result, the 4<sup>th</sup> defendant registered the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants as co-owners of the suit land and title deed issued accordingly. The plaintiff has pleaded particulars of fraud and or illegality by the defendants at paragraph 6 in the plaint as follows:-

**a) Transfer and/or dealing with the suit land parcel without succession.**

- b) Inserting the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the register without the consent or knowledge of the deceased.**
- c) Illegally disposing off portions of the suit property.**
- d) Interfering with the records of the suit land parcel without the consent or knowledge of the deceased or the plaintiff herein.**
- e) Dealing with the suit land parcel without consent and/or knowledge of all the beneficiaries.**
- f) Inserting the names of the 1<sup>st</sup> to the 3<sup>rd</sup> defendants in the adjudication record and land register without following due procedure.**
- g) Altering the adjudication and land registry records of the suit land parcel without the consent and/or knowledge of the deceased.**
- h) Altering the records of the suit land parcel without objection proceedings involving the original owner (deceased).**
- i) Transferring the suit land parcel into the names of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants without consent from the Land Control Board.**

4. The 1<sup>st</sup> and 2<sup>nd</sup> defendants appear in person and each of them filed a memorandum of appearance dated 19<sup>th</sup> August 2016 together with a notice of admission of the suit of the even date. They did not file a statement of defence in the suit.

5. The 3<sup>rd</sup> defendant neither entered appearance nor filed a statement of defence within the prescribed period of time or at all.

6. The 4<sup>th</sup> Defendant filed a memorandum of appearance dated 2<sup>nd</sup> June, 2016 and a statement of defence dated 22<sup>nd</sup> December, 2016 in which the plaintiff's claim is denied. In the alternative, the 4<sup>th</sup> defendant stated that if any registration was done on the suit land, although denied, then it was done in good faith. That the 4<sup>th</sup> defendant is not an expert in detecting fraud and could not and is not mandated to either investigate or detect if the documents presented for registration at their office were forged.

7. The 4<sup>th</sup> defendant, further, gave notice to raise a preliminary objection against the suit in that the same is statute barred under Limitations of Actions Act Cap 22 Laws of Kenya, the Public Authorities Limitation Act Cap 39 Laws of Kenya and the Land Adjudication Act Cap 284 Laws of Kenya. He contended that this is not the proper platform through which the plaintiff can seek redress. The plaintiff did not appeal the award by the adjudication officer in objection No. 967 to the Minister. The 4<sup>th</sup> defendant objected to the jurisdiction of this court to entertain this matter hence the reliefs sought untenable. He urged the court to dismiss the suit with costs to the defendants.

8. In his reply to defence dated 18<sup>th</sup> May, 2017, the plaintiff reiterated the contents of the plaint. She stated that the court has jurisdiction to grant the prayers sought in the plaint.

9. By a Notice of Preliminary Objection dated 22<sup>nd</sup> December, 2016, Winny Ochwal, learned counsel for the 4<sup>th</sup> Defendant raised a preliminary objection on points of law as follows:-

- a) The subject matter in the suit has previously been addressed and or adjudicated before a relevant and competent forum. Consequently this suit is Re-judicata.
- a) The issues raised in this suit arose in the year 2005 and hence the suit is barred under the Limitation of Actions Act Cap 22, laws of Kenya and the Public Authorities Limitation Act Chapter 39 Law of Kenya.
- b) The Honorable court is bereft of jurisdiction to entertain this suit under the Land Adjudication Act Chapter 284 laws of Kenya.
- c) The suit neither raises nor discloses any reasonable cause of action
- d) This suit is otherwise an abuse of the due process of the court.

10. On 2<sup>nd</sup> November, 2017, the suit came up for hearing. By consent of Mr Bagada counsel instructed by P. D Onyango counsel for the plaintiff and Ms E Opiyo counsel for the 4<sup>th</sup> defendant, the court directed that the preliminary objection be heard first and it be argued by way of written submissions.

11. Ms Opiyo, learned counsel for the 4<sup>th</sup> respondent filed submissions dated 5<sup>th</sup> December 2017. She highlighted the reliefs sought in the plaint and urged the court to dismiss the suit.

12. Counsel, further, submitted on issues for determination as follows:-

- a) Whether the suit is res-judicata. She relied on Sections 6 (1),7, 9 to 12, 20 to 22, 25 to 27, 29 of the Land Adjudication Act Cap 284 Laws of Kenya**

b) Whether the suit is barred under Section 4 (2) of the Limitation of Actions Act Cap 22 Laws of Kenya and Section 3 (1) of the Public Authorities Limitations Act Cap 39 laws of Kenya. She cited authorities;-

i. Iga –Vs- Makerere University (1972) EA 65 that, inter alia, a plaint barred by limitation is a plaint “barred by law.”

ii. Gathoni -Vs. Co-Operative Creameries Ltd Civil Application No. 122 of 1981 by Potter, J in respect of unreasonable delay.

iii. Tom Oyango Oketch –Vs – Kenyatta National Hospital (2016) e KLR regarding prolonged delay and that it has to be explained.

c) Whether the court has jurisdiction to entertain the suit under the Land Adjudication Act Cap 284 Laws of Kenya. She relied on the case of Bosire Ogero –vs- Royal Media Services (2015) e KLR where the court held that the issue of limitation goes to the jurisdiction of the court and if the matter is statute barred then the court has no jurisdiction to entertain it.

d) Whether the suit discloses any reasonable cause of action against the 4<sup>th</sup> defendant. She cited Sections 26, 26A, 27, 28, and 29 of the Land Adjudication Act Cap 284 Laws of Kenya thereof-

13. Mr.P.D. Onyango, learned counsel for plaintiff filed submissions dated 8<sup>th</sup> December 2017 whereby he referred to the ingredients of a preliminary objection as established in the case of Mukhisa Bisquit Manufacturing Co.Ltd-vs-West End Distributors Company Ltd (1969) EA 696. He submitted that the issues are contentious and need to be determined at the hearing of the suit. He termed the preliminary objection as a waste of court’s time, lacks merit and it should be dismissed with costs.

14. Counsel continued and submitted that :-

a) The subject matter in the suit has not previously been addressed and or adjudicated before a relevant and competent forum hence the suit is not res-judicata. He relied on Joseph Mwai Kamurwa V. Joseph Gichiri & 3 others (2015) e KLR, Gideon Mike Mbuvi –v- Registered Trustees of National Christian Council of Kenya & 3 others (2014) e KLR, Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya, Sections 13 and 19 of the Environment and Land Court Act, 2011 ( ELC Act ) and Article 162 (2) (b) of the Constitution of Kenya, 2010.

b) The issue raised in this suit arose in the year 2005 hence the suit is not barred under the Limitation of Actions Act Cap 22 of laws of Kenya and the Public Authorities Limitation Act Cap 39 laws of Kenya. He cited authorities namely Richard Oduol Opole-vs-Commissioner of Lands and 2 others (2015) eKLR, Justus Tureti Obara-vs-Peter Koipeitai Nangisoi (2014) eKLR. He relied on Sections 7, 26 (a) of the Limitation of Actions Act Cap 22, Sections 3, 6 of the Public Authorities Limitation of Actions Act Cap 39, Article 162 (2) (b) of the Constitution of Kenya, 2010, Section 13 (1) of the ELC Act 2011 and Section 30 of the Land Adjudication Act and the Registered Land Act Cap 300 Laws of Kenya (repealed).

c) The Honourable court has jurisdiction to entertain this suit under the Registered Land Act and not Land Adjudication Act Chapter 284 Laws of Kenya as a barrier. He cited the Registered Land Act Cap 300 (repealed), sections 27, 29 and 30 of the Land Adjudication Act Cap 39 Laws of Kenya, Migori ELCC No. 270 of 2017; John Ouma Daniel-vs-George Okech Oyugi, Section 13 of the ELC Act, 2011 and Article 162 (2) (b) of the Constitution of Kenya, 2010.

d) The suit does raise and discloses a reasonable cause of actions and is not an abuse of the court process. He referred to, among others, paragraphs 4, 5, 6 and 7 of the plaint.

15. I have considered the plaint, the statement of defence by the 4<sup>th</sup> defendant, the preliminary objection and submissions by counsel. The issues for determination that I have distilled from the submissions are;-

a) Is the suit res-judicata?

b) Are the issues in this suit time barred?

c) Jurisdiction of this court to entertain the suit.

d) Disclosure of any reasonable cause of action and any abuse of the court process in the suit

16. Res-judicata principle is anchored on Section 7 of the Civil Procedure Act which provides;-

“ No court shall try and suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issues has been subsequently raised, and has been heard and finally decided by such court.”

17. In order for res judicata to apply in a matter, the following are the essentials;

a) There must have been a previous suit between the same parties.

**b) The issue before the court must have been finally determined in that previous suit.**

**c) The issue must have been determined by a court having competent jurisdiction.**

18. The plaintiff's learned counsel submitted that the defendants committed an illegality by the alteration of adjudication record whereby the names of 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants were inserted therein un-procedurally, illegally and fraudulently by land Adjudication officer, Homa Bay after the death of the proprietor of the suit land. He also stated that no hearing of objection was done on the same matter and involving the same parties including the plaintiff and her mother. That the owner of the suit land was deceased and no beneficiary was notified of any objection in the matter. I have already taken into account the particulars of alleged fraud pleaded by the plaintiff in the plaint.

19. Counsel argued that the plaintiff's claim is made under Section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya) for recovery of land and the Registered Land Act (cap 300 Laws of Kenya) under which the land was registered hence it be determined by this court. Counsel submitted that fraud was discovered in February, 2016 while the suit was filed in April 2016. He further submitted that the register was closed and he sought help in this court's decision in ELCC No. 270 of 2017 (supra), section 13 (1) ELC Act and Article 162 (2) (b) Constitution, 2010 on jurisdiction of the court.

20. According to the 4<sup>th</sup> defendant's learned counsel, a 1st objection vide 966/1083 was lodged by Ramadhan Maftal Ondur and allowed on 19<sup>th</sup> September, 2005, but later reversed. A 2<sup>nd</sup> objection vide 967 was lodged on 11<sup>th</sup> October, 2005 by the 3<sup>rd</sup> defendant and it was allowed accordingly. The 2<sup>nd</sup> objection resulted in the land being registered in the names of the plaintiff, 1<sup>st</sup> defendant and the 2nd defendants who are all children of the deceased and the 3<sup>rd</sup> defendant, a buyer owning one and half acres of undivided shares of the suit land. The objections were determined by the adjudication officer as provided under section 26 of the Land Adjudication Act Cap 284 Laws of Kenya.

21. Counsel contended that the matter is res judicata while the plaintiff disputed the allegation and claimed that there is no proof thereof. There was no appeal from the decision of the adjudication officer to the Minister whose order shall be final. Moreover, there was no application for Judicial review or appeal from the Minister's decision, if any, to the Environment and Land court which is seized of appellate jurisdiction under **Section 13 (1) ELC Act 2015 (2011)**. Failure to file appeal or apply for judicial review is quite fundamental. It is not a mere technicality of procedure which is curable by **Article 159 (2) (d) of the Constitution of Kenya, 2010** on case to case basis.

22. Counsel submitted that under Section 26 of the Limitation of Actions Act Cap 22 Laws of Kenya and Section 3 of the Public Authorities Limitation Act Cap 39 Laws of Kenya, the present proceedings are founded on fraud hence a tort. The plaintiff has not given an explanation for prolonged delay in filing the suit as judicially recognized in the case of **Tom Onyango** (supra). Clearly the suit is statute barred as against the defendants; **Oduol Opolo case** (supra).

23. Sections 26 to 29 of the Land Adjudication Act (Cap 284 Laws of Kenya) give elaborate and exhaustive procedural steps for dispute resolution under the Act. **Section 29 (1)** of the Act, provides ;

**“(1) any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by –**

**a. Delivering to the Minister an appeal in writing specifying the grounds of appeal; and**

**b. Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”**

24. The Constitution of Kenya, 2010 and some statutes have donated jurisdiction to various organs to resolve disputes including land matters. In the instant suit, those organs are, among others, the Adjudication officer and the Minister as provided for under the Land Adjudication Act (Cap 284 Laws of Kenya). The organs and the procedures established in their hierarchy of dispute resolution must be carried in high esteem. I am inclined to agree with the decision in the case of **Alice Mweru Ngai-vs-Kenya Power and Lighting Co. Ltd (2015) eKLR**, whereby B N Olao, J, stated;

***“It is in the interest of proper, orderly and efficient administration of justice that proper procedures provided for in the hierarchy of dispute resolution be followed and that the organs mandated to arbitrate over such disputes be respected and allowed to perform their statutory responsibilities. That is why those procedures and such organs established.”*** (emphasis provided)

25. By virtue of Section 7 of the CPA Cap 21 LOK, the suit is res judicata and statute barred. This court has no jurisdiction to entertain the matter; see **Bosire Ogero case** (supra).

26. The Supreme Court of Kenya restated it's pronouncement on jurisdiction in **Abdallah-vs-Building Centre (K) Ltd & 4 others (2014) SCK**, thus;-

***“A litigant who approaches the court must be clear which jurisdiction, he/she intends to invoke. In Samwel Kamau Macharia and another-vs-Kenya Commercial Bank and 2 others, Application No. 2 of 2011 (2012)eKLR, this court pronounced itself on jurisdiction thus (paragraph 68);***

***‘ (68) A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1<sup>st</sup> and second respondents in submission that the issue as to whether***

**a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court can not entertain any proceedings.**” (emphasis added)

27. The instant matter was heard and determined by the adjudication officer under Section 26 of the Land Adjudication Act Cap 39 Laws of Kenya. There was no appeal to the Minister within the prescribed period of time or at all. This is neither an appeal from the decision of the Minister nor an application for judicial review of the decision. There is no reasonable cause of action disclosed in this suit which is otherwise an abuse of the court process.

28. I find the preliminary objection dated 2<sup>nd</sup> December, 2016 by the 4<sup>th</sup> defendant full of points of law; see **B-vs-Attorney General (2008) KLR 535**. The same is merited and I uphold it in favour of the 4<sup>th</sup> defendant and co-defendants.

29. Accordingly I strike out the suit against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants with costs to be borne by the plaintiff.

**DELIVERED, DATED and SIGNED at MIGORI this 1<sup>st</sup> day of February, 2018.**

**G.M A ONGONDO**

**JUDGE**

**In the presence of:**

Mr John Emukule, learned counsel holding brief for P D Onyango, learned counsel for the plaintiff

Ms Esther Opiyo, learned counsel for the 4<sup>th</sup> defendant

Tom Maurice-court assistant