



**REPUBLIC OF KENYA**

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

**ELC CASE NO.282 OF 2015**

**THOMAS OTIENO ABELE.....PLAINTIFF**

**(Suing on behalf of the Estate of SALOME ABELE AND JAMES ABELE ONDIEK)**

**VERSUS**

**ROSE PHILGONA ONYANGO .....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR AWASI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. **Thomas Otieno Abele**, the Plaintiff, suing on behalf of the estate of the deceaseds, **Salome Awino Abele and James Abele Ondiek**, filed this suit through the Plaint dated 23<sup>rd</sup> October 2015, against **Rose Philgona Onyango and the Land Registrar Awasi**, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant respectively. The main prayer is for a declaration that he acquisition of land parcel **Kisumu/Koru/599** by the 1<sup>st</sup> Defendant was illegal, unlawful,

fraudulently and a nullity abintio. He further prays that the 2<sup>nd</sup> Defendant be compelled to issue the Plaintiff with a certificate of title. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed their statements of defence dated 10<sup>th</sup> November 2015 and 21<sup>st</sup> December 2015 respectively denying the Plaintiff's claim. The 1<sup>st</sup> Defendant also filed the notice of motion dated 16<sup>th</sup> August 2015 seeking to have the plaint filed on 23<sup>rd</sup> October 2015 struck out with costs. The application is based on the eight grounds on its face and supported by the affidavit sworn by the 1<sup>st</sup> Defendant on the 16<sup>th</sup> August 2016 to which is annexed several documents.

2. The Plaintiff filed a document dated 21<sup>st</sup> September 2016 headed "Preliminary objection and grounds of opposition to the Application dated 16/08/2015" setting out the following three grounds;

"1. The application offends the mandatory provisions of **Order 2 Rule 15 (1) a, b, & d** of the Civil Procedure Rules 2015.

2. As matter of law, straying out is an extremely draconian move that should only be exercised in the clearest of cases.

3. The application offends the provision of **Article 159** of the Constitution of Kenya, 2010".

3. On the 16<sup>th</sup> august 2016, the notice of motion dated 16<sup>th</sup> august 2015 was fixed for hearing on the 22<sup>nd</sup> November 2016. On that day counsel for the Plaintiff and 1<sup>st</sup> Defendant agreed to have the Plaintiff

preliminary objection heard first. The matter was adjourned to the 15<sup>th</sup> February 2017 to allow the Plaintiff serve the notice on the 2<sup>nd</sup> Defendant's counsel. That on the 15<sup>th</sup> February 2017 counsel for the 2<sup>nd</sup> Defendant indicated that they will not

participate in the hearing of preliminary objection. The counsel for the Plaintiff and 1<sup>st</sup> Defendant made their oral rival submission which are as summarized hereinbelow;

• **1. PLAINTIFF COUNSEL'S SUBMISSION;**

- That the 1<sup>st</sup> Defendant's notice of motion offends **Order 2 Rule 15 (2)** which requires that no evidence will be admissible in an application **under subrule 1 (a)**.
- That the 1<sup>st</sup> Defendant's notice of motion has supporting affidavit and should therefore be struck out.
- That the application seeks to strike out the Plaintiff's suit which is a draconian move.
- That the fact that the 1<sup>st</sup> Defendant is registered with the land does not stop the Plaintiff from challenging that title.
- That the application offends **Article 159** of the Constitution and the Plaintiff's suit should be heard and determined on merit.
- That the two authorities in the 1<sup>st</sup> Defendant's list of authorities dated 21<sup>st</sup> November 2016 supports his client's case.
- That the Plaintiff's locus should not be challenged at this stage as he is a son to James Abele Ondiek, deceased.
- That the land registered with 1<sup>st</sup> Defendant is the one the Plaintiff claims and there is no difference in the title description as the Nyando Land Registry is a recent creation handling documents that were previously at the Kisumu Land Registry.

**B. B. 1<sup>ST</sup> DEFENDANT COUNSEL'S SUBMISSION;**

That the 1<sup>st</sup> Defendant's notice of motion dated 6<sup>th</sup> August 2015 is brought under **Order 2 Rule 15 (b) to (d)** of Civil Procedure Rules and therefore is not affected by the provision of **subrule 2** which requires that no evidence to be tendered for applications under **subrule 1 (a)**.

That the Plaintiff is not the administrator of the estate of James Abele Ondiek and therefore has no locus to sue for his estate.

That though the Plaintiff has availed documents on the succession of the estate of Salome Awino Abele, the suit land has never belonged to the said deceased.

That the Plaintiff had filed the suit on the strength of a discharge of charge and transfer document issued by the 2<sup>nd</sup> Defendant that indicated that the land belonged to James Ondiek. That later, the 2<sup>nd</sup> Defendant discovered that the said documents had been issued in error and did a written communication to that effect.

The discharge of charge and transfer documents that had been issued by 2<sup>nd</sup> Defendant in error related to land parcel **Nyando/Koru/599** while what the Plaintiff has sued for is land parcel **Kisumu/Koru/599** and therefore different. That the discrepancy cannot be cured even by amendment and hence their notice of motion should be allowed to be heard.

That the Plaintiff has referred to **Article 159** of the Constitution but has not shown how it relates to the issues before this court.

That the court has power to strike out cases like the instant one and hence the preliminary objection is without merit. The learned counsel relied on the two authorities on the 1<sup>st</sup> Defendant's list dated 21<sup>st</sup> November 2016. They are as follows:

**1. Kenya Commercial Bank –V- Suntra Investment Bank Ltd [2015] eKLR .**

**2. Transcend Media Group Limited –V- Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR.**

4 . The following are the issues for the court’s determination;

- a. Whether the 1<sup>st</sup> Defendant’s notice of motion dated 16<sup>th</sup> August 2015 offends **Order 2 Rule 15 (2)** of Civil Procedure Rules and **Article 159** of the constitution 2010.
- b. What orders to issue .
- c. Who pays the costs of the preliminary objection.

5. The court has carefully considered the grounds of the preliminary objection, oral rival submissions by both counsel and come to the following determinations;

a) That the 1<sup>st</sup> Defendant’s notice of motion dated 16<sup>th</sup> August 2015 in respect of which the Plaintiff raised the preliminary objection is clearly indicated to be brought “**under Order 2 Rule 15 (b), (c) and (d)** of the Civil Procedure Rules and **Section 3A** of the Civil Procedure Act. That it is obvious that the correct reference should have been **Order 2 Rule 15 (1) (b) to (d)** of the

Civil Procedure Rules. That the omission of **subrule (1)** notwithstanding, the application did not make reference to **subrule (1) (a)** at all contrary to the claim

by the Plaintiff’s counsel.

b) That as is correctly submitted by counsel for the Plaintiff, applications brought under **Order 2 rule 15 (1) (a)** of the Civil Procedure Rules should not be accompanied by affidavit evidence. The **subrule 2** is in mandatory terms as follows:

“ (2) No evidence shall be admissible on an application under **subrule (1) (a)** but the application shall state concisely the grounds on which it is made”.

The provision of **subrule (1) (a)** is as follows:

“15 (1). At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

it discloses no reasonable cause of action or defence in law: or

.....

.....

.....

and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.”

c) That though the counsel for the Plaintiff did not specify in what way the notice of motion offends **Article 159** of the Constitution 2010, the court takes it that the learned counsel was referring to the constitutional edict that “**Justice shall be administered without undue regard to procedural technicalities**” which is under sub **Article (2) (d)** of the said Article. That the 1<sup>st</sup> Defendant notice of motion dated 16<sup>th</sup> August 2015 cannot, on the face of it, be said to be based on

technicality as it has been made pursuant to specific provisions of the law and sets out the grounds it is based on.

6. That from the foregoing, the preliminary objection raised by the Plaintiff to the 1<sup>st</sup> Defendant notice of motion has no merit and the same is rejected with costs to the 1<sup>st</sup> Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

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

In presence of;

Plaintiff Absent.

Defendants Absent

Counsel Absent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**24/5/2017**

4/5/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Counsel absent

Court: The ruling dated and delivered in open court in absence of all the parties. The Deputy Registrar to communicate the delivery of the ruling.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**24/5/2017**