



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 559 OF 2017

(Formerly Kisii ELCC No. 321 of 2014)

NARIKISO OYUGI AKECH.....PLAINTIFF

VERUSUS

ELIJAH ONYANGO.....DEFENDANT

(Sued as the Administrator of JOASH ONYANGO ACHIENG – (DECEASED))

RULING

1. This ruling is in respect of the defendant's preliminary objection dated 26th May, 2017 and filed in court on 13th June, 2017. The preliminary objection is on points of law as follows:-

a. The suit is time barred considering that despite the plaintiff's admission to have lost the minister's appeal in 2004, no appeal was preferred by him ever since and to date, it is over 10 years since.

b. There is no cause of action disclosed against the defendant herein to warrant the issuance of an injunction order against the defendant vide the hearing by this honourable court considering that the same plaintiff admits in paragraphs 5 of the plaint that the suit land was registered in the names of JOASH ONYANGO ACHIENG, (now deceased) after he had lost the minister's appeal, to which appeal, he preferred no appeal.

c. The suit is incompetent, frivolous, vexatious and an abuse of the due process of this honourable court.

d. The suit is an anon-starter in law.

2. The plaintiff sued the defendant by way of a plaint dated 22nd August, 2014. He sought the following reliefs:-

a. A permanent injunction do issue forthwith against the defendant by himself his agents, servants and/or his employees from selling, disposing off and or transferring and or otherwise dealing with the property being land parcel **Kanyada/Kanyadier/783**.

b. The defendant be compelled to pay costs of the suit.

3. Briefly the plaintiff claimed that the deceased Joash Onyango Achieng created and caused the registration of the suit land namely LR NO. KANYANDA/KANYADIER/783 (the suit property) into his (Deceased) names during the adjudication period in collision with the adjudication officer. The plaintiff filed an objection No. 822 in Homa – Bay Land Adjudication Office. The objection was partially allowed on 16th October 2003 by the land adjudication officer.

4. The plaintiff appealed to the Minister under **Section 29(1) of the Land Adjudication Act (Cap 284 Laws of Kenya)** in land appeal case No. 75 of 2004. On behalf of the Minister for Land and Settlement, the District Commissioner Homa-Bay dismissed the appeal, upheld the decision of the Land Adjudication and Settlement officer and ordered the suit property to remain in the name of the deceased.

5. The plaintiff and his brother cultivated the suit land for many years. As the defendant encroached onto the suit land claiming a portion of the land, it provoked the instant suit.

6. The defendant denied the plaintiff's claim. He raised the present preliminary objection.

7. The plaintiff is represented by learned counsel Mr. S.M. Sagwe of S.M. Sagwe and Co. Advocates. The defendant is represented by learned counsel, Mr. B. Mboya of Tom Mboya and Co. Advocates.

8. The court directed that the preliminary objection be argued by written submission. Counsel for the respective parties exchanged written submissions accordingly.

9. The defendant's counsel in his submissions dated 26th September 2017, gave background issues, relied on authorities including the case of **Martha Kigen –v- Johana Tibino (2014) eKLR**, owners of the motor vessel "Lilians S" –v- **Caltex Oil (K) Ltd (1989) KLR 1 and Clerk and Lindsell on Torts Sweet & Maxwell 18th Edition at 923**. Learned counsel identified and analysed issues for determination, among them, whether the 1st plaintiff had locus standi to originate the suit and whether the suit is res judicata.

10. The plaintiff's submissions dated 3rd April 2018 referred to the land adjudication officer's decision as well as the Minister's decision on appeal. He submitted that after the appeal, the suit was filed to correct the errors thereof. He cited 7 of the **Limitation of Actions Act (Cap 22) and Article 50 (1) of the Constitution of Kenya 2010** in support of the suit.

11. I have considered the preliminary objection and submissions of counsel for the respective parties in this suit. The issues for determination are whether the suit:-

a. Falls within the jurisdiction of this court.

b. Is time barred

c. Is incompetent, lacks cause of action and is an abuse of the court process.

12. It is common ground that the plaintiff was affected by the adjudication register and objected the same to the adjudication officer pursuant to **Section 26 of the Land Adjudication Act (Cap 284 Laws of Kenya)**. The objection was partially allowed by the adjudication officer who held in part as follows:-

“Objection partially allowed. Plot number 783 to be sub-divided along the maize plantation moving on a straight line upto Sero River. The land in the Western side to be registered in the name of Narikiso Oyugi Aketch with a new number -5769. The remaining portion to remain in the name of Joash Onyango Achieng. Right of Appeal granted to any aggrieved parties within 60 (Sixty) days with effect from 16/10/2003. Both parties informed accordingly.”

13. The plaintiff was further aggrieved by the adjudication officer's determination of the objection. Under **Section 29(1) of the Land Adjudication Act (Cap 284)**, he appealed to the Minister. The District Commissioner, Homa – Bay on behalf of the Minister for Lands and Settlement determined the appeal thus:

i. The decision of the Land Adjudication and Settlement officer in an objection case No. 822 heard and determined on 16th October, 2003 is upheld.

ii. Appeal is dismissed.

iii. Land parcel No. Kanyada /Kanyadier /783 to remain in the name of JOASH ONYANGO ACHIENG.

14. The decision of the Minister was final as proved under the said Section. There was no other appeal in writing to the Minister as envisaged under **Section 30 (3) of the Act (Cap 284)** which provides that the Minister's decision shall be final.

15. Notably the adjudication officer and the Minister are quasi-judicial and administrative bodies mandated by statute for resolution of disputes; see **Orie Rogo Manduli –v- Catherine Mukite Nabwola & 3 Others (2013) eKLR**.

16. It is trite law that where there is clear procedure for the redress of any particular grievance prescribed by the Act, that procedure should be strictly followed; see **Cyrus Kono Njoroge –v- Karinge Njoroge Gachoka & 2 Others (2015) eKLR** and **Lepore Ole Maito – v- Letwa Kortome & 2 Others (2016) eKLR**.

17. The jurisdiction of this court flows from **Article 162 (2) (b) of the Constitution of Kenya 2010** and it is backed by statutes. **Section 13(1) of the Environment and Land Court, 2015 (2011)** makes provision for this Court's original and appellate jurisdiction. The dispute relates to the use and occupation of and title to the suit property. The present suit is neither an appeal, if any, from the Minister's decision nor an application for judicial review of the decision.

18. In the case of **Speaker of National Assembly – v- James Njenga Karume (1992) eKLR**, it was held by the Court of Appeal that :-

“Where there is clear procedure for the redness of any particular grievance prescribed by the Constitution or an Act of Parliament, the procedure should be strictly followed....”

19. The present grievance was determined by the Minister in the year 2004, as prescribed by **Section 29 (1) of the Land Adjudication Act (Cap 284)**. The plaintiff did not file Judicial Review of the decision within time. It would appear that this suit is filed as an afterthought on the part of the plaintiff. I am unable to find any law appointing the process followed by the plaintiff.

20. I note that the defendant raised the preliminary objection on pure points of law and no other facts are to be ascertained in the matter; see **Gitau –v- Thuo & 20 others (2009) KLR 86.**

21. I am of the considered view that the suit is incompetent and an abuse of the court process. In **Muchanga Investments Ltd –v- Safaris Unlimited (Africa) Ltd & 2 Others (2009) KLR 229 at 246,** the Court of Appeal held, inter alia;

“Again the Court of Appeal in Abuja Nigeria in the case of Attahiro –v- Bagudo 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.”

22. In light of the foregoing analysis and borrowing from the cited authorities, I find the Preliminary Objection dated 26th May, 2017 with considerable merit. Accordingly I uphold the preliminary objection.

23. The net result is that the plaintiff’s suit filed by way of plaint dated 22nd August 2014 is hereby dismissed with costs to the defendant.

DELIVERED, SIGNED and DATED in open court at MIGORI this **10th day of MAY ,2018.**

G. M. A. ONGONDO

JUDGE

In the presence of:

Mr. S. M. Sagwe learned counsel for the plaintiff.

Mr. B. Mboya learned counsel for the defendant

Tom Maurice Court Assistant