



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 205 OF 2014**

**RICHARD ONGULE ALIAS ALUBOKHO ..... PLAINTIFF**

**VERSUS**

**PETER KHAUKWA OMENO ..... 1<sup>ST</sup> DEFENDANT**

**MILLICENT ESHITUBI OUMKHULU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

The plaintiff's case is that, at all material times to this suit, he is a grandson of the late Omeno Munyakho Andrea deceased who died on 30<sup>th</sup> day of September, 1968 and brings out this suit for his own benefit and for the benefit of the entire estate of his said late grandfather. The suit the 1<sup>st</sup> defendant was one of the sons and or heir apparently surviving the plaintiff's deceased grandfather. That the plaintiff avers that his deceased grandfather was the absolute registered owner of all that parcel of land comprised in title number Marama/Shiatsala/1022. That the plaintiff further avers that after passing on of his grandfather his only surviving sons or heirs apparent include:-

- (a) The 1<sup>st</sup> defendant herein.
- (b) The late Jackton Alubokho Omeno – the plaintiff's father and
- (c) The late Peter Owasia Omeno

Were all directly to benefit substantially from the above parcel as their ancestral inheritance. That the plaintiff further avers that as such all the members were to sit and file and or take out grant of letters of administration intestate to administer and or share out the said land being the net estate of the deceased to the immediate beneficiaries who include also the plaintiff's deceased father. That it is the plaintiff's case that before the demise of his father and his uncle they had both prevailed to the 1<sup>st</sup> defendant requesting him to start the succession proceedings but for reasons better know to the 1<sup>st</sup> defendant he reluctantly refused and or ignored them. That meanwhile the plaintiff together with his father and all other members of the plaintiff's deceased grandfather were residing, working and occupying some parts of the above mentioned land and have done substantial development. The plaintiff states that in or around the year 1998 together in the company of his deceased father proceeded at the land registry with a view of conducting a search certificate for the purposes of the intended succession only to be surprised that the 1<sup>st</sup> defendant herein had without any consent, secretly, fraudulently and or dubiously registered the suit land in his name in exclusion of the plaintiff's father or the other heirs of the plaintiff's deceased grandfather. Better and further particulars are well within the 1<sup>st</sup> defendant's knowledge. That the plaintiff further avers that despite the fact that there was a family dispute concerning the suit land the defendant went ahead without any consent and fraudulently removed a caution placed on the aforementioned land, secretly surveyed and subdivided it into new portions now comprised in title number Marama/Shiatsala/1787. That it is the plaintiff's claim that the defendant further secretly sold a portion comprised in title number Maram/Shiatsala/1788 which sale was effected in or around 1997. The plaintiff's claim against the 1<sup>st</sup> and 2<sup>nd</sup> defendant jointly and severally is for:-

- (i) A declaration that registration of land parcel number Marama Shiatsala/1022 from the names of the late Omeni Munyakho alias Andrea now deceased to the 1<sup>st</sup> defendant was unlawful, illegal, null and void as there were no letters of administration to his estate.
- (ii) Order for cancellation of the new title number comprised in land parcel number Marama/Shiatsala/1787 and 1788 so that the same reverts back to the old title and name of the deceased herein for a proper petition for probate and letters for probate and letters of administration and sharing.

The 1<sup>st</sup> defendant testified that he got land parcel number Marama Shiatsala/1022 through succession and sold it to the 2<sup>nd</sup> defendant.

The 2<sup>nd</sup> defendant contents that she is the personal representative of the estate of Benson Nyaranga Aggrey (the deceased herein) who was the original 2<sup>nd</sup> defendant herein having obtained a grant of letters of administration ad-litem in respect of the estate of the said deceased

person vide Mumias SRM Probate and Administration Cause No. 135 of 2011. The 2<sup>nd</sup> defendant maintains that her deceased husband was a bonafide purchaser for value without notice and the plaintiff should be put to strict proof of each and every allegation contained in the aforesaid paragraphs of the plaint. The 2<sup>nd</sup> defendant admits that her deceased husband was and remains the proprietor of and holding title deed to a parcel of land known as MARAMA/SHIATSALA/1788 having purchased it from the 1<sup>st</sup> defendant and which is a sub-division of plot No. MARAMA/SHIATSALA/1022 but the 2<sup>nd</sup> defendant denies that the said sub-division of MARAMA/SHIATSALA/1022 to create MARAMA/SHIATSALA/1788 was done secretly or fraudulently or maliciously or unlawfully as alleged by the plaintiff or at all and invites strict proof thereof from the plaintiff. It is the 2<sup>nd</sup> defendant's case that sometime in 2001 or thereabouts her deceased husband bought a parcel of land from the 1<sup>st</sup> defendant without notice for value at a consideration of Ksh. 240,000/= which the deceased paid in full in the year 2001 following diligent search at the land registry and physical location revealed that it was freehold and the purchase transaction was without notice to the previous status, if any, and so being an innocent buyer for value without notice the 2<sup>nd</sup> defendant is not suited in the matter and he the 2<sup>nd</sup> defendant was wrongly enjoined to the foregoing proceedings. The 2<sup>nd</sup> defendant further contends that as an administratrix of the estate of the deceased absolute registered proprietor of land parcel L.R. NO. MARAMA/SHIATSALA/1788 the 2<sup>nd</sup> defendant is entitled to peaceful, unhindered, quiet and an uninterrupted ownership, occupation and use thereof and the plaintiff has no claim against the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant avers that the plaintiff has no locus standi to agitate this or any claim in respect of the suit land and that the plaintiff's suit is incompetent, a non-starter, frivolous, vexatious, time barred and untenable in law and it fails to disclose any or any reasonable cause of action against the 2<sup>nd</sup> defendant or at all and she will at the earliest opportunity raise a preliminary objection and notice thereof is hereby given seeking to have this suit struck out with costs and to enter judgment in favour of the 2<sup>nd</sup> defendant as against the plaintiff as follows:-

(a) A declaration that the 2<sup>nd</sup> defendant, being the administratrix and heir of the estate of the deceased proprietor of land parcel L.R. NO. MARAMA/SHIATSALA/1788 is entitled to exclusive, peace and unimpeded occupation and use thereof and that the plaintiff either by himself or through his relative, employees, servants and or agents or any other person claiming under him be permanently restrained from alienating, laying claim to, trespassing onto or in any other manner dealing with land parcel L.R. NO. MARAMA/SHIATSALA/1788 and or interfering with the 2<sup>nd</sup> defendant's peaceful and exclusive ownership, possession and or use thereof.

(b) Costs of this suit.

(c) Any other or further relief deemed fit and just.

The 2<sup>nd</sup> defendant submitted that the plaintiff has no locus standi to sue and that this suit is res judicata.

This court has carefully considered the evidence and the submissions herein. 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. From the plaint dated 1st January 2009 the plaintiff has filed this suit for the benefit of the entire Estate of late Omeno Munyakho alias Andrea it is clear from the plaint paragraph 3 and he has not obtained either a limited or full grant of letters of administration as per his own admission. The plaintiff had filed this suit on his behalf and as the legal representative of the Estate of his deceased grandfather the late Omeno Munyakho alias Andrea before obtaining grant of letters of administration, hence he lacks the necessary locus standi. As was held in the case of **Otieno vs Ougo 1986-1989 E.A.L.R 486:**

*".... an administrator is not entitled to bring any, action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception".*

Evidently, the plaintiff herein does not have the locus standi to file this suit.

On the issue of res judicata, 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."*

The plaintiff in evidence admits that he had knowledge of Kakamega CMC Misc Award No 171 of 1999 and Kakamega CMC Misc Award No 3 of 2014. These were matters between the plaintiff's father and the 1st defendant touching on the suit land and concerned boundaries. I find the present suit res judicata as the matter was heard and determined before a court of competent jurisdiction. The plaintiff also lacks locus standi. With these findings this court cannot go into the merit of this suit including the counter claim. This suit is struck out with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16<sup>TH</sup> DAY OCTOBER 2018.**

**N.A. MATHEKA**

**JUDGE**