



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 52 OF 2018**

**ROSE AUMA ONGENG.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**PETRONALA ADOYO ONGENG.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**MICHAEL ODHIAMBO ONGENT.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**JENIFER FLORA OMBAKA.....DEFENDANT/RESPONDENT**

**RULING**

1. On 23<sup>rd</sup> May, 2018, the defendant/respondent filed a Notice of Preliminary objection dated 22<sup>nd</sup> May 2018 brought under **Section 7 of the Civil Procedure Act and Order 51 Rule 14 (a) of the Civil Procedure Rules 2010**. The preliminary objection is to the Notice of motion dated 14<sup>th</sup> May, 2018 and to the entire suit proceedings and all applications in this matter based on the following grounds:-

2. The plaintiff/respondents appear in person. The defendant is represented by V.H. Awuor and Company Advocates.

3. By way of a plaint dated 16<sup>th</sup> April, 2018 the plaintiffs have sued the defendant for :-

**a) The revocation of the title of the suit land parcel title no. Suna East/Wasweta 1/625 issued to the defendant and a declaration that the suit land parcel belong to the family of the plaintiff.**

**b) Cost of the suit.**

**c) Any other relief this Honourable court would deem fit to grant to the plaintiffs.**

4. The plaintiff's claim that the defendant has fraudulently acquired and irregularly obtained a title deed to the suit had LR NO. SUNA EAST/WASWETA 1/1625 without the knowledge and or consent of the plaintiffs. That the defendant claimed that Samwel Ongeng Anya (deceased) who was the husband of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff and father of the 3<sup>rd</sup> plaintiff sold the suit land to him in 1986. That the deceased had purchased the suit land in the year 1982 from the late Nortabus Ogutu Ojwang who also inherited the land from his brother Paulus Ochupe Ojwang and that the plaintiffs have been raised and depend on the suit land.

5. On 4<sup>th</sup> May, 2018, the plaintiff filed a Notice of motion of the even date seeking an order that the Migori County Surveyor be restrained from carrying and or conducting any surveyor exercise on the suit land pending the hearing and determination of the main suit. That the intended exercise was to be conducted on 17<sup>th</sup> May, 2018 pursuant to the surveyor's letter dated 20<sup>th</sup> April 2018. They also seek costs of the motion.

6. The defendant filed her statement of defence and counterclaim simultaneously with the preliminary objection. She denied the plaintiffs' claim and pleaded particulars of fraud on the part of the plaintiff who allegedly intend to defraud her of the suit land which she lawfully bought from the deceased. That the plaintiffs have intentionally and maliciously obscured, tempered and removed the boundaries of the suit land thus she is seeking a declaration that she is the lawful owner of the suit land and survey exercise sought in the notice of motion, among other orders.

7. The defendant opposed the Notice of Motion by his 30 paragraphed replying affidavit sworn on 22<sup>nd</sup> May 2018 with supporting documents which include a copy of the title deed, sale agreement and a certificate of official search in respect of the suit land. She sought dismissal of the motion with costs and that this court lacks jurisdiction to entertain the application together with the entire suit.

8. This court directed that the preliminary objection be argued by way of written submission. Accordingly and the plaintiffs in person the defendant's counsel filed submission dated 27<sup>th</sup> June 2018 and 28<sup>th</sup> August 2018 respectively.

9. The defendant contended that the dispute arises out of a succession cause namely Migori Resident Magistrate's Court succession no. 23 of 1990 which was heard and finally determined hence the suit including the notice of motion is res judicata by virtue of **Section 7 of the Civil Procedure Act (Cap 21)**. Counsel relied on **John Florence Maritime Service Ltd and Anor –v- Cabinet Secretary for Transport and infrastructure and 3 others (2015) eKLR and Kamunye and Others –v- Pioneer General Assurance Society Ltd (1971) EA 263** on the ingredients and meaning of resjudicata.

10. Counsel further submitted that the suit purely in the nature of succession and or probate and administration which matter is governed by **Sections 2 and 76 of the Law of Succession Act (Cap 160 )** hence this court lacks jurisdiction over the matter. To buttress his submission, counsel cited **Article 162 (2) (b) of the Constitution of Kenya 2010, Section 13 (2) of the Environment and Land Court Act, 2015 (2011)** and the case of **Republic –v-Karisa Chengo & 2 others (2017) eKLR**.

11. In their submissions the plaintiffs reiterated the contents of the plaint and termed the preliminary objection baseless, misplaced, mischievous and an abuse of the court's process hence it should not be allowed. They asserted that the suit land was owned by the deceased who did not disclose to them or any of the family members that he had sold the suit land thus the alleged sale of the land to the defendant remains unclear.

12. The plaintiffs further submitted that the defendant disappeared for over 30 years only to resurface after the death of the deceased to lay the claim. That the defendant has not demonstrated that there was proper and valid sale of the suit land to her by the deceased. They submitted that they have been in occupation of the suit land for over 35 years without interference and have discovered the alleged fraudulent acquisition of ownership of the suit land by the defendant.

13. I have carefully considered the preliminary objection, the entire pleadings, the notice of motion, the replying affidavit and submissions including authorities cited therein. The issues for determination flow from the grounds of the preliminary objection. Therefore, is the suit res judicata and does this court have the requisite jurisdiction over the matter?

14. On res judicata, the defendant contended that the matter directly in issue is in respect of ownership of the suit land which issue was raised in Migori RMC succession cause No. 23 of 1990. That the deceased, Samwel Ongeng Anya, the person under whom the plaintiffs claim was a party in the succession case whereby an objection was raised, heard and determined.

15. The plaintiffs further asserted that if there was an attempt at succession as alleged by the defendant, there was no proof that a valid sale of the suit land existed between the defendant and deceased. They claimed to be the rightful and legal owners of the suit land.

16. Black's Law Dictionary 10<sup>th</sup> Edition, defines the term **"res judicata"** as follows:-

**"An issue that has been definitively settled by judicial decision"**

17. In Kenya, res judicata Doctrine is anchored on **Section 7 of the Civil Procedure Act (Cap 21)** which provides;-

**"No court shall try any suit or issues 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 issues has been subsequently raised, and has been heard and finally decided by such court".**

18. By the above Section, the **Black's Law Dictionary (supra)**, the decision in **Henderson –v- Henderson (1842) ER 313, Karia & Another –v- the Attorney General and others (2005) 1 EA 83** cited in **John Florence Maritime Services cases (supra)**, among other authorities, re judicata doctrine is essentially a bar to subsequent proceedings involving:-

- a) The same issue
- b) The same parties or their representative
- c) The issue has been finally and conclusively decided by a competent court in a prior suit.

19. In the plaint, the orders sought are revocation of the title to the suit land, a declaration that the suit land belongs to the family of the plaintiff and costs of the suit. On the counterclaim, the defendant seeks, among other reliefs, a declaration that she is the absolute registered proprietor of the suit land and a permanent injunction against the plaintiff.

20. The defendant contended that her objection to the grant of letters of administration was upheld in Migori Resident Magistrate's Court Succession Cause number 23 of 1990. That she was declared the personal representative of the estate of the deceased as per the ruling (JFO-11(i) and grant of letters of administration intestate ( JFO- 11 (i) ).

21. The plaintiffs stated that in the year 1982, the late Samwel Ongeng Anya, who was the husband to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff and the father to the 3<sup>rd</sup> defendant purchased the suit land which belongs to the plaintiffs and the entire family members of the deceased. At paragraph 8 of the plaint, the plaintiffs stated that:-

**"The plaintiff's further aver that the late Samwel Ongeng Anya who is the husband to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff's and the father to the 3<sup>rd</sup> plaintiff purchased the suit land parcel in the year 1982 from the late Norbatus Ogutu Ojwang who also inherited the sold parcel from his brother namely Paulus Ochupe Ojwang the plaintiffs and the entire family members of the late Samwel Ongeng Anya are the rightful beneficiaries of the estate of their late kin."**

22. It is evident from the plaint and the accompanying statements that the claim by the plaintiffs is hinged on the suit land allegedly owned by the deceased. Since the plaintiffs purported to be legal representative of the estate of the deceased, I am guided by **Section 2 of the Civil Procedure Act (Cap 21)** on the meaning of legal representative, **Order 4 Rule 4 of the Civil Procedure Rules, 2010** on capacity of parties to sue and be sued and

**Section 79 of the Law of Succession Act** that property of a deceased person shall vest on in personal representative.

23. Quite clearly, the plaintiffs claim to be beneficiary of the estate of the deceased and the issues in dispute were the same issues raised in Migori Resident Magistrate's Court Succession Cause number 23 of 1990 which was heard and finally determined by a competent court as revealed in documents marked JFO- 11 (i) and (ii) herein.

24. Moreover, the grant of letters of administration intestate issued to the defendant (JFO-11(i) were not challenged as provided for under Section 76 of the Law of Succession Act (Cap 160 Laws of Kenya). I find that this court lacks jurisdiction over the Succession dispute hence I down the tools; see **Republic –v- Karisa Chengo & 2 others (2017) eKLR**.

25. This court is absolutely aware of the fact that land is an extremely important aspect of the lives of ordinary people as observed in the case of **Mwangi & anor –v- Mwangi (1986) KLR 328**. Nonetheless justice shall be done to all irrespective of status as stipulated under **Article 159 (2) of the Constitution of Kenya,2010**.

26. In the premises, I find that the instant suit involves the estate of the deceased and the dispute was heard and finally determined by a competent court. Furthermore, the plaintiffs have no requisite capacity to originate the suit.

27. In the result, I find merit in the defendant's preliminary objection dated 22<sup>nd</sup> May, 2018, and I uphold it accordingly. The suit brought by way of a plaint dated 16<sup>th</sup> April, 2018 be and is hereby struck out with costs to the defendant.

**DELIVERED, SIGNED and DATED** in open court at MIGORI this **13<sup>th</sup> day of November 2018**.

**G. M. A. ONGONDO**

**JUDGE**

**In the presence of:**

Mr. Ochwal holding brief for V.H. Awuor for the defendant.

Tom Maurice, Court Assistant