



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT MIGORI
ELCC NO. 270 OF 2017

JOHN OUMA DANIEL.....PLAINTIFF

VERSUS

GEORGE OKECH OYUGI.....DEFENDANT

RULING

1. In a Notice of preliminary objection dated 3rd April, 2017, the Defendant namely **GEORGE OKECH OYUGI** has raised a preliminary objection to the Notice of Motion application dated 28th February 2017 and the entire suit on a point of law. The grounds of the objection are that;

a) The court lacks jurisdiction to entertain this matter pursuant to section 30 of the Land Adjudication Act Cap 284 Laws of Kenya.

b) The Plaintiff lacks the locus standi to institute this suit on behalf of the deceased herein.

2. The Plaintiff namely John Ouma Daniel is represented by P. D. Onyango Advocate. The Defendant is represented by Obach and Partners Advocate.

3. On 13th March, 2017, I certified the Notice of Motion application as urgent. It came up for inter partes hearing on 4th April, 2017 when I heard arguments by both counsel.

4. Mr P. D. Onyango counsel for the Defendant submitted as summarized as;

a) This court lacks jurisdiction to entertain the suit

b) The suit land namely Parcel number 963 Waware Adjudication Section in Mfangano Island is undergoing adjudication

c) Referred to letter dated 17th February 2017 document marked JOD 8 especially paragraph 2

d) No objection has been done to the adjudication

e) Section 30 of the Land Adjudication Act is a mandatory provision and bars court from dealing with the matter.

f) There is no consent in writing of the land adjudication officer as per Section 29 of the Act

g) Furthermore, no grant of letters of administration in respect of estate of the deceased, Daniel

Obwogo Onyango obtained.

h) No locus standi by Plaintiff/Applicant to institute this suit.

i) Referred to Section 54 Law of Succession Act Cap 160 and Rule 14 Probate and Administration Rules

j) That the suit and Notice of Motion dated 28th February, 2017 be dismissed or struck out with costs to the Defendant/Respondent

5. Mr Obach counsel for the Plaintiff/Respondent submitted in brief as hereunder;

a) The dispute has lasted over three years

b) Adjudication was involved in the matter

Referred to a letter dated 16th November 2016 annexure 6 to Notice of Motion dated 28th February, 2017 addressed to the area chief by the Mbita/Suba sub counties Land Adjudication and Settlement Officer.

c) The area chief tried to arbitrate and failed

d) The Plaintiff had no other help, but to file the suit

e) Alive to the mandatory provision of the Act.

f) Adjudication office failed

g) That the Preliminary Objection be dismissed with costs

6. I have studied the submissions in support of the Preliminary Objection and the rival submissions thereof. The points for determination at this stage are on whether;

a) this court has jurisdiction over the dispute and

b) the Plaintiff has locus standi to file the suit.

7. The Defendant counsel has raised a preliminary objection to the jurisdiction of this court to entertain the dispute. He has done so at the earliest opportunity. Notably a Preliminary objection was succinctly defined by Sir Charles Newbold President in **Mukisa Biscuits Co-Vs-West End Distributors (1969) EA 606 at page 701** as follows;

It is settled that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and that it can not be raised if any fact has to be ascertained.

8. Mr P. D. Onyango counsel for the Defendant in his submissions, cited **Section 29 (1) of the Land Adjudication Act Revised Edition (2016) 2012** which provides as follows :-

Any person who aggrieved by the determination of an objector under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-

a) Delivering to the Minister an appeal in writing specifying the grounds of appeal; and

b) Sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall

determine the appeal and make such order thereon as he thinks just and the order shall be final.

9. The counsel also cited Section 30 of the Land Adjudication Act which provides as follows:-

Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this act.

Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.

Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty –eight days after the refusal, appeal in writing to the Minister whose decision shall be final. (Emphasis supplied)

10. I note from both submissions that adjudication was attempted regarding the dispute. The adjudication register is still open hence adjudication process is incomplete. There is no consent in writing or direction of the adjudication officer relating to the dispute. Therefore, this court is debarred from entertaining any proceedings concerning the land whose adjudication is underway.

11. In **Samwel Kamau Macharia and Another-Vs-Kenya Commercial Bank and two others (2012) eKLR** it was held that a court's jurisdiction flows from the Constitution, or legislation, or both.

12. It is abundantly clear from the submissions made by both counsel that the dispute is before the land adjudication officer. Any appeal from the decision of the adjudication officer lies with the minister whose decision will be final as contemplated under Section 30 of the Act (supra). In the case of **Alice Mweru Ngai-vs-Kenya Power and Lighting Company Ltd (2015) eKLR**, B N Olao, J, noted, inter alia:

“It is clear from the above that the Plaintiff’s first port of call should be the Energy Regulatory Commission and not this court. Where the law has granted jurisdiction to other organs of Government to handle specific grievances. The courts must respect and uphold the law.” (Emphasis added)

13. Further, in **Daniel Kaloki Kioko and Another-vs-Willy Muasya Kioko (2009) eKLR**, it was observed that:

“There is nothing more to say as where jurisdiction is wanting, all other issues cannot have any meaning.”

14. Similarly in the celebrated case of **Owners of Motor Vessel Lilies “S”-Vs-Caltex Oil Kenya Limited (1989) KLR 1**, it was held that jurisdiction is everything and once a court has no jurisdiction, it has no power to make one more step. The court has to down its tools.

15. Additionally, the Supreme Court of Kenya (SCK) in **Republic –vs-Karisa Chengo and 2 Others Petition No. 5 of 2017** restated the same position. It held inter alia;

“...As we know, jurisdiction goes to the root of any litigation. This position was forcefully reiterated in the locus classicus decision of Nyarangi, JA in The Owners of Motor Vessel Lillian “S”-VS-Caltex Oil Kenya Ltd (1989) KLR 1 that “jurisdiction is everything.” Without it a court cannot make a move. Lack of jurisdiction thus renders a court’s decision void as opposed to it being merely voidable. When an act is void, it is a nullity ab initio.” (emphasis laid)

16. It follows that on the ground of jurisdiction alone, this court has to down its tools in the circumstances.

17. In respect of locus standi, **Section 54 of the Law of Succession (Cap 160 Laws of Kenya)** on Limited grants, provides as follows;

“A court may, according to the circumstances of each case, limit a grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule.”

18. I am also guided by the following provisions of the law;

a) Rule 12 of the Probate and Administration Rules governing the application for limited grant under the fifth Schedule to the Act (Cap 160 laws of Kenya).

b) Rule 14 of the Probate and Administration Rules is in respect of amendment or withdrawal of application for grant.

c) Rule 40 on application for confirmation of grants.

d) Section 71 of the Law of Succession Act Cap 160 on confirmation of grant.

19. In Probate and Administration causes, an executor or executrix, an administrators/administratrix of estate of a deceased person is entitled to represent that estate in matters including but not limited to suits. It has not been done so in the instant case. In **PIM-Vs-Morton (1976-80) KLR 963 at 967**, Harris, J observed, inter alia;

“I hold that the present application succeeds and I direct that the applicants, as executors of the deceased plaintiff, be made parties as plaintiff and be at liberty to proceed with the suit.”
(Emphasis laid)

20. The preliminary objection raises pure points of law and not general grounds to oppose the Notice of Motion and the entire suit on merits. It has been argued on the assumption that the facts pleaded by the other side are correct and it cannot be raised if any fact has to be ascertained; **see Mukisa Biscuit Co. (supra) at page 701 paragraph A and B**. I am inclined to uphold able submissions by the Defendant’s counsel.

21. A fortiori I find that the Preliminary Objection is merited. I strike out the Notice of Motion application dated 28th February, 2017 and the entire suit. Costs shall be borne by the Plaintiff.

Dated, signed and delivered at Migori this 31st day of May 2017.

G.M. A. ONGONDO

JUDGE

In the presence of :

Mr Agure Odera counsel holding brief for P.D Onyango for the Defendant

Mr Tom Otieno, court assistant/court clerk