



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 450 OF 2017

(Formerly Kisii ELcc No. 180 of 2014)

MICHAEL; OTIENO OKONGO

(Suing as the Legal administrator

of the Estate of ODUU GIGO, Deceased.....PLAINTIFF

VERSUS

LAMECK ODOYO OBOLA.....1ST DEFENDANT

(Suing as the Legal administrator of the Estate of

PETER DAVIDSON OTIENO, (Deceased)

YASON ONUKO DWALO.....2ND DEFENDANT

HENRY ANDERE.....3RD DEFENDANT

THE COUNTY LAND REGISTRAR, MIGORI COUNTY.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. The plaintiff sued the defendants by a plaint dated 6th May 2014, and filed in court on 9th May, 2014. He sought declaration that the sale transfer and registration of land parcel **LR NO.KAMAGAMBO/KONGUDI/537** (the suit land) in favour of one **PETER DAVIDSON OTIENO**, now deceased, on 20th September 1991, long after the death of Oduo Gigo was fraudulent, illegal, null and void. He also sought cancellation of the transfer and registration of the suit land and that the register be rectified to reflect the name of Oduo Gigo, deceased.

2. Briefly the plaintiff's claim is that the suit land was allocated, demarcated and registered in the name of Oduo Gigo (deceased) during the adjudication and demarcation process at Kengudi Adjudication section. The said Oduo Gigo died on 15th April 1989 and on 20th September 1991, Peter Davison Otieno (deceased) fraudulently registered the land in his name without the knowledge and participation of estate of Oduo Gigo (deceased). The plaintiff pleaded particulars of fraud on the part of the 3rd and 4th defendants at paragraph 11 of the plaint.

3. The 1st to 3rd defendants denied the plaintiffs' claim by their statement of defence dated 16th June 2014 and filed in court on the even date. They termed the suit a non-starter, an abuse of the due process of the court and that it offends mandatory provisions of the law hence issued notice of intention to raise a preliminary objection on a point of law during the hearing of the suit.

4. Equally in their statement of defence dated 18/9/2014, the 4th and 5th defendants denied the plaintiff's claim. They sought dismissal of the suit with costs.

5. The plaintiff is represented by M/s Oguttu, Ochwangi, Ochwal and Co. Advocates formerly M/s Oguttu Mboya and Co. Advocates. The 1st to 3rd defendants are represented by G.M. Nyambati Advocate while the 4th and 5th defendants are represented by Ms. Esther Opiyo, litigation counsel.

6. The 1st to 3rd defendants raised a preliminary objection dated 26th February 2015 on points of law. The same is based on the grounds:-

I. THAT the defendants lack locus standi to be sued on behalf of the estate of deceased person.

II. THAT the entire suit herein offends the mandatory provisions of Order 4 Rule 4 of the Civil Procedure Rules.

III. THAT the suit herein does not disclose any reasonable cause of action against the defendants.

IV. THAT the suit herein was filed outside the limitation period without leave of the court.

7. On 13th February, 2018, counsel for the respective parties agreed to canvass the preliminary objection by way of written submissions. The court allowed the parties to urge the same accordingly.

8. In his submissions dated 26th February 2018, learned counsel for the 1st to 3rd defendants made reference to paragraph 14 of the plaint and that since the defendants are not the administrators of the estate of Peter Davidson Otieno (deceased), they lacked capacity to be sued by the plaintiff. Counsel submitted that as per the plaintiff's claim, the cause of action arose in 1991 and the suit was filed in 2014, hence the suit is statute barred. Counsel relied on **Order 4 Rule 4 of the Civil Procedure Rules, 2010** as well as **Section 7 of the Limitation of Actions Act (Cap 22)** and urged the Court to strike out the suit with costs.

9. Learned counsel for the 4th and 5th defendants filed submissions dated 20th April 2018 and urged that the plaintiff having sued the 1st in representative capacity, has not stated how the capacity arises and that the plaintiff's pleading offends mandatory provisions of the law. Counsel submitted that the suit was filed on 9th May 2014, while the cause of action arose in 1991 thus the suit is barred by statute. Learned counsel relied upon authorities including **Order 4 Rule 4 of the Civil Procedure Rules, 2010, Section 79 of the Law of Succession Act (Cap 160), Section 4 (2) of the Limitation of Actions Act (Cap 22), Section 3 (1) of the Public Authorities Act (Cap 39), Igra-v-Makerere University (1972) EA 65 and Tom Onyango Oketch -v- Kenyatta National Hospital (2016) eKLR.**

10. The plaintiff's learned counsel filed submissions dated 7th May, 2018, wherein he gave background of the case and identified the following issues for determination:-

a) Whether the enjoining of the 1st defendant in the instant suit is fatally defective.

b) Whether the suit is fatally defective for failure to comply with provisions of Order 4 Rule 4 of the Civil Procedure Rules, 2010.

c) Whether the instant suit is statute barred by the dint of Sections 7 and/or 4 of the Limitations of Actions Act, Chapter 21, and Laws of Kenya.

d) Who should bear the cost of the Notice of Preliminary Objection.

11. Counsel analysed each of the issues for determination, termed the issues in controversy to be of high magnitude and urged the court to dismiss the preliminary objection with costs to the plaintiff. Learned counsel further cited authorities, among them, **Skair Associates Architect - v- Evangelical Lutheran Church of Kenya and 4 others (2015) eKLR, Milton Maina Musa Kiuru -v- Elijah Kigundu Kiuru and 4 others (2016) eKLR, Section 26 of the Limitation of Actions Act (Cap 22) and Order 1 Rules 9 and 10 (2) of the Civil Procedure Rules, 2010.**

12. I have carefully studied the entire pleadings, the preliminary objection and submissions including authorities cited by counsel for the respective parties herein. The issues for determination as identified and analysed by learned counsel for plaintiff are noted. Nonetheless in precise terms, the issues for determination are whether the grounds of the preliminary objection are sustainable and which party or parties to bear the costs of the preliminary objection.

13. At the onset, I must point out that it is common baseline that Peter Davidson Otieno, (deceased) was the registered proprietor of the suit land on 20th September 1991, which occurred after the death of Odua Gigo on 5th April, 1989. These revelations are made at paragraphs 10, 11 and 17 of the plaint and paragraph 6 of the 1st to 3rd defendants' statement of defence.

14. At paragraph 14 of his plaint, the plaintiff averred as follows:

“Upon the fraudulent transfer and registration of the suit property in the name of one Peter Davidson Otieno, now deceased, the 1st defendant herein, who is the duly constituted legal administrator of the Estate of Peter Davidson Otieno, now deceased, has since authorised and/or mandated the 2nd and 3rd defendants to enter upon and/or trespass onto the suit property, albeit without the permission and/or consent of the Estate of Odua Gigo.”(Emphasis added)

15. I note that the plaintiff's counsel filed statement of agreed issues dated 8th July, 2014 while the 1st to 3rd defendants counsel filed statement of agreed issues dated 23rd July, 2014. The issues include; whether the 1st defendant is the administrator of the estate of Peter Davidson Otieno and whether the suit property was transferred to Peter Davidson Otieno (deceased) before the death of Odua Gigo.

16. **Section 2 of the Civil Procedure Act (Cap 21)** defines the term legal representative as hereunder;-

“Legal representative” means a person who in law represents the estate of a deceased person and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;”

17. **Order 24 Rule 5 of the Civil Procedure Rules, 2010** is on determination of question as to legal representatives. The Rule provides:

“Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such question shall be determined by the court.”

18. The contention by learned counsel for the 1st to 3rd defendants and counsel for the 4th and 5th defendants is that the plaintiff has not presented material before court to show that the 1st defendant is an administrator of the estate of Peter Davidson Otieno (deceased) as pleaded in the plaint. **Section 79 of the Law of Succession Act (Cap 160)** provides that:-

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.” (Emphasis provided)

19. Counsel further contended that the suit offends mandatory provisions of **Order 4 Rule 4 of the Civil Procedure Rules** which reads:-

“Where the plaintiff sues in a representative capacity the plaintiff shall state the capacity in which he sues and where the defendant is sued in a representative capacity, the plaintiff shall state the capacity in which he is sued, and in both cases it shall be stated how the capacity arises.”

20. It was contended by learned counsel for the plaintiff that the defects in the instant suit can be cured by this honourable court in respect of locus of the defendant under Order 10 Rules 9 and 10. Learned counsel sought to rely on Order 1 Rule 9 of the Civil Procedure Rules, 2010, which provides:-

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

21. The defendants averred that the suit is an abuse of the due process of the court. Counsel for the 1st to 3rd defendants as well as a counsel for the 4th to 5th defendants did submit that the plaintiff failed to disclose materially how the capacity of the 1st defendant as legal administrator arises in the suit.

22. I endorse the position taken by my sister J.G. Kemei J, in **Muriithi Ngweya –v- Gikonyo Macharia Mwangi (2017) eKLR** whereby she held that one could represent the estate of a deceased person when a grant of representation had been made in respect of the estate of such deceased person under the **Law of Succession Act (Cap 160)**. The learned Judge further held that the court was in doubt whether the procedure in seeking a legal representative of the estate of deceased defendant’s estate was followed as no material had been presented to the court that the intended 1st defendant was a legal representative of the deceased or whether the applicant had filed citation proceedings in that regard.

23. Learned counsel for the defendants argued that the cause of action arose in year 1991 while the suit was filed in the year 2014, hence time barred. That no leave of the court was sought to file the suit out of time. Counsel relied on **Section 26 of the Limitation of Actions Act (Cap 22)** and 2013 certificate of official search. He termed the preliminary objection mischievous and meant to delay the determination of the suit.

24. Indeed a certificate of official search dated 22/8/2013, reveals that the alleged fraud was discovered upon search in the year 2013. It is attached to the plaintiff’s bundle of documents in the plaint. I find that the plaintiff filed his claim within the prescribed period of time. Therefore ground (iv) of the preliminary objection has no solid foundation or at all.

25. Based on the above analysis and the cited authorities, I find that grounds (i) to (iii) are tenable and I uphold the preliminary objection accordingly.

26. A fortiori, I strike out the plaintiff’s suit filed on 9th May, 2014 by way of a plaint dated 6th May, 2014 with costs to the defendants.

DELIVERED, SIGNED and DATED in open court at MIGORI this 29th day of May, 2018.

G. M. A. ONGONDO

JUDGE

In the presence of:

Mr. C. Ayayo holding brief for Oguttu Mboya for plaintiff.

Ms. Opiyo for 4th and 5th defendants.

Tom Maurice Court Assistant

G. M. A. ONGONDO

JUDGE