



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 197 OF 2013**

**MARY KERUBO NYANGENA .....PLAINTIFF**

**VERSUS**

**ONDARA ANYEGA .....1<sup>ST</sup> DEFENDANT**

**SUNEKA LAND DISPUTES TRIBUNAL ..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The plaintiff instituted the instant suit vide a plaint dated 24<sup>th</sup> April 2013 seeking inter alia:-

**(a) A declaration that award of land parcel number Wanjare/ Bomorenda/518 by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant is null and void as this is a matter being dealt with through the succession cause.**

**(b) Costs of the suit be borne by the defendants.**

The plaintiff through the plaint claimed that land **parcel Wanjare/ Bomorenda/518** was registered in the name of Martha Mogoi who died in 1990 and asserted that the 2<sup>nd</sup> defendant lacked the requisite jurisdiction to adjudicate on the matter as it ought to have been handled through succession.

2. The 1<sup>st</sup> defendant vide a statement of defence dated 24<sup>th</sup> May 2017 filed on the same date contended that the plaintiff lacks the locus standi to bring the present suit and further averred that the plaintiff herself moved the 2<sup>nd</sup> defendant vide Tribunal Case No. 21 of 2009 who made an award which was adopted by the Kisii CM's Court Case No. 49 of 2010 which judgment of the court has not been set aside and/or varied. The 1<sup>st</sup> defendant further contended that the plaintiff's suit is fatally defective, misconceived, incompetent and is otherwise an abuse of the process of the court. He further contended that the suit raises no reasonable cause of action or triable issue.

3. The 1<sup>st</sup> defendant filed on 23<sup>rd</sup> August 2013 a Notice of Motion dated on the same date seeking an order striking out the suit and the costs of the application and the suit on the grounds set out on the body of the application and the supporting affidavit sworn in support thereof by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant/applicant asserts that the matters/issues the plaintiff is raising in the instant suit were the subject matter in Suneka Land Disputes Tribunal Case No. 21 of 2009 who rendered an award that was adopted as judgment in Kisii CM Misc. Application No. 49 of 2010. The applicant states that the plaintiff is not the administrator of the estate of Martha Mogoi (deceased) and therefore lacks the capacity to bring the instant suit on behalf of her estate. The applicant further contends that the plaintiff's suit is incompetent and misconceived and amounts to an abuse of the process of the court.

4. The plaintiff filed grounds of opposition dated 23<sup>rd</sup> October 2014 to the 1<sup>st</sup> defendant's application averring that the plaintiff had complied with Order 11 of the Civil Procedure Rules insinuating the matter was ready for trial. The plaintiff further asserts that technical objections should not be raised in regard to pleadings citing Order 2 Rule 14 of the Civil Procedure Rules. The plaintiff further denied her suit was scandalous, frivolous or vexatious and/or was an abuse of the process of the court.

5. The plaintiff and the 1<sup>st</sup> defendant argued the application by way of written submissions. The 1<sup>st</sup> defendant's submissions dated 12<sup>th</sup> November 2014 were filed on the same date while the plaintiff's submissions dated 16<sup>th</sup> December 2014 were also filed on the same date. The 1<sup>st</sup> defendant/ applicant has argued that the late Martha Mogoi (deceased), who the plaintiff states in her pleadings to have been her mother in law, was never at any time registered as the proprietor of land parcel **Wanjare/Bomorenda/518** as claimed by the plaintiff. The 1<sup>st</sup> defendant further asserts that to the extent the plaintiff claims through the said Martha Mogoi (deceased) and has not taken out letters of administration for the said deceased estate she lacks any legal capacity to bring the suit.

6. The 1<sup>st</sup> defendant in his list of documents annexed a certified copy of the register (green card) for land parcel **Wanjare/Bomorenda/518** which indicates that the parcel of land was first registered on 6<sup>th</sup> August 1973 in the names of Mogoi Nyakundi, Maturi Nyangena and Anyenga Nyangena with each holding 1/3 undivided share of the land. On 7<sup>th</sup> August 1985 the land parcel was transferred to Annah Kerubo Moreka, Maturi Nyangena and Anyega Nyangena and again each held 1/3 undivided share. On 29<sup>th</sup> December 1995 a restriction was registered against the title barring any dealings pending the finalization of HC Succ. Cause No. 220 of 1992. From the said abstract of title it is evident that Martha Mogoi (deceased) never at any time got registered as proprietor of the suit property. The plaintiff as part of her documents included a certificate of confirmation of grant dated on 16<sup>th</sup> November 1992 and an order issued by the court on the same date. The order issued by Hon. Justice V. V Patel was in the following terms:-

**“The grant to administer the estate of late Anyega Nyangena who was registered owner of 1/3 share in land parcel No. Wanjare/Bomorenda/518 be issued to Gabriel Nyangena Anyega. The land registrar and the surveyor should survey and subdivide the 1/3 share referred to hereinabove into two equal shares and register the said share in the respective name of the above Gabriel and his only younger brother Ondara Anyega each getting a separate title. The grant is confirmed.”**

7. As per the above referred to order in the succession cause the 1<sup>st</sup> defendant was awarded ½ share of the 1/3 share of land parcel **Wanjare/ Bomorenda/518** held by the late Anyega Nyangena. The plaintiff in my view did not have any capacity to institute the present suit as she was neither the administrator of the estate of the late Martha Mogoi nor the administrator of the estate of Anyega Nyangena. I have perused the proceedings before the Suneka Land Disputes Tribunal and it is clear the Tribunal did not award the 1<sup>st</sup> defendant any land. The 1<sup>st</sup> defendant was awarded land as a beneficiary by the High Court in HC Succession Cause No. 220 of 1992. This award by the Succession Court was not challenged by the plaintiff and hence the award remains valid. The plaintiff could only have challenged the award by the succession court by seeking a revocation of the grant in accordance with the provisions of the Law of Succession Act, Cap 160 Laws of Kenya.

8. Section 76 of the Law of Succession provides for instances where a grant may be revoked and provides thus:-

**76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides either on application by any interested party or of its own motion-**

**(a) that the proceedings to obtain the grant were defective in substance;**

**(b) that the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case;**

**(c) that the grant was obtained by means of an untrue allegations of a fact essential in a point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.**

**(d) .....**

9. The Land Disputes Tribunal in essence disallowed and/or dismissed the plaintiffs claim before it and there is in effect no decision flowing from it that is capable of being annulled. The Succession Cause remains the only available avenue through which the plaintiff could have ventilated her concerns if she felt the 1<sup>st</sup> defendant was not properly awarded an interest in the estate of Anyega Nyangena (deceased). It is therefore my finding and holding that the plaintiff's instant suit is misconceived and raises no reasonable cause of action and/or any triable issue and the same is for striking out.

10. I am minded that striking out a pleading or a suit is a draconian action since such action effectively drives away a litigant from the seat of justice once the suit is ordered to be struck out. See the case of **The Co-operative Merchant Bank Ltd –vs- George Fredrick Wekesa CACA No. 54 of 1999** (unreported) where the Court of Appeal stated thus:

**“A court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”**

11. I have carefully considered the plaint by the plaintiff and I am persuaded the plaintiff has no locus to bring this action and further that the suit raises no reasonable cause of action and that no triable issue is discernable that would entitle me to permit the suit to progress to trial. I do not think any amount of amendment would salvage the plaintiff's suit and to allow further proceedings in the suit on the basis of the pleadings would end up being a waste of precious judicial time that could otherwise be used in dealing with more deserving cases.

12. I accordingly order the plaintiff's suit struck out but the parties being family members, I make no order for costs and direct that each party will bear their own costs.

13. Orders accordingly.

**Ruling dated, signed and delivered at Kisii this 21<sup>st</sup> July day of July, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

N/A for the plaintiff

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**