



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. CASE NO.36 OF 2016 (O.S)

VITALIS OMONDI OTHUON AND STEPHEN OCHIENG OTHUON

(suing as the administrators of the estate of the late Zacharia Osodho

Mungala and Bathlomeyo Adipo.....PLAINTIFFS/RESPONDENTS

VERSUS

SYLVESTER OKOTH ONYANGO & 18 OTHERS..DEFENDANTS/APPLICANTS

RULING

1. The notice of motion dated 14th July 2017, brought under **Order 2 Rule 15 (d) of the Civil Procedure Rules**, by M/s Bruce Odeny & Company Advocates for Edward Odera Adipo, Noah Otieno Ochieng, Thomas Onyango Ochieng, Noah Otieno Ondiege, Peter Onyango Omondi and Othiando Wanda, the 2nd, 4th, 5th, 8th, 10th and 12th Defendants respectively, seeks for orders that:

- 1. This honourable court be pleased to strike out this suit.**
- 2. Costs of this application be provided for.”**

The application is based on the eight (8) grounds marked (a) to (h) on its face and is supported by the affidavit sworn by Zaitun Akinyi Odera, the 9th Defendant, on the 14th July 2017. That as discerned from the grounds and deposition, the court is being asked to strike out the case filed by Vitalis Omondi Othuon and Stephen Ochieng Othuon, suing as administrators of the estate of the late Zacharia Osodho Mung'ala and Bathlomeyo Adipo, on the following reasons;

- a) That the issues in this suit are similar to the issues in Kisumu ELC 444 of 2016 [formally HCC NO. 89 OF 2010] that was dismissed by this court on the 9th May 2016, and for that reason this suit is re judicata.**
- b) That this suit is subjudice in view of the existence of Kisumu H.C.C. No. 30 of 2010 that is still pending.**
- c) That the Plaintiffs have failed to disclose the existence of the two suits detailed in (a) and (b) above.**
- d) That the Plaintiffs are without capacity to file and prosecute this suit on behalf of the estates of the late Zakaria Usodho and Bathlomeyo Adipo.**

2. The Litigation Counsel on record for 16th, 18th and 19th Defendants filed the notice of Preliminary Objection dated 4th September 2017 on the 13th September 2017 raising three grounds summarized as below;

- a) That the Plaintiffs lack *locus standi* in the suit,**
- b) That the suit is statutory time barred.**
- c) That the suit is *res judicata* or subjudice in view of paragraph 33 (g) of the plaint.**

3. That when the matter came up on the 21st September 2017 in the presence of the plaintiffs, Mr. Nyamweya for the Litigation Counsel, Mr. Omollo for Kuke for 1st Defendant and Mr. Kirenga for Odeny for 2nd, 4th, 5th, 8th, 10th and 12th Defendants, the court was informed of the pending notice of preliminary objection and notice of motion dated 14th July 2017 and it was directed that they be served for hearing on the

24th January 2018. That on that date, the Plaintiffs, Mr. Odeny for 2nd, 4th, 5th, 8th, 10th and 12th Defendants, Mr. Onyango for Kowino for 6th and 7th Defendants, M/s Langat for 16th, 18th and 19th Defendants and Mr. Ogonda for the 15th defendant were in attendance and after making their submissions, and noting that the Plaintiffs had filed and served a document containing the supplementary affidavit to notice of motion and preliminary objection dated the 5th December 2107, the court gave directions on filing and exchanging of written submission on the two. That consequently Counsel for the 2nd, 4th, 5th, 8th, 10th and 12th Defendants filed their submissions dated the 6th February 2018 on both their notice of motion and preliminary objection by the 19th Defendant. The Plaintiffs filed their submissions dated 26th February 2018 in response to that filed by M/s Bruce Odeny & Company Advocates for the 2nd, 4th, 5th, 8th, 10th and 12th Defendants.

4. The following are the issues for Court's determinations;

a) Whether this suit is res judicata in terms of Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya, in view of Kisumu ELC 444 of 2016 [formally HCCC No. 89 of 2010].

b) Whether this suit is subjudice in terms of Section 6 of Civil Procedure Act Chapter 21 of Laws of Kenya in view of Kisumu HCCC No. 30 of 2010.

c) Whether the Plaintiffs have legal capacity to file and prosecute this suit on behalf of the estates of the two named deceased persons.

d) Whether the suit is statutory time barred in terms of Section 7 of the Limitation of Actions Act Chapter 22 of Laws of Kenya.

e) Who pays the costs of the notice of motion and preliminary objection.

5. The court has carefully considered the grounds on the notice of motion, the grounds for the notice of preliminary objection, the affidavit evidence, the written submission filed, the record and come to the following findings;

a) That this proceedings was commenced by the Plaintiffs who clearly indicated in the headings of their pleadings that they are "suing in the capacity as administrators Ad litem of the estate of the late Zacharia Usodho Mungala and Bathlomeyo Adipo," through the plaint dated and filed on the 22nd February 2016. The suit is over land parcel Uholo/Ugunja/265 that was reportedly registered in the names of the two deceased persons but fraudulently and irregularly transferred to John Onyango Adipo (deceased) and subdivided into the various parcels before being transferred to the various named Defendants.

b) That the Plaintiffs have in the bound bundle containing the plaint and other documents annexed a copy of Limited grant of Letters of Administration Ad litem in Kisumu H.C succession Cause No. 899 of 2015 and issued on the 24th November 2015. That the said limited grant was for "***the purposes only for filing suit***" and had a lifespan of ninety (90) days. That as this suit was filed on the 22nd February 2016, then it was within the lifespan of the said letters of administration Ad litem. That should the Plaintiffs be successful in this suit, the suit property (ies) would only revert back to the names of the two deceased persons on whose behalf they have commenced this proceedings, unless by then they will have obtained a full grant to administer the two estates. That for the foregoing reason, the court finds that the Plaintiffs, having exhibited the Limited Grant of Letters of Administration Ad Litem dated 24th November 2015, are with Legal Capacity to file and prosecute this case on behalf of the two deceased's estates.

c) That though the Plaintiffs averred in paragraph 36 of the plaint "***that there is no pending suit and none had previously been instituted between the Plaintiffs and defendants concerning the same subject matter herein***", they have indicated at position 9 of the lists of documents filed with the plaint the "***pleadings of Civil Suit No. 89 of 2010, High Court Kisumu.***" That the Court has perused the plaint annexed at page 69 and the following are the parties in that suit from the heading:-

Naum Othuon Adipo.....Plaintiff

Versus

Silvanus Obonyo.....1st Defendant

Silvester Okoth Onyango.....2nd Defendant

Noah Otieno Ondiege.....3rd Defendant

Zaituni Akinyi Odero.....4th Defendant

Peter Onyango Omondi.....5th Defendant

Claris Awino Ochieng.....6th Defendant

Registrar of Lands, Siaya District.....7th Defendant

Registrar of Titles.....8th Defendant

The Attorney General.....9th Defendant

That at paragraph 1 of the said plaint, the said Naum Othuon Adipo described himself as **“an adult male of sound mind and is the Administrator of the Estate of ZACHARIA USODHO MUNGALA and BATHLOMAYO ADIPO (both deceased) and sues on his own behalf and on behalf of the beneficiaries of the said estates.”** That the averments at paragraph 11 to 16 and the prayers (a) to (d) confirm that subject matter was the title and ownership of Land Parcel Uholo/Ugunja/265 and the subdivisions thereof.

d) That Naum Othuon Adipo, the Plaintiff in ELC NO. 444 of 2016 formerly Kisumu H.C.C. No. 89 of 2010 is the father of the Plaintiffs herein as is discerned from paragraph 9 of the 1st Plaintiff’s affidavit sworn on 22nd February 2016, appearing between pages 7 to 11 and paragraph 6 of their respective statement appearing at pages 29 and 31 of their documents. That the 1st to 6th Defendants in ELC NO. 444 of 2016 formerly Kisumu HCCC No. 89 of 2010 appear as the 7th, 1st, 8th, 9th, 10th and 15th Defendants in the instant suit. That even though the Plaintiffs herein were not parties in ELC NO. 444 of 2016 formerly Kisumu HCCC No. 89 of 2010, they are suing in the same capacity their late father, Naum Othuon Adipo, who was the Plaintiff in that other suit had sued. That the 1st to 6th Defendants in ELC NO. 444 of 2016 formerly Kisumu H.C.C. No. 89 of 2010 who appear as the 7th, 1st, 8th, 9th, 10th and 15th Defendants in the instant suit are sued in the same capacities in both suits. That the Land Registrar and Attorney general who appear as the 7th and 9th Defendants in ELC NO. 444 of 2016 formerly Kisumu HCC No. 89 of 2010 are sued as the 16th and 19th Defendants in the instant suit. That though the Registrar of Titles who is the 8th Defendant in ELC NO. 444 of 2016 formerly Kisumu HCC No. 89 of 2010 is not a party in the instant suit, and that Okwiri, the Chairman National Lands Commission and Cabinet Secretary, Ministry of Lands, Housing and Urban Development the 6th, 17th and 18th Defendants in the instant suit were not parties in the previous suit, that does not alter the nature of the suit and the capacity in which the other parties appear. That the 2nd to 5th Defendants in the instant suit, though not parties in the previous suit, are described as beneficiaries and relatives (either uncle or cousin) of the Plaintiffs. That the 11th to 14th Defendants in the instant suit were not parties in the earlier suit but are sued in the instant suit for obtaining registration of parcels subdivided from Uholo/Ugunja/265 through fraud and in collusion with 1st, 7th, 8th, 9th and 16th Defendants, who are relatives to the Plaintiffs. That the foregoing therefore shows that though not all the parties in the instant suit were parties in ELC NO. 444 of 2016 formerly Kisumu HCC No. 89 of 2010, those appearing in both suits are suing, or have been sued, in or under the same capacities. That the subject matter in both suits is the same, that is title and ownership to Uholo/Ugunja/265 and or the subdivisions thereof.

e) That the Defendants’ case is that Kisumu HCC No. 89 of 2010 which is now Kisumu ELC 444 of 2016 was dismissed on the 9th May 2016 and therefore the issues therein as between the parties in that suit, which are similar to this suit, having been decided, this suit is res judicata. That the Plaintiffs’ case is that Kisumu HCC No. 30 of 2010 was terminated on being found that it had been filed through a counsel without practicing certificate and in its place ELC NO. 444 of 2016 formerly Kisumu HCC No. 89 of 2010 was filed through another Counsel. That the court has on its own volition, and so as to expedite this suit, called for the original records of ELC NO. 444 of 2016 formerly Kisumu HCC No. 89 of 2010 and upon perusing noted the following;

- **That the suit was commenced by Naum Othuon Adipo through the plaint dated 11th June 2010.**
- **That the Defendants named are nine, that is, Silvanus Obonyo, Silvester Okoth Onyango, Noah Otieno Ondiege, Zaituni Akinyi Odero, Peter Onyango Omondi, Claris Awino Ochieng, Registrar of Land Siaya District, Registrar of Titles and the Attorney General.**
- **That the prayers include permanent injunction, declaration, cancellation and rectification of the registers for Uholo/Ugunja/265 and the subdivisions thereof being 1520-1525, 1422, 1709-1711 and 2433-2434.**
- **That the suit was dismissed for want of prosecution under Order 17 Rule 2 of Civil Procedure Rules on the 9th May 2016 and there has been no effort taken to reinstate the suit.**

That in view of the findings in (d) and (e) above, this suit was filed on the 22nd February 2016 when HCCC No. 89 of 2010, [Currently ELC 444 of 2016], that was dismissed on the 9th May 2016 for want of prosecution was still pending before the court. That filing of this suit therefore contravened **Section 6 of the Civil Procedure Act Chapter 21 of Laws of Kenya**. That upon that earlier suit being dismissed on the 9th May 2016 for want of prosecution, the existence of this suit contravened **Section 7 of the Civil Procedure Act** as the issues and parties in both suits were by and large the same.

f) That so as to avoid falling prey to the principles of subjudice and *res judicata*, the Plaintiffs ought to have taken legal advice on how to move the court to revive or reinstate the suit filed by their late father as ELC 444 of 2016 [Formerly HCCC No. 89 of 2010]. That thereafter, they would have sought to be substituted for the Plaintiff and to enjoin the other necessary parties through appropriate amendments.

6. That flowing from the foregoing, the court finds merit in the notice of motion dated 14th July 2017, and the preliminary objection dated 4th September 2017, which is hereby upheld. That the suit filed by the Plaintiffs is therefore struck out with costs to the Defendants.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER 2018

In the presence of:

Plaintiffs Absent

Defendants Absent

Counsel Mr. Odeny for 2nd, 4th to 6th, 10th and 12th

Defendants and Mr. Esendi for 16th, 18th & 19th Defendants

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE