



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.105 OF 2016**

**OJWANG KOMBUDO.....1<sup>ST</sup> PLAINTIFF**

**OJENGE KOMBUNDO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**CLEMENT OTIENO ONDIEK alias LAMECK.....1<sup>ST</sup> DEFENDANT**

**PATRICK OGADA ONDIEK.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. **Ojwang Kombudo and Ojenge Kombudo** the Plaintiffs, filed two notices to raise a preliminary objection dated 5<sup>th</sup> July 2016 and 9<sup>th</sup> September 2016 raising the following two points of law;

a) That Clement Otieno Ondiek alias Lameck and Patrick Ogada Ondiek, the Defendants, lacks locus standi to maintain defence and counterclaim for they have not obtained a Grant of letters of Administration of the estate of the deceased persons on whose behalf they purports to act.

b) That the Defendants defence and counterclaim is statute time barred under **Section 7 of the Limitation of Actions Act** Chapter 22 of Laws of Kenya.

2. That Mr. Aboge and Onyango, learned counsel for the Plaintiffs and Defendants respectively, appeared before the court on the 14<sup>th</sup> September 2016 for the hearing of the Plaintiffs notice of motion dated 13<sup>th</sup> May 2016. That a consent was recorded that prayer 3 be allowed on condition that the Plaintiffs do not dispose off or part with possession of the suit land **Kisumu/Dago/670**. The counsel agreed to have written submissions filed on the two preliminary objections within the agreed timeline. The matter was listed for mention on the 3<sup>rd</sup> November 2016 when the court was informed that the Plaintiffs had filed and served their submissions dated 30<sup>th</sup> September 2016. The counsel for the Defendants sought for more time to file and serve their submission.

The matter was mentioned on the 13<sup>th</sup> February 2017 when the court was told by counsel for the Plaintiffs that the Defendants had not filed their submissions within the seven days given or at all. The matter was then fixed for ruling today.

3. That following are the issues for determination by the court;

a) Whether the Defendants have the locus standi to file the counterclaim against the Plaintiffs.

b) Whether the Defendants claim in the counterclaim is statute barred in view of the provisions of **Section 7 of the Limitation of Actions Act**.

c) Whether the defence raises triable issues to the Plaintiffs claim

d) What orders to issue.

e) Who pays the costs.

4. The court has carefully considered the two issues contained in the two notices of preliminary objections dated 5<sup>th</sup> July 2016 and 9<sup>th</sup> September 2016, the submissions by the Plaintiffs counsel and come to the following findings;

a) That this suit was commenced by the Plaintiffs through their plaint dated 13<sup>th</sup> May 2016 and filed in court on the 16<sup>th</sup> May 2016 through the receipt No.7412521. The Plaint names Clement Otieno Ondiek Alias Lameck and Patrick Ogada Ondiek as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively. The plaint contains the following prayers:

- Permanent injunction against Defendants from land parcel **Kisumu/Dago/670**.

- Special damages of Ksh.362,460/= plus interest at court rates.

- Costs of the suit and interests at courts rates.

b) That it follows that the two Defendants individually or jointly have an automatic right to defend the suit filed against them by the Plaintiffs. That the Defendants have filed a defence which contains a counterclaim and the Plaintiffs have not shown any reasons why the defence should be struck out. The court has perused the defence filed. It raises the defence of fraud in the way the Plaintiffs obtained registration with the said land and alternatively the defence of adverse possession. The court is of the view that the defence raises triable issues to the Plaintiffs claim and for that reason it should not be struck out.

c) That as properly captured by the Plaintiffs in their notice to raise preliminary objection dated 5<sup>th</sup> July 2016, the Defendants have not obtained a Grant in respect of the estate of the late Okongo Randa and Ondieki Randa. That is confirmed by the Defendants in their averments at paragraphs 14 and 15 of the defence and counterclaim dated 20<sup>th</sup> June 2016.

d) That the Defendants counterclaim is aimed to having the entries made in favour of the Plaintiffs in respect of land parcel **Kisumu/Dago/670** cancelled and to revert the land to the names of the two deceaseds, yet they are not the appointed legal representatives or administrators of their estates in accordance with the provisions of Law of **Succession Act, Chapter 160 of Laws of Kenya**. The Defendants are therefore without capacity to file and prosecute a counterclaim on behalf of the estate of the late Okongo Randa and Ondiek Randa.

e) That having come to the finding in (d) above, the court do not need to pronounce itself on whether or not a claim for recovery of land on behalf of the estates of late Okongo Randa and Ondiek Rando would be statute barred as to do so would amount to placing the cart in front of the horse.

5. That flowing from the foregoing, the court uphold the Plaintiffs preliminary objection that the Defendants are without locus standi to file a counterclaim for the benefits of the estates of the late Okongo Randa and Ondiek Randa. That accordingly;

i) Prayers 1 and 2 of the counterclaim are hereby struck out with costs to the Plaintiffs.

ii) That the Defendants are hereby directed to file and serve an amended defence and counterclaim within 21 days.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

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

In presence of;

Plaintiffs            Absent

Defendants            Absent

Counsel            Mr. Onyango for the Plaintiff.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**24/5/2017**

24/5/2017

S.M. Kibunja Judge

Oyugi court Assistant

Mr Onyango for the Plaintiff

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

Mr. Onyango for the Plaintiff.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**24/5/2017**