



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO. 255 OF 2013
(FORMERLY CIVIL SUIT NO.255 OOF 2013]

THOMAS OMONDI OWAKO.....1ST PLAINTIFF
ANNA AKINYI OWAKO.....2ND PLAINTIFF
VERSUS
DAVID OSCAR OWAKO1ST DEFENDANT
JOHN KENNEDY AGENGO.....2ND DEFENDANT
ABIRA CATHERINE.....3RD DEFENDANT

RULING

1. **Thomas Omondi Owako** and **Anna Akinyi Owako**, the plaintiffs, filed this suit against **David Oscar Owako** (sued in his capacity as alleged administrator), **John Kennedy Agengo** and **Abira Catherine**, the Defendants, through the plaint dated 25th September 2013 filed contemporaneously with a notice of motion of even date.

2. The 1st Defendant **David Oscar Owako**, filed a notice of preliminary objection dated 16th September 2016 setting out the following grounds;

- That the Plaintiff lacks requisite locus standi to institute this suit.
- That the suit and subject matter herein is res judicata in view of Kisumu High Court Succession No.452 of 2008 and No.453 of 2008.
- That the suit has abated upon the demise of 1st Plaintiff.
- That the court has no jurisdiction as this suit is a family (succession) dispute.

3. The notice of motion dated 25th September 2013 came up for hearing on the 19th September 2016. The court heard the 1st Defendant in person, Mr. Yogo for the Plaintiffs and Mr. Onsongo for the 2nd and 3rd Defendants and directed that the Preliminary

objection vide 1st Defendant's notice dated 16th September 2016 be heard first. Mr Yogo, learned counsel for the Plaintiff requested for adjournment to prepare for the preliminary objection while Mr. Onsongo for the 2nd and 3rd Defendants indicated that the preliminary objection do not affect his client.

The hearing of the preliminary objection was fixed for the 30th November 2016.

4. That on the 30th November 2016, the 1st Defendant and Mr. Yogo for the Plaintiffs submitted on the preliminary objection and their submissions are as summarized herein below;

A. 1ST DEFENDANT'S SUBMISSION:

That the succession causes has been finalized and he is the appointed administrator of the estates That the Plaintiffs have no locus standi to file this suit. That the 1st Plaintiff died on the 15th December 2015 and as he has not been substituted, the case has abated as the 2nd Plaintiff do not have locus to prosecute this case. That this suit was filed through the personal interest of the Plaintiffs counsel over property subject matter of another pending case.

B. PLAINTIFFS COUNSEL'S SUBMISSIONS:

That the death of the 1st Plaintiff did not affect the pending suit as the 2nd Plaintiff is still alive and has the locus to prosecute the case. That the suit is not res judicata as the revocation proceedings in the two succession causes are ongoing and until they are decided, this suit cannot be res judicata. That the Plaintiffs interests can only be dealt with by this court and the preliminary objection should be rejected and dismissed with costs.

5. The following are the issues for the court's determination;

- a) Whether the Plaintiff have the locus to file and prosecute this case.
- b) Whether the suit is res judicata for reasons of the two succession causes.
- c) Whether this court has jurisdiction to deal with the issues in this case.
- d) What orders to issue in respect of the preliminary objection.
- e) Who pays the costs.

6. The court has after carefully considering the grounds on the notice of preliminary objection dated 16th September 2016, the oral rival submissions tendered thereof, and the pleadings filed came to the following determinations:

- a) That from the pleadings filed by the Plaintiffs, specifically paragraph 3 of the plaint dated 25th September 2013 and paragraph 2 of the 1st Plaintiff supporting affidavit sworn on the 25th September 2013, the Plaintiffs and 1st Defendant are children of the late **Jonathan Owako Oyiejowi** and the late **Melda Akinyi Owako**.
- b) That the 1st defendant has been appointed the administrator of the estate of the said **Imelda Akinyi Owako** and **Jonathan Owako Oyiejowi** in Kisumu H.C. Succession Cause Nos. 452 and 453 of 2008 respectively. That the grants were confirmed on the 26th February 2009 according to the certificates of confirmation of grants attached to the 1st Plaintiff's supporting affidavit referred to above.
- c) That the Plaintiffs pleadings especially paragraphs 4, to 12 of the plaint dated 25th September 2013 raises questions that falls under the jurisdiction of the succession court in terms of **Section 2(1)** of the Law of Succession Act, Chapter 160 of Laws of Kenya. That the Plaintiffs averments seem to question the grants obtained by the 1st Defendant in Kisumu H.C. Succession Causes Nos. 452 and 453 of 2008. That the Plaintiffs further accuse the 1st Defendant of meddling with the

properties of the two estates and unlawfully transferring some of the properties to other persons, including the 2nd and 3rd Defendants. That the issue of whether or not the grant of letters of administration issued to the 1st Defendant in Kisumu H.C. Succession Cause Nos.452 and 453 of 2008 were lawfully, procedurally and legally issued are matters to be determined by the High Court sitting as a succession court and not by this court.

d) That though the Plaintiffs counsel submitted that revocation proceedings have been commenced in the two succession causes, the 1st Defendant response was that there was nothing pending in the two causes. That none of the parties herein availed any copies of the said revocations proceedings to this court. That in any case until and unless the grants issued and confirmed in Kisumu H.C. Succession Case Nos.452 and 453 of 2008 are revoked, this court would have no basis of faulting the transactions done by the 1st Defendant on the strength of the said certificates of confirmation of grant for the simple reasons that it would be akin to sitting on appeal on a decision made by the High Court.

e) That the prayers sought at paragraph 16 of the plaint dated 25th September 2013 if granted against the 1st Defendant would amount to contradict the express orders in the certificates of confirmation of grant issued in Kisumu H.C. Succession Cause Nos.452 and 453 of 2008 in his favour. That the Plaintiffs should first pursue their interests through the Succession Court in accordance with the provisions of the Law of Succession Act and if the grants are revoked and or distribution of the estates altered, then they may move this court on any land matter or issues that the succession court may not give directions on.

f) That the 1st Defendant contention that the 1st Plaintiff passed on the 15th December 2015 has not been disputed. That the Plaintiffs counsel submitted that the suit survived the demise of the 1st Plaintiff and therefore it will proceed with the 2nd plaintiff. That position is supported by **Order 24 Rules 1 and 2** of the Civil Procedure Rules. That **Rule 3 (1)** of the said order provides for the substitution of a deceased's party with a legal representative on application. That there is no application made to substitute the 1st Plaintiff since his death on the 15th December 2015 and under **Rule 3(3)** of the said order, the 1st Plaintiff's case against all the three Defendants has abated, as more than one year has lapse since his death.

g) That even though the 2nd and 3rd Defendants did not participate in the hearing of the preliminary objection, the court has noted that they have been mentioned in paragraphs 8, 10 and 13 in relation to having bought some of the properties from the 1st Defendant. That the prayers that may affect the 2nd and 3rd Defendants if granted, are prayers (b) and (c) if the title for **Kisumu/Mohoroni/514 and 144** are to be cancelled. That as the Plaintiffs were not parties to the sale agreements between the Defendants, and the grants under which the 1st Defendant draws his rights to the said properties has not been successfully challenged todate, the Plaintiffs lacks capacity (locus) to sustain this suit against them.

7. That flowing from the foregoing, the court upholds the 1st Defendant's preliminary objection on the grounds that the Plaintiffs are without locus and that the issues in the suit being essentially of validity of the grants of letters of administrations and distributions of the properties of the estates of the two deceased persons, this court lacks jurisdiction. The Plaintiffs suit commenced through the plaint dated 25th September 2013 and the notice of motion of even date are hereby struck out with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 29TH DAY OF MARCH 2017

In presence of;

Plaintiffs Absent

Defendants 1st present

Counsel None

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

29/3/2017

29/3/2017

S.M. Kibunja Judge

Plaintiff absent

1st Defendant present

Court: The Ruling dated and delivered in open court in presence of the 1st Defendant only.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

29/3/2017