



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.182 OF 2013**

**DAN AKELLO OYOGA.....PLAINTIFF**

**VERSUS**

**JOSEPH AKELLO OYOGA .....1<sup>ST</sup> DEFENDANT**

**CORNEL ODENY ODERA.....2<sup>ND</sup> DEFENDANT**

**RULING**

**1. Joseph Akello Oyoga and Cornel Odeny Odera**, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively, through M/S Otieno, Yogo, Ojuro & Advocates, filed the notice of preliminary objection dated 20<sup>th</sup> March 2014 to the notice of motion dated 10<sup>th</sup> July 2013 and suit commenced through the plaint dated 10<sup>th</sup> July 2013 by **Dan Afuoka Ayoo**, the Plaintiff through M/S Obara & Obara Company Advocates. The notice set out two grounds being that;

a. That the pleadings should be struck out for being prepared, signed and filed by a person who did not have a practicing certificate.

b. That the suit is barred by the provisions of **Section 6 and 7** of the Civil Procedure Act, **Order 2 Rule 15** of the Civil Procedure Rules by reasons of previous suits filed by the Plaintiff against 2<sup>nd</sup> Defendant being Siaya SRM CC NO.73 of 2009, Siaya District Land Disputes Tribunal case No.34 of 2009 and Kisumu H.C.C.C. NO.71 of 2009 which have been decided in the 2<sup>nd</sup> Defendant's favour.

2. The notice of preliminary objection and notice of motion seeking same prayers were served on the firm of M/S Obara & Obara Advocates, the counsel on record for the Plaintiff on 23<sup>rd</sup> June 2014 and affidavit of service sworn by Julius Otieno Raminya filed. The court notes that no reply to the notice of motion and or the preliminary objection was filed. Several dates were fixed for the hearing of the notice culminating with the 17<sup>th</sup> October 2016. The court on being satisfied that counsel for the Plaintiff had been served but were absent allowed the Defendant's counsel to prosecute the notice.

3. The following are the issues for determination

a. Whether the person who prepared signed and filed the plaint and notice of motion dated 10<sup>th</sup> July 2013 for the Plaintiff had a valid practicing certificate.

b. Whether the parties and subject matter in this suit are the same to the other matters.

c. Whether the notice of motion and plaint should be struck out.

d. Who pays the costs.

4. The court has considered the grounds on the notice of preliminary objection, the submission by counsel for the Defendants, pleadings filed by both sides and come to the following determinations;

a. That the plaint and notice of motion dated 10<sup>th</sup> July 2013 are indicated to have been drawn, signed and filed on behalf of the Plaintiff by M/S Obara & Obara Company Advocates. The certificate of urgency of even date is drawn by the same firm and signed by one Stephen Ouma Kadera Advocate.

b. That the copies of the online search from the Law Society of Kenya website attached to the supporting affidavit of Cornel Odeny Odera, the 2<sup>nd</sup> Defendant, sworn on 19<sup>th</sup> March 2014 indicates the status of Obara Adonijah Oiro of Obara & Obara Advocates as “inactive in 2013. The notes on the right margin defines “inactive” to mean “the advocate is not certified to practice for the indicated year.” The document in respect of Kadera Stephen Ouma indicates his status as “unknown”. The court has taken note of a letter dated 11<sup>th</sup> July 2014 by M/S Obara & Obara Company Advocates addressed to the Registrar Environment and Land Court seeking to withdraw the suit. There is however no indication whether it was brought to the attention of the court for action.

c. That the proceedings annexed to the affidavit of the 2<sup>nd</sup> Defendant referred to above show that the Siaya Land Disputes Tribunal case No.34 of 2009 was between the Plaintiff and 2<sup>nd</sup> Defendant herein. That the subject matter was **Siaya/Karapul –Ramba/1108**, which is the same subject matter in this suit. The tribunal made its award in favour of the 2<sup>nd</sup> Defendant which was adopted in Siaya PMCC Land case No.73 of 2009 on the 15<sup>th</sup> December 2009 whose pleadings is also annexed to the said affidavit. That also annexed to the said affidavit is an order issued in Siaya PMCC Land case No.73 of 2009 lifting the caution filed by the Plaintiff and restraining him from the suit land.

d. Though the Defendants have referred to another suit being HCC NO.71 of 2009, no pleadings or proceedings concerning that case has been availed. That in the absence of such documents, the court is unable to make any determination on whether the parties and subject matter of that case were similar to those in this instant case.

e. That for reasons set out above the plaint and notice of motion dated 10<sup>th</sup> July 2013 are clearly about a matter and between parties to previous court proceedings that have already been decided upon on merit. The suit offends the provisions of **Section 6 and 7** of the Civil Procedure Act Chapter 21 of Laws of Kenya.

5. The plaint and notice of motion dated 10<sup>th</sup> July 2013 are therefore struck out with costs to the Defendants.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 24<sup>TH</sup> DAY OF JANUARY 2017**

In presence of;

Plaintiff Absent

Defendant 2<sup>nd</sup> present

Counsel Mr. Oriel for the Defendants

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**24/1/2017**

24/1/2017

S.M. Kibunja Judge

Oyugi court Assistant

2<sup>nd</sup> Defendant present

Mr Oriel for the defendant

Court: Ruling dated and delivered in open court in presence of

Mr. Oriel for the Defendants and the 2<sup>nd</sup> Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/1/2017