



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 410 OF 2017**

**JOHN MAKOMELO KENYA.....PLAINTIFF**

**VERSUS**

**TAMARY OMUKUNDA NDAKWA**

**JULIUS ODONGO NDAKWA.....DEFENDANT**

**RULING**

The 1<sup>st</sup> defendant has raised her preliminary objection to the plaintiff's suit on the following grounds:-

1. That the plaintiff lacks the locus standi to bring this suit.
2. That the plaintiff's suit is res-judicata in view of Kakamega High Court Succession Cause No. 579 of 2014.
3. That the 1<sup>st</sup> defendant is wrongfully sued as there is no privity of contract between the plaintiff and the defendant.
4. That the 2<sup>nd</sup> defendant is deceased and this suit is a non starter and an abuse of the court process.
5. That the plaintiff's suit is statutorily time barred under the Limitation of Actions Act Cap 22 Laws of Kenya.
6. That the agreement of sale is illegal and unenforceable.

That the plaintiff lacks the locus standi and there is no privity of contract between the plaintiff and the 1<sup>st</sup> defendant. The agreement giving rise to this suit is the plaintiff's document number 1 dated 14/7/2007 it was between Joseph Ndakwa – deceased and Mary Wileta. The plaintiff has not demonstrated that he is bringing this suit on behalf of the purchaser. He has no authority from the purchaser to file this suit. The purchaser is alive and should be the one to pursue her rights if any.

The land in question was the property of the deceased one Joseph Ndakwa. Any agreement affecting a deceased person's estate before obtaining letters of administration is illegal, null, void and unenforceable. No consent was obtained from the Land "Control Board as required by the Land Control Act within 6 months of the agreement of sale.

The plaintiff cannot seek specific performance. The suit is time barred in that the agreement was entered into on 14/7/2007. The case was filed on 14/11/2017 after a period of 10 years. Any claim based on contract should be brought within 6 years from the date of contract. The plaintiff did not obtain leave under the Limitation of Actions Act Cap 22 Laws of Kenya.

The plaintiff's suit is res-judicata in that this matter was heard and determined in Kakamega High court succession Cause No. 579 of 2014 (see judgment attached as 1<sup>st</sup> defendant's document No. 1)

The plaintiff submitted that locus standi can be briefly described as the right/capacity to bring an action in a court of law. They argue that capacity to bring a suit in court, they are duly guided by the principals set out in the Court of Appeal Case, Civil suit Appeal Number 9 of 2013. In that case the court found among other things that "the stringent requirements of locus standi have been buried in the history and that to shut a pleader out of the seat of judgment on account of some prior categorization of him as undeserving to bring out his complaints of constitutional violations is out of step."

The plaintiff is seeking to enforce high rights, as a purchaser of land and a user of land which are being denied by the 1<sup>st</sup> defendant, all of which are not only Constitutional Rights, but also rights under the law of Contract and the Land Act 2012. The plaintiff purchased land from

the 1<sup>st</sup> defendant and proceeded to take vacant possession of the same that in itself gives him a right to a claim in this court, other issues can be canvassed at a later stage. The plaintiff has also attached proof that he personally paid the 2<sup>nd</sup> installment of the purchase price himself and in person.

The issues canvassed in Succession Cause No. 579 of 2014 and the issues raised in this suit are different:- The plaintiff was claiming an interest in the estate of the deceased in that Succession Cause. In this suit the plaintiff is seeking to enforce an agreement that was entered into between himself and the 1<sup>st</sup> defendant and for a refund of purchase price. The outcome in succession Cause No. 579 of 2014, and the outcome in this Environment and land Court case is expected to be different as the subject matter is different. While the parties are the same in both matters, in the Succession Cause the 1<sup>st</sup> defendant was being claimed from as an administrator/beneficiary to the estate of the deceased in question, while in this suit she is being sued as a party to the said agreement, and the party who is in current possession of the contested suit parcel, they rely on the case of ANM vs PMN (2016) eKLR CIVIL CASE No. 14 of 2015 and the provisions of section 7 Civil procedure Act. The issues of facts and law raised in Succession Cause 579 of 2014 are completely different from the issues of facts and law raised in this particular suit, hence this suit does not meet the principles of Res judicata.

The plaintiff further submits that, the 1<sup>st</sup> defendant is rightfully sued, not only was she a party to the contract in question but she is the only surviving defendant, further as evidenced by the plaintiff's pleading and the admission of the 1<sup>st</sup> defendant that the 2<sup>nd</sup> defendant is dead, upon amendment of pleadings she can also be sued as administrator of the 1<sup>st</sup> defendant is also in the estate, hence they invite this court not to dismiss the plaintiff's claim prematurely and on a basis of a simple technicality. It is not in dispute that the 2<sup>nd</sup> defendant is deceased and that the suit against the 2<sup>nd</sup> defendant was withdrawn by counsel for the plaintiff, however, this fact does not take away the merits of the suit as against the 1<sup>st</sup> defendant for reasons stated in above – the death of the 2<sup>nd</sup> defendant does not take away the plaintiff's claim against the 1<sup>st</sup> defendant, neither does it take away the merits of this case. They submit that the defendant's preliminary objection is frivolous and lacks merit, they pray that the same be dismissed with costs to the plaintiff.

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd(1969) E.A 696,**

*“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”*

In the same case, Sir Charles Newbold said:

*“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 had to be ascertained or if what is sought is the exercise of judicial discretion”.*

The issue as to whether or not this suit is res judicata or sub judice is therefore properly raised as a Preliminary Objection. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

*“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”*

Section 7.

*“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”*

This court has taken the liberty to peruse Succession Cause 579 of 2014 and indeed find that the parties are the same and subject matter is the same. The plaintiff in this matter is the objector. I find that this matter is res judicata Succession Cause 579 of 2014. Be that as it may and without prejudice to the foregoing, on the issue of Locus standi, is defined in Black's Law Dictionary 9<sup>th</sup> Edition as the right to bring an action or to be heard in a given forum. Para 4 of the plaintiff states that the plaintiff bought the land through his sister Mary Wileta Malenya. Indeed the sale agreement to be relied on states the same. I find that the plaintiff lacks the locus to bring this suit. For these reasons I find the preliminary objection has merit and I uphold the same. This suit is struck out with costs to the defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23<sup>RD</sup> DAY OF OCTOBER 2018.**

**N.A. MATHEKA**

**JUDGE**