



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 75 OF 2017

(Formerly Kisii ELCC No. 404 of 2014)

NASHON ADEDE OGOLA.....1ST PLAINTIFF

JOSHUA OKETCH OGOLA.....2ND PLAINTIFF

VERSUS

JOSHUA OTIENO MISADHI.....1ST DEFENDANT

JAMES OMOLO OGOMA.....2ND DEFENDANT

SAMWEL ODHIAMBO AKUMU.....3RD DEFENDANT

RULING

1. By a plaint dated 21st October 2014, and filed in court on 23rd October 2014, the plaintiffs namely **NASHON ODEDE OGOLA** and **JOSHUA OKETCH OGOLA** sued the 1st and 2nd and 3rd defendants namely **JOSHUA OTIENO MISADHI**, **JAMES OMOLO OGOMA** and **SAMWEL ODHIAMBO AKUMU** for inter alia;-

- a. Kshs. 5500/= special damages as above together with interest thereon @12% p.a from the date of filling suit until payment in full**
- b. An order of declaration that the defendants are holding a portion of land parcel No. Kanyada/Kotieno-Katuma 'A'/1403 in trust for the plaintiffs as beneficiaries of the estate of Ogola Ugeke.**
- c. An order for the rectification of the register for land parcel No. Kanyada/Kotieno-Katuma 'A'/1403 by deleting the name of Samwel Odhiambo Akumu as proprietor of half share of the said land registering the whole parcel of land in the name of Ogola Ugeke or the plaintiffs.**

2. The defendants filed their statement of defence dated 7th January 2015 and denied the plaintiff's claim. They stated, inter alia; that 1st and 2nd defendants filed and obtained confirmation of grants of letters of administration and confirmed the suit property in the name of the 3rd defendant.

3. The 3rd defendant filed his statement of defence dated 7th December 2015, whereby he claimed that he bought the suit property from the 1st and 2nd defendants who were the lawful administrators of the previous registered proprietor of the suit property. At paragraph 15 of the defence statement, he raised a preliminary objection on points of law as hereunder:-

- i. The plaintiffs' claim is barred by the provisions of the Limitation of Actions Act, Chapter 22 Laws of Kenya.**
- ii. The suit herein is res-judicata and hence barred by the provisions of Section 7 of the Civil Procedure Act, Chapter 21, and Laws of Kenya.**
- iii. The suit herein is Pre-mature, misconceived and bad in law.**
- iv. The plaint herein does not disclose any reasonable cause of action against 3rd defendant.**

v. **The instant suit amounts to and/or constitutes an abuse of the due process of court.**

vi. **The plaintiffs are Non-suited.**

4. The plaintiffs are represented by Mr. G.S. Okoth Advocate. The 1st and 2nd defendants appear in person. The 3rd defendants are represented by Oguttu , Ochwangi, Ochwal and Co. Advocates formerly Oguttu Mboya and Co. Advocates.

5. The 3rd defendants' learned counsel filed submission dated 7th March 2018 in which the entire proceeds herein were termed still born thept and misconceived. Counsel urged the court to strike out the suit with costs to the defendant. Counsel further analysed five (5) issues for determination, invoked and relied on authorities, inter alia, **Section 82 of the Law of Succession Act (Cap 160 Laws of Kenya), Law Society of Kenya –v- Commissioner of Lands & 2 others (2001) KLR 706-712, Section 93 of the Laws of Succession Act (Cap 160), Section 4 of the Limitations of Actions Act (Cap 22 Laws of Kenya) and Virani T/a Kisumu Beach Resort –v- Phoenix of East Africa Ltd (2004) 2 KLR at 269** in support of the submissions.

6. The plaintiff's learned counsel filed submissions dated 12th March 2018 and urged the court to dismiss the preliminary objection with costs. Counsel submitted that the plaintiffs are in physical possession of the suit property and as his 16 paragraphed defence which joins issue with the plaint, the suit raised several triable issues for court's determination.

7. Learned counsel for the plaintiff further cited **Section 7 of the Limitation of Actions Act (Cap 22) , Section 7 of the Civil procedure Act (Cap 21 Laws of Kenya and Section 19 of the Environment and Land Court Act.** That the plaintiff's obtained a grant of letters of administration to the estate of Ogola Ugeke on 23rd June ,2014 in Homa- Bay High court Probate and Administration Cause No. 43 of 2014 hence they have a locus standi to file and prosecute this suit.

8. I have considered the entire pleadings including the preliminary objection raised in the 3rd defendant's statement of defence and submissions by counsel for the 3rd defendant and counsel for the plaintiff. The issues for determination are whether;

a. **The suit in statute barred**

b. **The suit is res judicata**

c. **The plaintiff have locus standi to file and prosecute the suit.**

d. **The court has jurisdiction to entertain the suit.**

e. **The suit is premature, misconceived bad in law, disclosures no reasonable cause of action and an abuse of the court process.**

9. On whether the suit is statute barred the 3rd defendant contented that the plaintiff claim is anchored on fraud. Indeed the plaintiff pleaded fraud and its particulars at paragraph 11 of the plaint; see **Abero –v- Thabiti Finance Co. Ltd & anor (2001) KLR 496.**

10. The 3rd defendant's counsel relied on section 4 of the Limitation of Actions Act (Cap 22 Laws of Kenya) which states;-

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued-

a. **Actions founded on contract**

b. **Actions to enforce a recognizance;**

c. **Actions to enforce an award;**

d. **Actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;**

e. **Actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.**

11. The plaintiff's counsel contented that the claim relates to recovery of land under Section 7 of the Limitation of Actions Act (Cap 22 laws of Kenya) which reads;-

“An action may not be brought by any person to recover land after end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.” (Emphasis laid).

12. A thorough examination of the plaint and statements of defence reveals allegations of fraud on the part of the defendants. It requires more than proof on a balance of probability, see; **Virani case (supra).** However, it is pretty clear from the reliefs sought in the plaint that the predominant claim by the plaintiff is an action to recover land as provided under **Section 7 of the Limitation of Actions Act (Cap 22).**

13. In respect of res judicata, the 3rd defendant contended that the suit is barred by Section 7 of the Civil Procedure Act (Cap 21 laws of Kenya). The section provides:-

“No. court shall try any 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 issue has been subsequently raised, and has been heard and finally decided by such court.”

14. There is nothing else either the statement of defence or submission to show that the suit involves parties and subject matter which has been heard and finally determined in former suit. Therefore, the preliminary objection on that point of law flops.

15. The 3rd defendant admitted the contents of paragraphs 15 & 16 of the plaint by paragraph 14 of his statement of defence. The plaintiff averred at paragraphs 15 and 16 of the plaint that:-

15. “This cause of action arose at West Kanyada location in Homa –Bay District of Homa- Bay county within the jurisdiction of this Honourable court.

16. The plaintiff avers that there is no other suit pending and that there have been no previous proceedings in any court of law between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.”

The pleadings clearly show that the court has jurisdiction over the matter and that the suit is not resjudicata.

16. On the issue of the plaintiff’s locus standi to file and prosecute the suit, learned counsel for the 3rd defendant submitted that the suit property was part and parcel of the land of the late Ogola Ugeke who is said to have be queathed the land to the late Mbadi Nyamburo who was husband to the late Margret Onyango Mbadi, who became the 1st registered proprietor of the suit property. That since the plaintiff’s claim to be heirs of the late Ogola Ugeke, it was incumbent upon the plaintiff to seek and obtain grant of letters of administration pursuant to Section 82 of the Law of Succession Act (Cap 160) which provides for personal representatives.

17. The role of a legal representative was soundly considered in Republic –vs- Attorney General & Another exparte John Mugo (2013) eKLR by H. Ongundi, J who held thus:-

“And a legal representative is a person who has been issued letters of grant. This is provided under Section 82 (a) of the Law of Succession Act”

18. In the case of Omari Kaburu –ICDC (2007) eKLR , Wanjiru Karanja,J (as she then was) aptly commented on the issue of locus standi in respect of the estate of deceased persons as follows :-

“The law is that the grant is what clothes a person with locus standi to stand in and sue on behalf of the estate of the deceased...”

19. The plaintiffs averred in paragraph 1 of the plaint that they obtained a limited grant of letters of administration ad litem in Homa –Bay High Court Succession cause No. 43 of 2014. The said grant is one of the documents accompanying their plaint in this matter. The 3rd defendant averred that the contents of paragraph 1 of the plaint are strange to him and invited the plaintiff’s to strict proof at paragraph 3 of his statement of defence.

20. Limited grants are governed by Section 54 of the Law of Succession Act (Cap 160) laws of Kenya and the limited grants issued to the plaintiffs were never annulled or revoked as envisaged under the Act. The plaintiffs filed the suit after the grant of the limited grant thus their action is not incompetent see; Virginia Edith Wamboi Otieno case (supra).

21. On this court’s jurisdiction to entertain the suit, the 3rd defendant’s counsel submitted that the issue of the legitimacy of the 1st and 2nd defendant’s as lawful beneficiaries and administrators of the estate of Margret Onyango Mbadi can only be raised and addressed by the probate and administration courts. Learned counsel cited Article 162 (2) of the Constitution of Kenya, 2010 and Esther Gachambi Mwangi and Odera case (supra) to fortify the submissions.

22. In Samwel Kamau Machana and Anor –v- Kenya Commercial Bank & 2 others (2012) eKLR, the Supreme Court pronounces itself on jurisdiction thus:-

“(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.”

23. The jurisdiction of this court flows from Article 162 (2) (b) of the Constitution of Kenya 2010. It is reinforced under Section 13 of the Environment and Land Court, 2015 (2011). In view of the reliefs sought in the plaint and since limited grants were issued by the relevant court coupled with the fact that the grants have not been annulled or revoked by the court and there is no application pending thereof, the matter squarely falls within the jurisdiction of this court.

24. There is no dispute from the defendants' statement of defence dated 7th January 2015 and the submissions by the plaintiff's counsel, that there are triable issues raised in the plaint for determination by this court. I take into account the right to fair trial under **Article 50(1) of the Constitution of Kenya, 2010**, hence the court is enjoined to give an opportunity to the parties to ventilate the issues at the hearing of the suit.

25. In the upshot, I find that this suit is alive and calls for determination on its merits. The preliminary objection raised at paragraph 15 of the 3rd defendant's statement of defence dated 7th December 2015 is want of merit.

26. Accordingly, I disallow the preliminary objection.

27. Costs of the preliminary objection be in the cause.

28. In order to facilitate the hearing and determination of the suit, parties may file and serve further or additional documents to be relied upon within the next thirty (30) days from the date hereof.

29. Hearing of the suit on 17th October 2018.

DELIVERED, SIGNED and DATED in open court at MIGORI this 26th day of **APRIL, 2018**

G. M. A. ONGONDO

JUDGE

In the presence of:

Mr. G.S. Okoth learned counsel for the plaintiff.

Ms. W. Ochwal learned counsel for the 3rd defendant.

Tom Maurice Court Assistant