



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO. 263 OF 2014

VITALIS AGUNDA JUMA (Suing as the Administrator of the Estate of the

Late DALMAS JUMA OCHIENG (Deceased)...PLAINTIFF/APPLICANT

VERSUS

JOHN NYAKURE OCHIENG.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff commenced this suit through the plaint dated 5th September 2014 and Amended on 30th September 2014, as the administrator of the estate of the late Dalmas Juma Ochieng (deceased), under the limited grant of Letters of Administration Ad Litem issued on 9th June 2014 in Kisumu H.C. Probate and Administration Cause No. 225 of 2014. The Plaintiff alleges fraud and illegality in the way the Defendant obtained registration with **land parcel Siaya/Mulaha/20** which is the suit land and which had been registered in the name of Damianus Ochieng Nyakure (deceased), as trustee for the family of the said Dalmas Juma Ochieng (deceased). The Plaintiff then filed the notice of motion dated 18th September 2014 seeking for temporary injunction against the Defendant over land parcels **Siaya/Mulaha/2903 and 2904, East Alego/Mulaha/3110 and 3111**, which are subdivisions from **Siaya/Mulaha/20**. The Defendant filed the notice of a Preliminary Objection dated 27th October 2015. The Preliminary Objection is based on the ground that this Court has no jurisdiction to hear this suit for reasons that the High Court Kisumu, which is a Court of equal jurisdiction had in Succession Cause No. 73 of 1993 given the order through a confirmed grant on how **land parcel Siaya/Mulaha/20**, the same subject matter in this suit, was to be administered by the Defendant. That the Plaintiff's recourse under **Section 76 of the Law of Succession Act Chapter 160 of Laws of Kenya**, read with **Rules 43, 49 and 73** is to move the High Court and not this Court.

2. The Preliminary Objection came up for hearing on the 15th February 2018 when M/s Olango, the Learned Counsel for the Defendant and the Plaintiff in person, made their oral submissions for and against the Preliminary Objection.

3. The following are the issues for determination by the Court;

a. Whether the claim raised in the pleadings filed by the plaintiff are matters on the administration and distribution of the estate of the deceased.

b. Whether this Court has jurisdiction to deal with this suit.

c. Who pays the costs of the Preliminary Objection.

4. The Court has carefully considered the submission presented in support and opposition of the Defendant's Preliminary Objection, the pleadings filed and come to the following conclusions;

a. That the pleadings filed and the green card for **Siaya/Mulaha/20** availed to the Court through the Plaintiff's list of documents show that the Defendant got registered with the said Land on the 1st February 2002 through Succession of the estate of the first registered proprietor, Damianus Ochieng Nyakure, deceased. That the position taken by the Defendant in prosecuting their preliminary Objection is that the Plaintiff's claim is as a beneficiary of the estate of the said Damianus Ochieng Nyakure, and therefore the forum to do so is the High Court sitting as a Succession Court where the administration and distribution of the said estate was done. That if that was actually the case, the Defendant would be right and their Preliminary Objection would win the day.

b. That paragraph 3 and 4 of the Amended plaint shows that the plaintiff's claim is as a beneficiary over the estate of Dalmas Juma Ochieng, his late father, and not over Damianus Ochieng Nyakure's estate from where the Defendant got the land. That further, at paragraphs 6 to 8 of the Amended Plaint the Plaintiff avers that the registration of the suit land with the said Damianus Ochieng Nyakure, deceased, was as trustee for the family of the late Dalmas Juma Ochieng, deceased. The Plaintiff has set out the particular of fraud and illegality attributed to the Defendant under paragraph 10 of the Amended Plaint and in paragraphs 11 to 14 of the said

plaint has given details of the Defendant's acts of subdividing the said land allegedly with the to "muddy the waters and defeat the interests of the beneficiaries of the Estate of Dalmas Juma Ochieng (deceased)."

c. That the foregoing leaves the Court with no doubt that the claim before this Court is between the Plaintiff as legal representative for the estate of Dalmas Juma Ochieng, deceased, on one part and the Defendant as administrator of the estate of Damianus Ochieng Nyakure, deceased, on the other part over **land parcel Siaya/Mulaha/20** and the subdivisions thereof. The suit is not about administration and distribution of the estate of any of the two deceaseds. That should the Plaintiff be successful in his claim, he will be duly bound, and legally required to move to the Succession Court for the administration and distribution of the suit land, being part of the estate of the late Dalmas Juma Ochieng.

5. That for reasons set out above, the Court finds no merit in the Defendant's Preliminary Objection which is hereby rejected and dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 9TH DAY OF MAY 2018

In the presence of:

Plaintiff: Present

Defendant: Present

Counsel M/s Olango for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE