



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC 213 OF 2017

FORMERLY MACHAKOS 125 OF 2015

HASSAN MUTISYA MULINGE.....PLAINTIFF/APPLICANT

VERSUS

MALOMBE KYUNUUE NZAU.....DEFENDANT/RESPONDENT

RULING

1) On the **17th June, 2015** the defendant filed the notice of preliminary objection dated the same day. The grounds of the preliminary objection are:-

- 1. The plaintiff has no capacity to sue.***
- 2. The court lacks territorial jurisdiction.***
- 3. The application for adverse possession is not in the proper form.***
- 4. The plaint is defective in form.***

2) On the **21st July, 2017** the court directed that this application be disposed off by way of written submissions and both parties have since then complied with the court's directive.

3) Firstly, the defendant's counsel in his submissions pointed out that even though the plaintiff has brought this suit claiming proprietary interests in the property known as **Mbuvo/Kiangini/1388** which he claims that it was purchased by his late father, he (the plaintiff) has not obtained letters of administration for the estate of his late father, one **Mulinge Kamba**. The counsel referred the court to **Section 45 (1)** of the Law of Succession Act that prohibits intermeddling with any free property of a deceased person and as such the plaintiff has brought this suit in blatant violation of the law.

4) The counsel referred the court to the cases of **Troustik Union International and Another Vs Alice Mbeyu and Another, Civil Appeal No. 145 of 1990, Pedee Builders Ltd VS Petronilla Ojiambo Odori Civil Appeal No. 170 of 1992, Jonathan Orengo Obiaya VS Moses Ondiegi Okoth in Civil Appeal No. 146 of 1990 and Teresia Wairimu Kirima Vs Father Romeo & Another [2013]eKLR.**

5) All the above authorities hold that a party who has not obtained grant of representation cannot claim on behalf of a deceased's estate.

6) Secondly, the defendant's counsel submitted that although the plaintiff has raised the issue of adverse possession, such orders can only be granted by way of an originating summons but not in the current suit. The counsel therefore termed the plaint herein as incurably defective in form for offending **order 2 rule 4** of the Civil Procedure Rules, 2010 and urged the court to uphold the preliminary objection and dismiss the suit.

7) On the other hand, the plaintiff's counsel termed the preliminary objection by the defendant as one that serves no legal purpose as it is not hinged on any legal provisions. He termed the preliminary objection as one that is based on technicalities.

8) The counsel added that it would be unjust and an infringement of constitutional right if the court were to dismiss the plaintiff's suit taking into consideration that **Article 159(2) (d)** of the Constitution provides for justice to be administered without undue regard to procedural technicalities.

9) The plaintiff's counsel went on to submit that the issue of the plaintiff having to obtain letters of administration in order for him to have

locus stand: to institute adverse possession proceedings is a non-starter and lacks legal basis since the plaintiff in his plaint has clearly indicated that he is suing on his own behalf and that of his family and not on behalf of his deceased father as the defendant purports. The counsel pointed out that the plaintiff and his family member have been in possession and occupation of properties known as **Mbuvo/Kiangini/1388** and **Mbuvo/Kiangini/215** for decades, and therefore he has a viable claim under adverse possession without obtaining letters of administration. The counsel termed the quoted provisions of the law of succession Act as inapplicable in this matter since the plaintiff is not claiming on behalf of a deceased person nor the estate of his deceased father. The counsel urged the court to decide this matter on merit.

10) Regarding the issue of jurisdiction, the plaintiff's counsel submitted that the suit properties **Mbuvo/Kiangini/1388** and **Mbuvo/Kiangini/215** are situated in **Makueni County** which is within the jurisdiction of this court and therefore the issue of jurisdiction is misplaced. The counsel asked the court to determine the suit as provided under **section 13** of the **Environment and Land Act no. 19 of 2011** of the Laws of Kenya.

11) The counsel cited the cases of **Mukisa Manufacturing & Co. Ltd Vs West End Distributor Ltd (1969) EA 696 and Centory Oil Trading Company Vs Kenya Shell Limited [2007] eKLR** and opined that the preliminary objection dated **17th June, 2015** lacks merit and as such, it should be dismissed with costs to the plaintiff.

12) I have read the submissions filed by counsel for the plaintiff and the defendant. Regarding the issue of whether or not the plaintiff lacks capacity to sue, it is clear that he has averred in **paragraph 3** of his plaint that he sues on his own behalf, that of the family and the late **Mulinge Kamba** who was his father. In **paragraph 4** of his plaint, the plaintiff has averred that property known as **Mbuvo/Kiangini/1388** was bought by his late father in **1967** from the late Sammy Matolo in his presence.

13) That being the case, I am in agreement with the defendant's counsel that it was necessary for the plaintiff to obtain letters of administration before filing this suit. I concur with **L.N Gachero, J. in Teresia Wairimu Kirima Vs Father Romeo and another [2013] eKLR** who held that,

“the suit herein was brought before the Applicant/applicant obtained letters of administration”

and therefore suit was incompetent. Besides, the plaintiff herein has not annexed letters from his family to authorize him to sue on their behalf.

14) It follows therefore that this court lacks jurisdiction to entertain this matter for the obvious reason that the plaintiff does not have letters of administration.

15) On the issue of claim for adverse possession being not in proper form, I do agree with the defendant's counsel that such claim can only be made by way of originating submissions. The plaintiff has brought this suit by way of plaint. **Order 37 rule 7(i) and (2)** of the Civil Procedure Rules 2010 is clear on the format in which such claim should be commenced.

16) Prayer (1) of **paragraph 11** of the plaint seeks a declaration that the certificate of the title of land reference no. **Mbuvo/Kiangini/1388** held by the defendant was acquired irregularly, unprocedurally among other grounds.

17) As was correctly pointed out by the defendant's counsel, it was upon the plaintiff to plead the particulars of irregularity and failure to adhere to procedure as is required under **order 2 rule 4(1) (a) (2) and (3)** of the Civil Procedure Rules makes the application for adverse possession not to be in the proper form.

In the circumstances, my finding is that the preliminary objection has merits. I, therefore, dismiss the suit with costs to the defendant.

Signed, Dated and Delivered this 24th day of **November, 2017**

MBOGO C.G

JUDGE