



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 42 OF 2015**

**IN THE MATTER OF TRUSTS OF THE WILL OF JONAN OMAIDO MISHAE**

**AND**

**IN THE MATTER OF THE TRUSTS OF THE WILL OF ALFRED ARTHUR DURANI MARTINEAU**

**IN THE MATTER OF LAND REFERENCE NO. 8699/7**

**BETWEEN**

**ROBELLA BETTY AYODE OMAIDO.....PLAINTIFF**

**VERSUS**

**ELIFINIAS JACKSON EKIM OMAINDO.....DEFENDANT**

**RULING**

1. The defendant filed an application dated 2/9/2017 seeking the following orders:-

**1. That the Environment and Land Court has no jurisdiction to hear and determine the issues raised by the plaintiff originating summons.**

**2. That the suit herein is *res judicata* having been determined by this court vide *Kitale ELC No. 11 of 2014*.**

**3. That the plaintiff is not a person entitled to take out an originating summons under Order 37 Rule 1 of the Civil Procedure Rules 2010.**

2. The grounds upon which the application is based are as found in the affidavit of the defendant sworn on 2/9/2017 in support of the motion.

3. The applicant state that the suit is *Res Judicata* having been determined by this court vide ***Kitale ELC No. 11 of 2014***. It is stated that the originating summons shows that the plaintiff claims touch on the Wills of deceased persons and issues of dependency since the applicant was registered as owner of the suit land pursuant to the said Wills. The applicant states that the plaintiff seeks to have the court determine if those listed in the originating summons are dependents of **Jonan Onaido Mishae** and **Alfred Arthur Durani Martineau** and this would require this court to examine the Wills of the two deceased persons in order to determine the issue, yet these issues fall within the jurisdiction of the High Court as they fall under the Law of Succession.

4. The applicant sets out the provisions of **Section 13 of the Environment and Land Court Act** as read out together with **Act 162 (2) (b) of the Constitution**. The applicant has stated that these succession issues were the subject of the case: ***Robella Betty Ayade Omaido -vs- E.J.E. Omaido 2015 eKLR - Kitale ELC No. 11 of 2014***.

5. Regarding where the suit is *Res Judicata* the applicant cites **Section 7 of the Civil Procedure Act** .

6. He states that the matter raised in this suit by the plaintiff are the same matters raised by the plaintiff in the case of ***Robella Betty A. Omaido -vs- E.J.E. Omaido 2015 eKLR*** which decision he has annexed to the affidavit in support of the application. That case, he states, was heard and dismissed with costs and this court held that it lacked jurisdiction to entertain the plaintiff's originating summons and that the plaintiff was not entitled to take out originating summons. The parties are still the same in both cases and the court is still the same. The suit has been brought by way of originating summons just as ***Kitale ELC No. 11 of 2014***. The prayers are slightly modified. The defendant says the suit is an abuse of the process of the court.

7. On the issue of whether the plaintiff is entitled to take out an originating summons under **Order 37 Rule 1** of the **Civil Procedure Rules 2010**, the plaintiff avers that she is not. **Order 37 Rule 1** he states is applicable only to proceedings under the **Law of Succession Act (Cap 160 L.O.K)** by virtue of **Order 41(3) and (1)** the **Probate Administration Rules** and not to land matters. **Order 37** also applies during the hearing of a summons for Confirmation of a Grant only in certain instances. He cites the case of **Re Njoroge Mbote, 2002 eKLR**. He states the Grant which led to his registration as owner of the suit land was confirmed over 23 years ago.

8. The applicant argues that where the proceedings relate to **Law of Succession Act Matters, Order 37 (1) of the C.P.R.** must be read with **Rule 41(4)** of the **Probate and Administration Rules** which restricts the persons who can take out such originating summons to personal representatives “unless the court directs otherwise, the personal representative of the deceased shall be the applicant seeking determination of the question and the person claiming to be so beneficially interested together with the residuary legatee or other person appointed by the court to represent the residuary legatee shall be the respondents.” **Rule 41(3) of the Probate and Administration Rules** restricts the questions to be raised to the issues mentioned in that sub-rule, namely share or estate or condition or qualification attaching to such share or estate and yet these are not the questions which the plaintiff seeks this court to determine.

9. Therefore the defendant urges, the plaintiff is not properly before this court, is not a person entitled to take out an originating summons under **Order 37 Rule (1)** as she is not a person representative of any of the deceased person and the prayers sought are not questions for determination by this court under **Order 37 Rule 1 (a) to (g) of the Civil Procedure Rules**.

#### **The plaintiff's response to the Preliminary Objection**

10. The plaintiff avers that the case **Kitale ELC No. 11 of 2014** was not heard on the merits but was struck out for alleged lack of jurisdiction. He cites **Kerchand -vs- Jan Mohamed [1919-21] EA PLR 64, Isaac Bob Busulwa -vs- Ibrahim Kakinda [1979] HCB 179** and urges that *Res Judicata* doctrine set out in **Section 7** of the **Civil Procedure Act 2010** is inapplicable to this case and that in any case, triable issues having been raised in this case, upholding the doctrine would prevent the plaintiff and the other beneficiaries from enforcing their remedies against the defendant; adding that the doctrine should be construed with care to avoid injustice. He cites **Greenhalgh -vs- Makard 1947 2 ALL E.R. 255** at 257 for this proposition and also **Bertram -vs- Wood 1993 (10) SC 177** at 180 as well as **Bafokeng Tribe -vs- Impala Platinum Ltd and Others 1999 (3) SA 517 (B)**.

11. Regarding the issue of whether the Environment and Land Court has jurisdiction to hear and determine the issues raised by the plaintiff's originating summons, the plaintiff submitted that the suit land, **LR No. 8699/7** measuring **474.7Ha** is held in trust by the defendant; that the trust had been abused; that the trust should now be determined as the defendant, despite endless promises, to the plaintiffs, has been selfish and is intent on disposing of most of the property for his sole benefit. The plaintiff cites **Article 162(2) (b)** of the **Constitution** and **Section 13(1)** of the **Environment and Land Court Act** as granting this court jurisdiction. She urges that she filed this case in the High Court only for the High Court to transfer this matter to this court, opining that the matters in the plaintiff's suit herein are matters that touch on the jurisdiction of this court.

12. As to whether the plaintiff is entitled to take out an originating summons under **Order 37 Rule 1** of the **Civil Procedure Rules 2010**, the plaintiff avers that the objection does not raise a pure point of law, fit for consideration and by raising this objection the plaintiff is merely attempting to pre-empt the plaintiff's suit from being heard. She cites **Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd 1969 EA 696** in support of that position, urging that the 3<sup>rd</sup> point of preliminary objection raises a matter that calls for evidence and ascertainment of facts. This is therefore not a point of law. The plaintiff concludes by saying that the Notice of Preliminary Objection is frivolous, vexatious and an abuse of the court process. But is it?

13. I have perused the decision of my brother the **Hon. Justice E. Obaga** in **Kitale ELC No. 11 of 2014**. In that suit the plaintiff therein who is still the plaintiff herein, approached the court by way of an originating summons, seeking a determination as to whether the defendant holds the title to LR. No. 8699/7 in trust for the plaintiff and other dependants of Jonam Omaido Mishae and Alfred Arthur Durani Martineau. It also sought, as in this suit an order though couched in other language, that the trust if any, should now determine and an order be made that the said land be partitioned among all the children of Jonam Omaido Mishae in equal shares.

14. Upon scrutinizing that decision I find that the issue of how to construe the wills that touch on the land in question reigns supreme in both matters. In that case, as now, the issue of whether the Environment and Land Court had jurisdiction to hear and determine the issues raised by the plaintiff's originating summons was raised.

15. This court had this to say in the earlier related case, that is, **Kitale ELC No. 11 of 2014:-**

**“6. I have considered the submissions by counsel for the parties herein. Order 37 Rule 1 is clear as to who can bring out originating summons. The persons who can do so are listed and the questions which can be determined in the originating summons are listed from (a) to (g) of the same rule. The plaintiff in this originating summons is none of the persons contemplated under Order 37 Rule 1 of the Civil Procedure Rules and the questions she is seeking this court to determine are none of the questions listed under (a) to (g).**

7. On the issue of jurisdiction, there is no doubt that the plaintiff is invoking the wills of Arthur Durani Martineau and Jonam Omaido Mishae. The defendant herein was registered as owner of the suit property pursuant to the said wills. The plaintiff and others who have been listed in the originating summons are seeking the reliefs on the basis that they are dependants. It is argued that there has never been any application for provision of dependants and the wills of the two deceased have never been contested. There is no way the court will address the question raised by the plaintiff without examining the wills of the two deceased persons. Under the Law of Succession Act it is the High Court and to some extent the subordinate court who have jurisdiction to determine the issues of dependency and matters relating to probate. As for this case, it is the High Court which has exclusive jurisdiction to deal with a matter such as this one. I therefore find that the proper court to handle the issues herein is the High Court and not the Environment and Land Court. I find that the preliminary objection is well founded on the two grounds. Even if the plaintiff was to argue that she is claiming to be

interested in the land, she will only do so based on the two wills. The question of her interest as per Order 37 Rule 11 of the Civil Procedure Rules will depend on determination of constructions of the will and declaration of her rights resulting therefrom. The court best placed to address such issue is the High Court. I uphold the preliminary objection and proceed to strike out the plaintiff's originating summons with no orders as to costs".

16. In my view the only difference between this matter is that this matter was commenced in the High Court and transferred here while the earlier suit was commenced in the Environment and Land Court. However the issues are the same, and I find that they were decided in the *Environment and Land Court Decision in Kitale ELC No. 11 of 2014. Robella Betty Ayode Omaido and Eliphineas Jackson Ekim Omaido*. According to *Section 7* of the *Civil Procedure Act* this court cannot therefore proceed to determine these matters as they are *res judicata*.

17. I have noted that in the replying affidavit of **Elphineas Jackson Omaido** dated **6<sup>th</sup> May 2015** which must have been served upon the plaintiff, one of the exhibits, **Gazette Notice No 7065 of 4<sup>th</sup> November 1994** reveals that there was **Eldoret Probate and Administration Cause Number 154 of 1994** in which the matters related to the property and wills in respect of the estate subject matter herein were dealt. This court does not know if the same details had been provided to the plaintiff in *Kitale ELC No. 11 of 2014*. The plaintiff, after the observation by the judge in the previous judgment in *Kitale ELC No. 11 of 2014* appears to have just gone ahead and replicated the same claim before the High Court at Kitale instead of seeking to find out how she could involve herself in the probate and administration cause mentioned above hence the transfer of this matter by the High Court to this court, which she has earlier alluded to in her submissions. In my view, there would have been no better way of proceeding than for the plaintiff in these two suits to seek interpretation of the will or wills of the deceased *within the Probate and Administration Cause No. 154 of 1994 - Eldoret*. That she has not done.

18. The proceedings herein are therefore an abuse of the court process. I therefore strike out the originating summons herein with costs to the defendant.

**Dated, signed and delivered at Kitale on this 22<sup>nd</sup> day of March, 2018.**

**MWANGI NJOROGÉ**

**JUDGE**

**22/3/2018**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Teti for defendant

Mr. Bisonga holding brief for the Plaintiff

**COURT**

Ruling read in open court.

**MWANGI NJOROGÉ**

**JUDGE**

**22/3/2018**