



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 120 OF 2017

(FORMERLY KISII ELC CASE NO. 1205 OF 2016)

PAUL OTIENO ODWAR

CALEB ODWAR

FELIX OGUTU TOTIENO

SUSAN OWUONDO ODWAR PLAINTIFFS/RESPONDENTS

VERSUS

MESHACK DAWA

S.O. OKOTH DAWA

LAND REGISTRAR (MIGORI/RONGO DISTRICT

ATTORNEY GENERAL CHAMBERS DEFENDANTS/APPLICANTS

RULING

1. This Ruling is in respect of the following preliminary objections and Notice of Motion applications filed by the 1st and 2nd Defendants/Applicants against the plaintiffs/respondents;

a) Notice of preliminary objection dated 17/12/2009 in relation to the hearing of the application /suit.

b) Notice of preliminary objection dated 2nd June 2015 with regard to Notice of Motion dated 12/5/2015 brought pursuant to Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Order 15 (2) order 14 A Rule 10 of the Civil Procedure Rules

c) Notice of Motion dated 4/7/2011 to dismiss suit for want of prosecution of suit and costs brought under order 17 Rules (2) (1), 2 e3 Civil Procedure Rules 2010 and all enabling provisions of the law.

d) Notice of Motion dated 20/12/2017 to dismiss suit for want of prosecution of the suit and costs brought under order 40 Rules 1 and 2 of the Civil Procedure Rules, Section 1, 1A, 1B and 63 Civil Procedure Act Cap 21 Laws of Kenya. Section 3, 13, 18 and 19 of the ELC Act Cap 12A Laws of Kenya, Rules 1 and 2 of the practice Directions of proceedings in ELC and all enabling Provisions of the law.

2. The 1st and 2nd Defendant are represented by counsel Otieno C.O. Ayayo. The 3rd and 4th Defendants are represented by Ms Ochwal litigation counsel instructed by the Attorney General. The plaintiffs are represented by Agure Odero Advocate.

3. Hearing of the preliminary objections and the notice of motion applications was informed by request made by counsel for the respective parties and further to **Article 159 (2) (b) of the Constitution of Kenya , 2010** as ordered by this court on 5/4/2017.

4. Mr. Ayayo counsel for the 1st and 2nd Defendant submitted that the suit is bad in law and unlawful, an abuse of the court process, desperate, suspect and incurable in law. He further submitted that the plaint dated 3/11/2009 was filed yet the plaintiff had not obtained letters of administration of the estate of Caleb Odwar (Deceased). He also submitted that notice of motion applications are for amendment and substitution of the plaintiffs and the law requires substitution thereof within 12 months and not 3 years like in the present case. He urged this court to allow the preliminary objections and notice of motion applications as the plaintiffs had no locus standi to file this suit.

5. **Ms. Odiwal** counsel for the 3rd and 4th Defendants submitted that she associated herself with the submissions made by the counsel for the 1st and 2nd Defendants. She stated that she had nothing useful to add to the same.

6. **Mr. Agure Odera** counsel for the plaintiff submitted that Paul Odwar (Deceased) had obtained letters of administration ad litem dated 16th May 2006 in Migori Principal Magistrate's Court P&A No. 214 of 2007. He referred to the said letters of administration and that the same were issued Pursuant to Section 54 of the Laws of Succession Act Cap 160 laws of Kenya. He submitted that the plaintiff was filed on 4/11/2009. He is a plaintiff in the suit which is competent. He further submitted that notice of motion applications dated 6/9/2011 and 2/7/2012 were dismissed and withdrawn on 25/11/2015 and 11/12/12 respectively hence the matter is res judicata. He also submitted that the plaintiff filed notice of motion dated 12/5/2015 for substitution of the plaintiff and obtained order to file supplementary affidavit on 16/7/15 to prosecute this suit. The proposed plaintiff namely **Felix Ogutu Otieno** and **Susan Owuondo** obtained letters of administration ad litem in Migori High Court Succession Cause No. 8 of 2012 further to Section 54 of the laws of Succession Act Cap 160 of laws of Kenya. That the Plaintiff's counsel is advanced in age and the case deserves to be heard.

7. The plaintiff's counsel further submitted that the Preliminary objections and notice of motion applications ought to be dismissed with costs to the plaintiff/respondent and it will not prejudice the Defendants herein. He cited Article 159 of the constitution 2010 that justice should be seen to be done to all parties irrespective of status and Section 13 Environment and Land Court Act, 2015 on justice to the parties.

8. I have carefully studied the two preliminary objections and the two Notice of motion applications. The issues to resolve or determine at this stage are ;

- (a) Locus standi of the plaintiff to institute the suit
- (b) Is the suit crying for dismissal for want of prosecution?

9. On the issue of locus standi, I am guided by the following:

(a) Section 54 of the Law of Succession Act Cap 160-

(b) Migori PM'S Court P&A 214/2017- Estate of the late Caleb Odwar

Angila issued to Paul Otieno Odwar on 16/5/2007.

(c) Migori High Court Succession cause no. 8 of 2017-Limited grant of Administration Ad litem in respect of the estate of the late Paul Otieno Kodwar issued to Susan Owuondo Odwar and FELIX Ogutu Otieno 4/4/2017.

(d) Order 4 Rule 4 Civil Procedure Rules on suits in a representative capacity.

10. On want of prosecution of the suit; I have examined the following Orders, Sections and Rules:

- (a) Order 17 rule 2(1) (2) and (3) Civil Procedure Rules on Notice to Show Cause why suit should not be dismissed for want of prosecution. It envisages no step taken in the matter for one year and notice be in writing to the parties. If there is no - satisfactory cause, then obtain expeditious hearing of the suit
- (b) Order 40 Rules 1 and 2 Civil Procedure Rules 2010 regarding -grant of temporary injunctions
- (c) Sections 1 1A, 1B and 63 Civil Procedure Act Cap 21 on overriding objective and duty of the court in just, efficient and timely justice and other temporary orders as may appear to the court to be just and convenient
- (d) Rules 1 and 2 of the Practice Directions, 2014 on proceedings in Environment and Land Court.

11. A preliminary objections must be on a clear point of law based on undisputed facts as Judicially recognized in **Republic-vs-Public Procurement Administrative Review Board And Anor exparte Selex Sistemi integrati (2008) KLR 728**. Moreover, in **Mukisa Biscuits and Company Co. Ltd Vs. West End Distributors (1969) EA 606 at 701** preliminary objections must not be misconceived .

12. In **Muchanga Investment Ltd Vs. Safaris Unlimited (Africa) Ltd and 2 others (2009) KLR 229 at 246**, it was observed that:-

“Again the Court of appeal in Abuja, Nigeria in the case of Attahiroi Vs. Bagudo 1998 3 NWLL at 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it”

13. **Article 159 (2) (a) and (b) constitution 2010** provides for justice to all, without delay and technicalities of procedure. In the instant application, the said Article comes in very handy.

14. The plaintiff counsel gave reasons for the application. He relied on replying affidavit sworn on 4/4/17 and annexed documents. The same are sound and cogent.

15. In **PIM Vs. Morton (1976 -80) LKR 963 at 967**, Harris J observed inter alia;

“For these reasons I hold that the present application succeeds and I direct that the applicants, as executors of the deceased plaintiff, be made parties as plaintiffs and be at liberty to proceed with the suit; and I further direct, as requested by the applicants, that the costs of the application be costs in the cause.”(Emphasis supplied.)

16. The matter was in court on 13/12/16 for hearing of Notice of Motion of 17/10/2016. The Notice of Motion dated 20/12/2016 was filed on 9/2/2017. It does not comply with Order 17 Rule (2) Civil Procedure Rules, 2010 since one year had not elapsed to prompt the making of the application.

17. Notice of Motion dated 4/7/11 came up for hearing on 21/9/2011 as it had been fixed on 28/7/2011. The Defendants/Applicant’s Counsel Mr Ntabo for Otieno said that he had been served with papers in opposition to it. He sought time to respond to it accordingly. The case was adjourned to 25/10/11. To date it is yet to be heard.

18. The suit is still active. Some applications and or steps have been taken by either party in the suit since 2009 to-date. It is not a desperate or suspect suit. Order 17 (supra) can not be invoked in the present scenario. The plaintiff has to be given an opportunity to be heard.

20. **Article 50 (1) of the Constitution of Kenya 2010** provides for a right to fair hearing. It reads;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.”

21. In **Sebei District Administration Vs. Gasyali and others (1968) EA 300-302**, it was stated that denying a subject a hearing should be the last resort by a court. It was noted, inter alia;

“In my view that is not the sole matter which must be considered in cases of this kind.....

And finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court
(Emphasis added).”

22. I therefore, find that the plaintiffs have a right to be heard. The preliminary objections and Notice of motion applications are unmerited. I accordingly dismiss them.

23. Costs of the Preliminary Objections and Notice of Motion applications shall be in the cause.

DELIVERED, SIGNED and DATED in open court at MIGORI this 2nd day of June 2017.

G. M. A. ONGONDO

JUDGE

In the presence of;

Mr. Agure Odera for the plaintiffs

Mr. Tom Otieno-Court assistant

G. M. A. ONGONDO

JUDGE

Mr. Agure : I pray for leave to file an application to substitute the parties namely the plaintiffs herein.

G. M. A. ONGONDO

JUDGE

Court: The plaintiff counsel is hereby granted leave to amend the plaint, file and serve the defendants counsel within 14 days. Mention 28/6/2017 for directions.

G. M. A. ONGONDO

JUDGE