



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CIVIL SUIT NO. 34 OF 2018

EGLYNE CHEPCHIRCHIR CHOGE.....1ST PLAINTIFF

MIRRIAM ARUM CHOGE.....2ND PLAINTIFF

CHRISTIAN CHOGE.....3RD PLAINTIFF

JOSEPH ANG'ANG'A.....4TH PLAINTIFF

(Suing as Administrators to the Estate of Simeon Kiptum Choge (Deceased))

VERSUS

SINGA HAM EDAMBO.....1ST DEFENDANT

WILSON OMOKE EDAMBO.....2ND DEFENDANT

AGGREY O YAVO EDAMB.....3RD DEFENDANT

ALBERT MADETE EDAMBO.....4TH DEFENDANT

RULING

This ruling is in respect of a notice of a Preliminary objection by the defendants dated 22nd February 2018 and an application by the plaintiff dated 12th February 2018. The defendants seek for the suit to be struck out on grounds that:

1. The ownership of Land parcel NANDI/KAPKERER /279 was vested in the defendants through an order of the High Court of Kenya Kisumu in Succession Cause No. 58 of 2004 and Kisumu High Court Misc. Application No. 160 of 2009 and the same cannot be reserved by this Court in the manner sought by the plaintiffs in the instant proceedings.
2. By the nature of the suit, the plaintiffs are seeking to enforce through this Court the purported judgment of the Minister for Lands and Settlement dated 31/8/90 in Appeal No. 1804 of 1986 which award is statutorily time barred for the said purpose and cannot be enforced 28 years after the purported ruling was delivered.
3. There is no valid suit before the court for determination as the instant proceedings are fatally and incurably defective for non-compliance with the mandatory requirements of the Civil Procedure Rules and or laws.
4. The purported appeal to the Minister for Lands and Settlement being Appeal No. 1804 of 1986 was non-appeal having been filed two years after the decision of the Land Adjudication Officer delivered on 20/3/85 and therefore in gross violation of the sixty (60) days period provided by the Section 29(1) of the Land Adjudication Act and hence incapable of enforcement in a court of law.
5. The suit and the application amounts to gross abuse of the process of the Honourable court.

I will therefore dispose of the preliminary objection first before dealing with the application for injunction. Counsel agreed to canvass the application by way of written submissions.

DEFENDANT'S WRITTEN SUBMISSIONS

Counsel for the defendant filed submissions and gave a brief background of the case stating that the plaintiffs are legal representatives of the late Simeon Kiptum Choge (deceased) who died on the 14th December 2013. He stated that the dispute relates to land parcel NANDI/KAPKERER/279 which was registered in the name of one Elly Edambo Kamidi (who is also deceased) but transferred to the defendants jointly through Kisumu High Court Succession Cause No. 58 of 2004.

Counsel further stated that the defendants hold title to the land which was issued to them upon registration of the certificate of confirmation of grant and that the Chief Land Registrar had registered a restriction on the said parcel which, Singa Ham Edambo who is enjoined as the 1st defendant herein and who was the administrator of the estate of the late Elly Edambo Kamidi moved the High Court in Kisumu through Misc. Civil Application No. 160 of 2009 to cancel, thereby enabling the title to be transferred to the defendants.

It was the defendants' Counsel's submission that the late Simeon Kiptum Choge had filed an application in Kisumu High Court succession File No. 58 of 2004 to have the grant revoked but passed on before the application was heard. Counsel further stated that the present plaintiffs took over the proceedings before Justice Majanja of the High Court in Kisumu after substitution but the Judge recused himself for personal reasons. The matter then went before Justice Cherere of the High Court of Kenya Kisumu who ruled that she had no jurisdiction to entertain the matter therefore necessitating the filing of this suit.

Counsel submitted that the plaintiffs maintain that the suit land belongs to the late Simeon Kiptum Choge and by extension to them. He stated that the original owner of the land sold the same to two buyers, namely the late Elly Edambo Kamidi and Simeon Kiptum Choge resulting in an adjudication dispute which the Land Adjudication officer resolved in favour of Elly Edambo Kamidi in objection Case No. 7 of 1982 and ordered the land be registered in his name.

It was counsel's submission that Simeon Kiptum Choge appealed the decision of the Land Adjudication Officer with the Minister in Land Appeal No. 1804 of 1986 which reversed the decision of the Land Adjudication Officer and granted the land to Simeon Kiptum Choge. He stated that no explanation has been offered by the late Simeon Kiptum Choge or the plaintiffs why the decision of the Minister in Appeal No. 1804 of 1986 was never filed with the Land Adjudication Officer or the Chief Land Registrar all these years until today.

Counsel submitted that the plaintiffs are relying on the proceedings and judgment by the District Magistrate Kapsabet in Land Case No. 1 of 1972 in which the late Simeon Kiptum Choge purportedly sued the seller (to the exclusion of the late Elly Edambo Kamidi) for possession and, from the record, the case was heard in one day, the court visited the disputed land on the same day and wrote judgment and delivered the same day in favour of Simeon Kiptum Choge.

Counsel listed several issues that arise from the plaintiff's pleadings as follows:

1. That the defendants never personally had a dispute with the late Simeon Kiptum Choge or the plaintiffs over the suit land.
2. The dispute if any was between Elly Edambo Kamidi and Simeon Kiptum Choge and it was during the adjudication which was resolved by the year 1986.
3. Since 1986, Simeon Kiptum Choge never put any claim to the suit land, the first such claim coming on 19th November 2013 when he is said to have sworn the affidavit that was filed in Kisumu High Court succession Cause No. 58 of 2004.
4. Through the instant proceedings, the plaintiffs seek to achieve the following objectives with regard to ownership of the land.
 - a. Confirm or enforce the physical control (occupation) of the suit land in accordance with the judgment of the District Magistrate Kapsabet in Civil Suit No. 1 of 1972.
 - b. Certificate of title (title deed) in accordance with the decision of the Minister in Land Appeal No. 1804 of 1986 which remedy shall not only involve cancellation of the defendants names as title owners but ALSO reversion of the registration to the late Elly Edambo Kamidi.

Counsel therefore submitted that court cannot recognize, enforce, or entertain or confirm the judgment of the Kapsabet District Magistrates Court Civil Suit No. 1 of 1972 as the case did not involve the defendants or their late father Elly Edambo Kamidi. It was Counsel's submission that the Magistrate who heard the case did not have jurisdiction as the claim was for more than Kshs. 5000/-. Counsel submitted that this court lacks the requisite jurisdiction by virtue of Section 30 (1) of the Land Adjudication Act Cap 284 which expressly ousted the jurisdiction of the court in disputes involving land in an adjudication section hence enforcement of such proceedings amounts to gross abuse of the court process in terms of Ground 5 of the notice of preliminary objection.

Mr. Musiega Counsel for the defendants submitted that this Honourable Court is not the correct legal forum to investigate alleged fraud in the proceedings that were before the High Court in Kisumu as it cannot nullify those proceedings in order to make it possible for the plaintiffs in this suit to get a title deed as the law of Succession under which that cause was heard has exhaustive provisions on addressing fraudulent dealing with the estate of a deceased person.

Counsel further submitted that the plaintiff's claim is time barred as it purports to enforce the Minister's decision which awarded the plaintiff land on 31st August 1990 but was not implemented. Counsel relied on Section 28 of the Land Adjudication Act which states that restrictions can only last until the date of the determination of appeals before the Minister presented in accordance with Section 29 of that Act. The restriction dies on the date of the determination of appeal.

Mr. Musiega submitted that the plaintiffs are seeking is to enforce the Minister's decision to alter the register to give effect to that decision made 28 years ago which should not be allowed as per the Limitation of Actions Act Cap 22 Laws of Kenya. Counsel also submitted that the

suit is res judicata and offends the Civil Procedure Rules on presentation and authority to plead on behalf of other plaintiffs. He therefore urged the court to uphold the preliminary objection and strike out the case.

PLAINTIFFS' WRITTEN SUBMISSIONS

Counsel for the plaintiffs filed written submissions and also gave a background of the plaintiffs' case. He stated that the Plaintiffs are administrators of the Estate the late Hon Simeon Kiptum Choge who have filed this suit to recover NANDI/ KAPKERER / 279, which property rightfully belongs to the deceased's estate. That the late Choge purchased the property from Jonathan Kipngetch Arap Nyauke in 1967 and later sold it to Elly Edambo Kamidi but the transaction was reversed for failure to complete payment and purchase price paid was refunded to him.

Mr. C. F Otieno Counsel for the plaintiffs stated that the late Jonathan Kipngetch at some point refused to give possession of the property necessitating the filing of DMCC LAND CASE NO. 1 OF 1972 for recovery of the same land whereby judgment was entered in favour of the late Choge confirming that indeed the suit land belonged to him. Counsel further stated that the land was thereafter registered in the name of the late Choge in the Adjudication Register and that the late Kamidi being dissatisfied lodged an objection before the Land Adjudication Officer Kapkerer being Objection case No. of 1982 whereby the late Choge and Mr. Nyauke were absent and the proceedings went on ex parte. He stated that it was within the adjudication officer's knowledge, from the pleadings, that he was fully aware that the late Choge was in prison at the time and he ought not to have proceeded with the hearing and the result was that the late Kamidi was given an unfair advantage over the late Choge. He further stated that when the late Choge was released from Prison, he lodged an appeal before the Minister being MINISTER'S LAND APPEAL CASE NO. 1804 OF 1986 which verdict was delivered on 31st August 1990 and his appeal was upheld and declared that the decision of the Kapsabet court in Case No. 1 of 1972 determined ownership and that the late Choge was never served and that is why the Objection proceeded ex parte.

It was Counsel's submission that the Minister noted that the late Kamidi had collected his money from his advocate and that there was need to effect changes as to ownership at the Land Adjudication office but this was not effected due to an error and the late Kamidi remained as the proprietor of land Parcel No. NANDI/ KAPKERER / 279 though the objection had been overturned. He further stated that on 22nd January 2002 the Green Card to NANDI/ KAPKERER / 279 was opened with Elly Edambo Kamidi as the proprietor as his name was still appearing on the records after the objection proceedings and on 30th March 2010 the late Choge lodged a caution on NANDI/ KAPKERER / 279 claiming purchasers interest.

Counsel also stated that the 1st Respondent herein moved the High Court in KISUMU VIDE MISC. CIVIL APPLICATION NO. 160 OF 2009 seeking to lift the Restriction placed by the Lands Registrar Kapsabet and the late Choge was not served with this application and as a result it was heard ex parte and decided in favour of the 1st Respondent as he concealed the existence of an appeal and material facts which could have otherwise influenced the decision of the Court.

Counsel therefore listed the following issues for determination by the court.

1. Whether or not land parcel No. NANDI/ KAPKERER/ 279 rightfully belonged to the late Hon Choge.
2. Whether or not the Estate of the late Choge through the Plaintiffs herein is entitled to NANDI / KAPKERER/ 279.
3. Whether or not the defendant herein rightfully and lawfully acquired NANDI/ KAPKERER / 279.
4. Whether or not the defendants Preliminary Objection dated 22.02.2018 should be sustained.
5. Whether or not the Plaintiffs have made out a case for the grant of Injunctive Orders pending the hearing and final determination of the suit.

In response to the 1st issue, Counsel stated in the affirmative that land indeed belonged to the late Choge having purchased it in 1967 for a consideration of Khs. 10,000/ He also stated that the 1st Plaintiff / Applicant is the sole surviving widow of the late Hon Choge, 2nd and 3rd Plaintiffs/ Applicants are children of the deceased and the 4th Plaintiff / Applicant is the brother to the deceased therefore entitled to bring the suit as they are the Administrators to his estate.

Counsel further stated that KISUMU SUCC CAUSE NO. 58 OF 2004 and KISUMU HIGH COURT MISC APPL. NO. 160 OF 2009 erroneously vested the suit land on the defendants. As the late Hon. Choge had obtained a Court Order restricting dealings in the suit land pending the hearing and final disposal of his Summons for Revocation of grant filed in KISUMU HC CAUSE NO. 58 OF 2004 after learning of the Orders that had been obtained surreptitiously by the defendants lifting the Land Registrars Restriction.

On the preliminary objection raised by Counsel for the defendants, Mr. C F Otieno submitted that the general rule regarding Preliminary Objections is that they shall only be based on a pure point of law, which is clear and is pleaded. He stated that the defendants have not even filed or served their defence therefore they lack the locus to raise the objection that they seek to raise. Counsel also submitted that Counsel for the defendants cannot introduce and argue matters of fact from the bar as they did not file a replying affidavit. What has been raised by the defendants are not points of law but issues which the Court has to look into and render a decision after a full trial. Counsel relied on the case of Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd [1969] EA 696 where the Court held:-

'A "preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.'

Counsel further cited the case of Oraro Vs. Mbaja [20051 e KLR. Where Justice J.B Ojwang (as he then was) sitting in Nairobi dismissed the applicant's Preliminary Objection held that:

‘A "preliminary objection correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed’

Counsel therefore urged the court to dismiss the preliminary objection.

Counsel therefore moved on to submit on whether the plaintiffs have established a prima facie case for the grant of an injunction. He cited the conditions that an applicant must meet to enable the court grant such orders as per the Giella Casman Brown case. Counsel submitted that the plaintiff will prove that the land belonged to him and that the family of the late Choge to date are still in possession of the land and that they will suffer irreparable loss not capable of being compensated by way of damages. That the defendants have never been in possession of the said land and even to date they are not in possession as the purchase price was refunded to them. Counsel further submitted that the land was fraudulently registered in the defendants name due to concealment of material facts and as such the balance of convenience tilts in favour of the plaintiffs. Counsel urged the court to allow the application for injunction as it is not opposed.

Analysis and determination.

This matter was coming up for the hearing of an application dated 12th February 2018 but before the application could be heard Counsel for the defendants filed a notice of preliminary objection to the whole suit seeking that it be struck out. Counsel agreed to canvass both the preliminary objection dated 22/2/18 with the application by way of written submissions. I must say that they wrote detailed submissions each giving the background to the case according to their client's versions. I had to therefore go through the lengthy backgrounds to the case before getting down to the issue at hand which is the preliminary objection and the application for injunction.

It should also be noted that the defendants neither filed a replying affidavit nor a defence to the claim. The issue for determination in the preliminary objection is as to whether the applicant has met the threshold for grant of the orders sought. It is trite law that preliminary objections must be purely on points of law and not facts as was established in the Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd [1969] EA 696. This is because preliminary objections if proved can determine the suit without going for full hearing.

From the submissions of Counsel for the defendant/applicant who neither filed a replying affidavit nor a defence , I notice that he has enumerated elaborate history or background of the case which I wonder where he was getting the information from. This amounts to Counsel giving evidence of facts which might not be within his knowledge and can only be verified through a full trial. The court is being put in an awkward situation where it is supposed to look elsewhere to verify the facts submitted by Counsel. This therefore does not amount to a preliminary objection.

Having said that I find that the applicant has not met the threshold for upholding a preliminary objection and is therefore dismissed with costs.

On the issue of the orders for injunction, I will not belabor much as I had earlier looked at the pleadings and the submissions of Counsel and had granted interim orders pending the hearing of this application inter partes. The application is not opposed and that does not mean that orders can be granted if the application is undefended. The same can still be dismissed if the applicant does not meet the threshold for grant of injunctions.

I have considered the application, the supporting documentation together with submission of Counsel and find that this is a case where I will exercise my discretion and grant the order of injunction pending the hearing and determination of this suit. This is in order to preserve the substratum of the suit. I therefore grant the orders as prayed in the application dated 12th February 2018.

Parties to comply with order 11 within 30 days.

Dated and delivered this 19th day of July, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Mitei holding brief for Mr. C.F Otieno for the Plaintiff and Mr. Segesi holding brief for Mr. Musiega for defendant.

Mr. Koech: Court Assistant.