



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC CASE NO.294 of 2016**  
**[FORMERLY KISII ELC CASE NO.40 OF 2016]**

**JAMES GORDON REGE.....PLAINTIFF**

**VERSUS**

**JOSEPH ODERO ACHOLA (sued on is behalf and as the administrator  
of the estate of PITALIS ACHOLA ONGIRI).....1<sup>ST</sup> DEFENDANT**

**MOSES ODERO ACHOLA.....2<sup>ND</sup> DEFENDANT**

**DANIEL ODHIAMBO ACHOLA.....3<sup>RD</sup> DEFENDANT**

**RULING**

**1. Joseph Achola (sued on his behalf and as administrator of the Estate of Pitalis Achola Ongiri), Moses Adero Achola and Daniel Odero Achola, herein after refered to as 1st to 3rd Defendants respectively, filed the notice to raise preliminary objection dated 8th March 2016 on the following grounds.**

- “1. The Plaintiff has got no locus standi.**
- 2. The Plaintiff is meddling with the property of the deceased.**
- 3. The Plaintiff’s claim is fraudulent and/or unlawful.**
- 4. The Plaintiff has no cause of action.”**

**2. That on the 2<sup>nd</sup> February 2017, the court gave directions of filing of written submissions on the preliminary objection. Subsequently, the counsel for the Defendants and Plaintiff filed their written submissions dated 13<sup>th</sup> February 2017 and 8<sup>th</sup> March 2017 respectively. The submissions are as summarized hereinbelow;**

**A. DEFENDANTS COUNSEL’S SUBMISSIONS:**

**(i) The land parcel West Karachuonyo/Kanjira/645 was registered in the name of Pitalis Achola Ongili, now deceased. That deceased and the Defendants have not entered into any sale agreement over the said land with the Plaintiff.**

(ii) That in case the Plaintiff's claim is that the Defendants sold the portion of land he claims before the completion of the succession cause, the Defendants did not have capacity to transact over the land registered in the name of the deceased.

(iii) That the Plaintiff's acts over the suit land amounts to intermeddling with the property of a deceased person.

(iv) That the Plaintiff do not have capacity or locus to file and prosecute this suit and the notice of motion based on it.

(v) That the Plaintiff's suit and notice of motion should be dismissed with costs.

### **B. PLAINTIFF'S COUNSEL'S SUBMISSION;**

(i) That the Legal representative of an estate of a deceased person is capable of suing and being sued on their own behalf and on behalf of the estate upon obtaining a grant of letters of administration.

(ii) That through the land sale agreement dated 2<sup>nd</sup> September 2005, the Defendants sold to the Plaintiff 1 ½ acres of land parcel **West Karachuonyo/Kanjira/645** under which he paid them Kshs.40,000/= and the balance of Kshs.30,000/= was to be paid after completion of the succession cause as the land was in their late father's name.

(iii) That the Defendants allowed the Plaintiff to take possession of the portion of the land he had bought awaiting transfer and was therefore not intermeddling with the property of the deceased.

(iv) That the 1<sup>st</sup> Defendants failed to honour the terms of the sale agreement after he obtained letters of administration in succession Cause No.117 of 2009.

(v) That the Plaintiff has locus to file and prosecute this suit under the sale agreement and the suit should be allowed to go to full hearing.

3. The following are the issues for the court's determination;

a) Whether the Plaintiff has locus to file and prosecute this case.

b) Whether the Plaintiff pleadings has disclosed a reasonable cause of action against the Defendants.

c) Who pays the costs of the preliminary objection.

4. The court has carefully considered the grounds on the notice of preliminary objection, the written submissions by both counsel, the pleadings filed and come to the following determination;

a) That the Plaintiff's suit against the Defendants is based on the land sale agreement allegedly dated 22<sup>nd</sup> September 2005. The Plaintiff has annexed a copy of the sale agreement to his list of documents dated 24<sup>th</sup> February 2016 filed with the plaint of even date.

b) That the Plaintiff prays for permanent injunction, declaratory orders, general damages, refund of the market value for the 1 ½ acres of West Karachuonyo/Kanjira/645 and costs against the Defendants. That even though the Defendants appear to disown the said sale agreement or to plead incapacity to enter into such a transaction at the time, the pleadings discloses a reasonable cause of action that should go to full hearing.

c) That further to (b) above, the pleadings show that the Plaintiff as a party to the said land sale agreement has capacity or locus to commence and prosecute this suit and the notice of motion

based on it.

d) That the Plaintiff avers and depones that he took possession of the portion of the suit land under the land sale agreement and with concurrence of the Defendants as potential beneficiaries of the estate of the late Pitalis Achola Ongiri, who was the registered proprietor. That all was well until the Defendants failed to transfer the 1 ½ acres to him after 1<sup>st</sup> Defendant became the administrator of the deceased estate which led to the filing of this suit. That as the Plaintiff was not an heir to the estate of Pitalis Achola Ongiri, he could not lodge his claim over the land in the succession cause. That the court therefore finds that the Plaintiff is properly before this court to pursue his rights against the Defendants under the said sale agreement.

5. That having come to the findings set out above, the court further finds that the Defendants preliminary objection to the suit and notice of motion have no merits and is rejected with costs to the Plaintiff.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 27<sup>TH</sup> DAY OF SEPTEMBER.2017**

In presence of;

Plaintiff	absent
Defendant s	1 <sup>ST</sup> Defendant present
Counsel	Mr. Mule for Nyanga for Plaintiff Mr Ayayo for Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**27/9/2017**

27/9/2017

S.M. Kibunja Judge

Oyugi/Joane court assistants

1<sup>st</sup> Defendant present

Mr Ayayo for Defendants

Mr. Mule for S.J. Nyanga for Plaintiff

Order: Ruling dated and delivered in open court in presence of Mr. Mule for Nyanga for Plaintiff and Mr Ayayo for the Defendants.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**27/9/2017**