



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 599 OF 2015

(FORMERLY HIGH COURT CASE NO. 60 OF 2011)

JOSEPH KABERA MBUGUA....1ST PLAINTIFF/APPLICANT

KAMAU MBUGUA.....2ND PLAINTIFF/APPLICANT

VERSUS

HANNAH MUMBI MBUGUA.....1ST DEFENDANT

GORDON NGUONO OLANDO.....2ND DEFENDANT

JUDGMENT

By their plaint filed herein on 27th April 2014, the Plaintiffs sought judgment against the Defendants jointly and severally in the following terms:

1. A declaration that the transfer of all the parcel of land known as KISUMU/FORT TERNAN/332 and KISUMU/FORT TERNAN/218 from the name of MBUGUA IGWENYA (deceased) to the 1st Defendant and subsequently transfer of KISUMU/FORT TERNAN/332 to the 2nd Defendant were both fraudulent, unlawful, null and void.

2. An order directing the Land Registrar Kisumu – Nyando Districts to cancel the registration of the 1st Defendant as proprietor of all that piece of land known as KISUMU/FORT TERNAN/218 and the 2nd Defendant as proprietor of all that piece of land known as KISUMU/FORT TERNAN/332.

3. A permanent injunction restraining the 2nd defendant by himself, his agents, servants, workers, employees and/or those claiming through or under him from entering, occupying, leasing, mortgaging, transferring, evicting the Plaintiffs and/or in any way dealing with all that piece of land known as KISUMU/ FORT TERNAN/332.

4. Costs.

5. Any other or further relief this court may deem fit to grant.

The basis of the Plaintiffs case is that their late father **MBUGUA IGWENYA MUIRURI** (the deceased) was the registered owner of the land parcels **No. KISUMU/FORT TERNAN/218** and **KISUMU/FORT TERNAN/332** (the suit land) and sometime in the year 2006 their mother who is the 1st Defendant and without their knowledge or that of the other beneficiaries filed **Succession Cause No.519 of 2006** without disclosing that the Plaintiffs and others were beneficiaries to the deceased's Estate. Having obtained the said grant and before it was confirmed, the 1st Defendant in collusion with the Land Registrar Kisumu – Nyando proceeded to have the suit land transferred to the 1st Defendant without the knowledge or consent of the Plaintiffs and other beneficiaries. Then on or about 25th March 2006, the 1st Defendant, again without the knowledge and/or consent of the Plaintiffs and other beneficiaries, unlawfully and fraudulently transferred the land parcel **No. KISUMU/FORT TERNAN/332** to the 2nd Defendant. Particulars of fraud are pleaded in Paragraphs 9 and 11 of the Plaint. Following the transfer of Parcel **No. KISUMU/FORT TERNAN/332** to the 2nd Defendant, he has now given verbal notice to the Plaintiffs to vacate failure to which the Chief and his Administration Police Officers will move in.

The Defendants filed separate defences in which the 1st Defendant pleaded, inter alia, that the Plaintiffs have no locus standi to agitate this suit as they have no letters of administration and the issues raised offend the mandatory provisions of the Succession Act in particular **Section 93** thereof. She added that the suit land did not form part of the Free Estate of the deceased and that she bought the same from the Settlement Fund Trustees who were the registered owners although there was a thwarted attempt to register, posthumously **MBUGUA**

IGWENYA as the owner on 19th September 2006 yet he had passed on 30th May 2011 without being registered as the owner. That having been registered as the owner, the 1st Defendant took a loan of Ksh.1,055,98 from the Agricultural Finance Corporation and another from the Kenya Sugar Board but defaulted following the post-election violence and sold Parcel **No. KISUMU/ FORT TERNAN/332** openly and with the knowledge of the Plaintiffs. She denied the allegations of fraud levelled against her in Paragraphs 9 and 11 of the Plaint and pleaded, instead, that it is the Plaintiffs who are fraudulent in, inter alia, failing to disclose that the suit land belongs to the 1st Defendant, denying knowledge of the transaction, trying to steal from the 2nd defendant who has lawfully purchased the Parcel **No. KISUMU/FORT TERNAN/332** without notice of any irregularity or fraud, purporting to challenge their mother's ownership of the land etc.

The 2nd Defendant pleaded that sometime in 2010 he was informed that the land Parcel **No. KISUMU/FORT TERNAN/332** was available for sale by the 1st Defendant. He met her and she appeared to be an elderly honest person who told him that she had abandoned it due to the post election violence of 2007 and 2008 and also that she needed to pay back a bank loan to discharge other parcels. Having done all the necessary requirements, they entered into a sale agreement on 16th September 2010 and the title was transferred to the 2nd Defendant on March 2011. The 2nd Defendant denied the allegations of fraud adding that the Plaintiffs have a remedy under the **Law of Succession Act**. He added that he is an innocent purchaser who paid Ksh.1,301,690.00 to the 1st Defendant and this suit is untenable in law, incompetent, fatally defective and contrary to the mandatory provisions of **Sections 27 and 28** of the **Registered Land Act**. He pleaded that it is the Plaintiffs who have acted fraudulently particulars of which were pleaded in Paragraph 21 to include, not having questioned the sale transaction since 2010, alleging that they occupy the suit land yet they have never resided therein for over 10 years, allowing the 2nd Defendant to proceed with the transaction and commit a substantial sum of money only to later claim that the land does not belong to the 1st Defendant, filing this case against the 1st Defendant in a bid to steal from the 2nd Defendant, purporting to challenge the 1st Defendant's ownership of the land etc. He pleaded therefore that the Plaintiffs have no sustainable claim against him and urged that this suit be struck out.

This suit came up for hearing on 4th December 2018 and though served, there was no appearance by either of the two defendants nor Counsel and the hearing therefore proceeded in their absence.

KAMAU MBUGUA the 2nd Plaintiff asked the court to adopt as his evidence his witness statement dated 27th April 2011 as well as the list of documents filed herein. He added that he has the authority of his elder brother the 1st Plaintiff to testify on his behalf. He told the court that the 1st Defendant who is their mother sold to the 2nd Defendant the land Parcel **No. KISUMU/FORT TERNAN/332** which belonged to his late father **MBUGUA IGWENYA MUIRURI** before doing Succession and without their consent. He added that the court had directed him to refund the 2nd Defendant the purchase price which he did and now seeks judgment as per the Plaint.

I have considered the 2nd Plaintiff's evidence as well as the documents filed herein. Although the Defendants were not present in the trial, they have filed their documents and respective defences and notwithstanding the fact that they did not come to court to adopt their written statements, I am of the view that nothing stops this court from considering issues of law that were pleaded by them.

The main issue that I need to resolve at this early stage is whether in fact the Plaintiffs have the necessary locus standi to prosecute this claim. This has been pleaded in Paragraph 18 of the 1st Defendant's defence as follows:

18 "The prayers sought cannot in law be granted and as such the 1st Defendant shall raise a Preliminary Objection on points of law to the effect that:

a. The Plaintiffs have no locus standi to agitate this suit.

b. The Plaintiffs have no letters of administration to the Estate of MBUGUA IGWENYA MUIRURI.

c.

d.

e.

“

The 1st Defendant also filed a notice of Preliminary Objection on points of law dated 7th June 2011 raising the above issues among others.

On his part the 2nd Defendant pleaded in Paragraph 26 of his defence as follows:-

26: "The 2nd Defendant avers that the Plaintiff's claim herein is misguided, wishful, speculative and untenable in law. The Plaintiffs lack the requisite legal interest/authority to bring and sustain the claim herein. The 2nd Defendant will apply for this suit to be struck out."

As I have already indicated above, although the Defendants were not in court to canvass the issues raised in their respective defences, those are matters of law which the court can consider and determine suo moto since they touch on the court's jurisdiction and the parties capacity to approach the court. **BLACK'S LAW DICTIONARY 10TH EDITION** defines locus standi as:

"The right to bring an action or to be heard in a given forum."

In NJAU V. NAIROBI CITY COUNCIL 1982 – 88 1 KAR 229 CHESONI Ag. J A (as he then was) said:

“To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he had no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

It is that issue of the Plaintiff’s locus standi that I must now consider.

It is clear from the documents filed herein that both land parcels

No. KISUMU/FORT TERNAN/218 and **KISUMU/FORT TERNAN/332** were first registered in the name of the Settlement Fund Trustees on 13th June 1980 before being transferred into the names of the deceased on 6th June 1991 and 19th September 2006 respectively. Land Parcel **No. KISUMU/FORT TERNAN/218** was subsequently transferred to the 1st Defendant on 28th February 2007 while the transfer of Land Parcel **No. KISUMU/FORT TERNAN/332** into the 1st Defendant’s name on 18th December 2006 appears to have been cancelled but the same is now registered in the 2nd Defendant’s names. It is not clear why the registration of that land parcel in the 1st Defendant’s names was cancelled. What is clear from the proceedings in **KISUMU HIGH COURT SUCCESSION CAUSE NO. 519 OF 2006** which did form part of the record herein is that although **MWERA J** (as he then was) issued Letters of Administration in respect to the deceased’s Estate on 19th December 2006 to the 1st Defendant, that grant and the subsequent confirmation dated 1st October 2013 were revoked by **MAJANJA J** on 10th June 2016 who then proceeded to reissue the grant to the 2nd Plaintiff, the 1st Defendant and one **ALFRED KINYANJUI** who is not a party in this case. That grant was confirmed by **MAJANJA J** on 26th October 2016. This suit was filed on 27th April 2011 some five years before the 2nd Plaintiff had obtained a grant of Letters of Administration in respect to the deceased’s Estate. The 2nd Plaintiff in his evidence in-chief conceded that the suit land was part of the deceased’s Estate. This is what he said when he addressed the court orally:

“The 1st Defendant is my mother while the 2nd Defendant is the one who purchased the property No. KISUMU/FORT TERNAN/332 from my mother without the knowledge of the family and without having done succession. The said property belonged to our late father MBUGUA IGWENYA MUIRURI.”

The 2nd Plaintiff was only confirming what is contained in the register with regard to the suit land herein being part of the Estate of the deceased herein. Given those circumstances, the Plaintiffs were not the administrators of the Estate of the deceased herein who as defined in **Section 3** of the **LAW OF SUCCESSION ACT** are persons:

“to whom a grant of letters of administration has been made under this Act.”

Under Section 82 of the same Act, a personal representative, subject only to any limitation imposed by the grant, has power to enforce by suit all causes of action which survive the deceased. And a personal representative is defined under **Section 3** of the same Act as:

“..... the executor or administrator of a deceased person.”

It is clear therefore that by the time the Plaintiffs filed this suit in 2011, they were neither the legal representatives nor administrators of the deceased’s Estate. On the authorities of **TROUSTIK UNION INTERNATIONAL & ANOTHER V MBEYU & ANOTHER (2008) 1 KLR (G & F) 730**, they had no capacity to file and prosecute this suit which, as per their own pleadings, involves the suit land which forms part of the Estate of the deceased. The defendants plea that the plaintiffs have no locus standi to agitate this suit appears to me to be well taken and should be up-held.

Even on the evidence before me, it is clear that by the time the 1st Defendant transferred to the 2nd Defendant the land Parcel **No. KISUMU/FORT TERNAN/332** by the agreement dated 16th September 2010, she was by then a holder of the grant issued by **MWERA J** (as he then was) on 19th December 2006. That grant was duly confirmed on 1st October 2013 before it was revoked and re-issued in 2016. So really there was no proper transfer of the suit land either to the 2nd Defendant or to the 1st Defendant and the same remain the Estate of the deceased. Indeed it is clear from the ruling of **MAJANJA J** dated 2nd March 2017 in **KISUMU HIGH COURT SUCCESSION CAUSE NO. 519 OF 2006** that the sale of land Parcel **No. KISUMU/FORT TERNAN/332** to the 2nd Defendant “was reversed” and the 2nd Plaintiff was “ordered to refund the purchase price which he did.” In the same ruling, **MAJANJA J** refers to the 2nd Plaintiff as “the beneficiary of KISUMU/FORT TERNAN/332” and my understanding of that is that the issue of ownership of land Parcel **No. KISUMU/FORT TERNAN/332** has been determined.

However, having already determined that the Plaintiffs lack the locus to prosecute this suit as they were not holders of a grant of letters of administration as at the time of filing this suit, the up-shot of the above is that this suit is incompetent and will be struck out which I hereby do. As the Plaintiffs and 1st Defendant are a mother and sons, I direct that each party meet their own costs.

B. N. Olao

Judge

7.12.2018

Judgment Dated, Signed and Delivered

this 7th day of December, 2018 in Open Court at Kisumu

2nd Plaintiff - Present

1st Plaintiff - Absent

Mr. Gakinya for Plaintiffs – Absent

Defendants both absent

Right of Appeal

B. N. Olao

Judge

7.12.2018