



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 114 OF 2016

TERESA KWAMBOKA ONDIEKI.....PLAINTIFF

VERSUS

JOHN NYANGENA RIAKO.....1<sup>ST</sup> DEFENDANT

CHARLES MAKORI RIAKO.....2<sup>ND</sup> DEFENDANT

ANNAH BOSIBORI ONGWAE.....3<sup>RD</sup> DEFENDANT

ELIZABETH NYAMBOGA.....4<sup>TH</sup> DEFENDANT

R U L I N G

1. The plaintiff commenced the instant suit vide a plaint dated 27<sup>th</sup> April 2016. The plaintiff claims she was married to the defendants mother in a woman to woman marriage and therefore was a beneficiary of the estate of Mokinwa Oangi the father of the defendants (now deceased). The plaintiff claims she was entitled to a portion of land parcel **West Mugirango/Bomabacho/130** which she states the defendants caused to be clandestinely subdivided amongst them to her exclusion. The plaintiff states land parcel **West Mugirango/Bomabacho/130** was fraudulently subdivided by the defendants without complying with the Law of Succession Act, Cap 160 Laws of Kenya. The plaintiff seeks a declaration that the subdivision and registration of land parcels **West Mugirango/ Bomabacho/1021, 1022, 1023 and 1024** were fraudulently obtained and that the subdivision and the titles should be cancelled.

2. The defendants filed a statement of defence dated 26<sup>th</sup> May 2016. Inter alia the defendants pleaded that the plaintiff had no *locus standi* to file the instant suit and further denied that they acted fraudulently in any manner as alleged by the plaintiff. The defendants averred that the plaintiff's suit was bad in law and defective and was an abuse of the process of the court and deserved to be struck out.

3. The defendants on 14<sup>th</sup> November 2016 filed a notice of preliminary objection dated 11<sup>th</sup> November 2016 on the sole ground that the plaintiff lacks *locus standi* to institute this suit. On 25<sup>th</sup> April 2017 the court directed that the preliminary objection be argued by way of written submissions. The defendants filed their submission in support of the preliminary objection on 9<sup>th</sup> May 2017. The plaintiff filed her response submissions on 20<sup>th</sup> June 2017.

4. The defendant submits that the plaintiff had no *locus standi* to file the suit to the extent that she claims to be entitled to property belonging to a deceased person as pleaded in paragraphs 1 and 2 of the plaint. It

is the defendants contention that the plaintiff's suit offends Section 82(a) of the Law of Succession Act, Cap 160 Laws of Kenya which provides thus:-

**82. Personal representatives shall subject only to any limitation imposed by their grant, have the following powers:-**

**(a) To enforce by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arise out of his death for his estate.**

The defendant argues that the plaintiff needed to obtain a grant of letters of administration to enable her to file the instant suit against the defendants respecting land parcel number **West Mugirango/Bomabacho/130** which belonged to the late Mokinwa Oangi (deceased).

5. The plaintiff in response submissions stated that the defendants had as at the time of filing the suit caused land parcel number **West Mugirango/ Bomabacho/130** to be fraudulently subdivided and new titles issued to the defendants and consequently land parcel 130 did not exist as a unit. The plaintiff claims that even though the defendants ought to have undertaken succession proceedings in respect of land parcel 130, they did not do so and consequently the subdivision and the registration of the resultant subtitles in their respective names was fraudulent and null and void and should be cancelled. The plaintiff's claim is that she would have been entitled as a beneficiary to inherit a portion of land parcel 130 which belonged to Mokinwa Oangi if the defendants had followed due process and filed succession proceedings. As they did not, the plaintiff claims they disinherited her and thus seeks orders for cancellation of the titles registered in the defendant's name to enable the due process of succession to be undertaken.

6. At the time the plaintiff instituted the instant suit, the defendants had gotten registered as the owners of land parcels **West Mugirango/Bomabacho/ 1021, 1022, 1023 and 1024** which from the copies of official searches annexed to the plaintiff's bundle of documents it is evident were subdivisions of land parcel **West Mugirango/Bomabacho/130** owned by the defendants late father from whom the plaintiff claims to have been entitled as a beneficiary. The plaintiff in my view was entitled to seek to know from the defendants how the original land parcel got to be subdivided and distributed when according to the plaintiff no succession process was undertaken. To the extent that the plaintiff claims to have been entitled to a portion of land parcel 130 as a beneficiary, she was in my view entitled to seek for an explanation from the defendants as to how the distribution of the estate of their late father was effected to her exclusion.

7. The plaintiff in bringing the action is not bringing the action on behalf of the deceased estate but is seeking to have the process by which the defendants got registered as owners of the various parcels of land interrogated and if found to have been fraudulent to be annulled to enable due process to be followed. It is my view therefore the plaintiff does have the *locus standi* to bring the instant suit against the defendants in her own right. The action is not brought for and on behalf of the deceased estate but against persons and individuals who have held themselves out as the beneficiaries who were entitled to distribute the estate of the deceased. That is what the present suit puts to question.

8. Accordingly, it is my finding and holding that the defendants preliminary objection lacks merit and I hereby dismiss the same. The costs of the preliminary objection will be in the cause.

9. Orders accordingly.

**Ruling dated, signed and delivered at Kisii this 29<sup>th</sup> day of September, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Sagwe for the plaintiffs

Mr. Omwenga for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**