



Abudo v Okuku (Suing as legal rep of Alfred Wadondera Okuku) (Environment & Land Case 92 of 2018) [2024] KEELC 41 (KLR) (19 January 2024) (Ruling)

Neutral citation: [2024] KEELC 41 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 92 OF 2018**

**BN OLAO, J
JANUARY 19, 2024**

BETWEEN

KARIM OJIAMBO ABUDO PLAINTIFF

AND

**PAULINE NABWIRE OKUKU (SUING AS LEGAL REP OF ALFRED
WADONDERA OKUKU) DEFENDANT**

RULING

1. By an amended plaint dated 15th October 2019 and filed on 16th October 2019 Karim Ojiambo Abudo (the Plaintiff) impleaded Pauline Nabwire Okuku the Defendant and sued as the legal representative to the Estate of Alfred Wadondera Okuku seeking the main remedy that the Defendant's name be cancelled from the register to the land parcel no Bunyala/Bulemia/2228 (the suit land) and that the same be registered in the Plaintiff's names. It is the Plaintiff's case that the suit land was hived out from the original land parcel no Bunyala/Bulemia/358 which he held in trust for himself and his brother Benson Mbwede Okado. In 1977 the Plaintiff was imprisoned for 20 years at Luzira Maximum Prison in Uganda and upon his release in 1998, he found that the deceased Alfred Wadondera Okuku had fraudulently demarcated the original land and created the suit land which he then registered in his name. Particulars of fraud are pleaded in paragraph 9(1) to (iv) of the amended plaint and it is the Plaintiff's case that the Defendant holds the suit land in trust for him. The Defendant is sued as co-Administrator to the Estate of Alfred Wadondera Okuku.
2. The Defendant filed a defence dated 31st March 2021 through the firm of J. V. Juma Advocates in which she admitted that she is a co-Administrator to the Estate of Alfred Wadondera Okuku. She however denied the allegations of fraud levelled against Alfred Wadondera Okuku adding that infact part of the suit land was purchased from the Plaintiff's family and the other part from one Ojiambo Khaluba and the two portions were amalgamated to create the suit land.



3. Subsequently, the firm of Ashioya & Company Advocates came on record for the Defendant and filed another defence dated 27th April 2023 without leave. However, the trial had commenced on 4th October 2021 and therefore, the defence dated 27th April 2023 and filed on 3rd May 2023 is hereby struck out from the record.
4. The Plaintiff testified before Omollo J on 4th October 2021 and closed his case. The Defendant was granted leave to file further documents and meanwhile, she changed her advocate and also became unwell and that perhaps explains why 2 years after the Plaintiff closed his case, the Defendant is yet to testify. The record also shows that attempts have been made towards a settlement but with no success.
5. The Defendant has now approached this Court vide her Notice of Preliminary Objection dated 26th September 2023 in which she challenges the competency of this suit on the following six (6) grounds namely;
 1. That the Plaintiff brings this suit on behalf of his brother yet he has not filed his brother's written authority.
 2. That the registration complained of by the Plaintiff is a first registration and it cannot be defeated.
 3. That the Defendant is being blamed for liability acts of fraud of a deceased person yet she has no Letters of Administration to his Estate.
 4. That the Plaintiff's claim to the suit land was defeated by the Limitation of Actions Act way back in the year 1990 and this suit is therefore null and void *ab initio*.
 5. That the contract forming the basis of this suit was allegedly entered onto in the year 1997 between the parties herein i.e. the Plaintiff and Alfred Wadondera Okuku and it was overtaken by the Limitation of Actions Act it is therefore not enforceable.
 6. That no nexus has been established between the Defendant and the late Alfred Wadondera Okuku.
6. When the Preliminary Objection was placed before me on 25th September 2023, I directed that it be canvassed by way of written submissions.
7. The submissions were subsequently filed both by the firm of S.s. Balongo & Company Advocates for the Plaintiff and by the firm of Ashioya & Company Advocates for the Defendant.
8. I have considered the pleadings herein, the Preliminary Objection and the submissions by counsel.
9. A preliminary Objection is to be considered in line with the well trodden path set out in the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors* 1969 E.A. 696 where LAW J.A. said a Preliminary Objection:

“... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued on a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”



In the same case, Sir Charles Newbold P. described it thus:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Discussing the same issue, Ojwang J (as he then was) in *Oraro v Mbaja* 2005 KLR 141 said:

“A Preliminary Objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a Preliminary point ... Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence ...”

10. Guided by the above precedents, I have considered the Preliminary Objections to find out if they raise pure points of law or if in fact they require to be proved by evidence.
11. As to whether the Plaintiff has filed this suit on behalf of his brother and therefore needed written authority to do so, there is nothing in the plaint to suggest that the Plaintiff has approached this Court as a representative of his brother. It is clear from the plaint and particularly paragraph 11 that he seeks the registration of the land parcel no Bunyala/Bulemia/2228 in his own names. He did not therefore need any authority from any other person to file this suit.
12. On the issue that the registration of the land parcel NO Bunyala/Bulemia/2228 is a first registration and therefore cannot be impeached, counsel for the Defendant no doubt had in mind section 143(1) of the repealed *Registered Land Act*. It provided that:

143

- (1). “Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake”.

The copy of register of the land parcel NO Bunyala/Bulemia/2228 shows that it was first registered in the name of Alfred Wadondera Okuku on 2nd October 1985. That was long before the commencement of the *Land Registration Act* 2012 and the Land Act. Section 80(1) of the *Land Registration Act* provides that:

80

- (1). “Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake”.



Further, Section 106(1) of the [Land Registration Act](#) 2012 provides that:

“On the effective date, the repealed Acts shall cease to apply to a parcel of land to which the Act applies.”

It is clear, therefore, that whereas Section 143 of the repealed Registered Land Act protected a first registration notwithstanding how it was obtained, following the promulgation of the new Land Laws in 2012, no registration is exempt from rectification if it was obtained fraudulently – see [Esther Ndengi & another v Gatei Mbugua](#) 2020 eKLR. Therefore, although the issue of whether or not the registration of the land parcel no Bunyala/Bulemia/2228 was or was not a first registration is not strictly a pure point of law as it requires the Court to examine the registration documents which is a matter of evidence, I have decided to determine it at this early stage because it has been raised as a Preliminary Objection. My finding is therefore that following the promulgation of the new Land Laws, even a first registration is impeachable if fraud is proved and in this case, fraud has been pleaded.

13. The third objection is that the Defendant has been sued for acts of fraud of a deceased person yet she has no Letters of Administration in respect to his Estate. It is true that the Defendant has been sued as a legal representative to the Estate of the deceased Alfred Wadondera Okuku. None of the parties has filed any Grant of Letters of Administration in respect to the Estate of the said Alfred Wadondera Okuku. But in her own defence, the Defendant had admitted in paragraph 2 of her defence that she is a co-Administratrix to that Estate as pleaded in paragraph 2 of the plaint. Again, this is a matter to be proved by evidence and is not a proper Preliminary Objection. It will have to await the full trial.
14. Further, the Defendant has pleaded that the contract forming the basis of this suit was entered into in 1977 and therefore this suit was defeated by the [Limitation of Actions Act](#) in 1990. The Plaintiff has pleaded fraud and in paragraph 9 of the amended plaint, he has added that the fraud was discovered in 2016. This suit was first filed on 30th November 2018 before being amended on 15th October 2018. Section 26 of the [Limitation of Actions Act](#) provides that where a cause of action is based on fraud, the limitation period does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it. That Preliminary Objection does not aid the Defendant.
15. Finally, the Defendant has pleaded that there is no nexus between the Defendant and the deceased Alfred Wadondera Okuku. Again, the Defendant having admitted that indeed she is a co-Administratrix to the said Estate notwithstanding the fact that no Grant of Letters of Administration has been filed by either party that is an issue best left to be determined on the evidence during the plenary hearings.
16. The up-shot of all the above is that the Preliminary Objection dated 26th October 2023 is devoid of any merit. It is accordingly dismissed with costs.

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 19TH DAY OF JANUARY 2024.

BOAZ N. OLAO

JUDGE

19TH JANUARY 2024

This being a part heard case in which the Plaintiff testified before Omollo J way back on 4th October 2021 and closed his case, I direct that the Defendant’s case shall be heard on 25th April 2024 to avoid any further delays.

BOAZ N. OLAO



JUDGE

19TH JANUARY 2024

