



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 668 OF 2017

(formerly Nairobi ELC No. 1268/13)

SIBOI TIPANGO & 5 OTHERS.....PLAINTIFF

VERSUS

ROSE MUENI MAITHA & 5 OTHERS.....DEFENDANTS

RULING

What is before court is the 1st Defendant's preliminary objection dated 30th May, 2017 and the Plaintiffs' Notice of Motion dated 31st August 2017 brought pursuant to Rule 3(2) of the High Court (Practice and Procedure Rules); Order 40 Rules 1(a) & (b) and 4(1); Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 1A, 1B(1), 3A, and 63(e) of the Civil Procedure Act; Section 68 (1) & (2) of the Land Registration Act, 2012 and all the other enabling provisions of the Law.

The 1st Defendant's preliminary objection raises the points that this Court lacks jurisdiction to entertain this suit and the Plaintiffs have no locus standi hence the suit in its entirety is a nullity.

The Notice of Motion application is based on the following grounds which in summary are that:

At the time of filing this suit, the suit property was comprised in land title number, NGONG/NGONG/3768 (suit property) and the suit has not commenced for hearing. The Defendants have proceeded to cause the suit property to be subdivided, the cautions and restrictions registered against it removed without notice to the Plaintiffs and they are in the process of obtaining title deeds to the said subdivisions viz NGONG/NGONG/5386, 5387, 5388, 5389, 5390, 5391 and 5392. That there is real apprehension that the Defendants' actions will culminate in the transfer of the said subdivisions to third parties who are not parties to the suit.

The application is supported by the affidavit of WILLIAM SIASAI TIPANGO the 4th Plaintiff herein where he deposes that at the time of filing this suit his brother STEPHEN OISESOI was the registered proprietor of suit land and against the title, there was registered one restriction and four operative cautions. He avers that the suit has not proceeded to full hearing but on 6th December, 2016 and 29th March, 2017, the Defendants had invited the District Surveyor Kajiado to fix boundaries. Further that the Plaintiffs had initially applied for temporary injunction but since they did not get the orders, they sought the intervention of the local administration, friends and family and managed to repulse the said visit. He avers that this suit was transferred from Nairobi ELC to Kajiado for hearing and final determination. He claims that the preliminary objection pending is a charade and on 25th August, 2017 after several requests for the Green Card on the suit land, from the Land Registry, he discovered the cautions and restrictions had been removed. He reiterates that the Green Card to the suit land indicates the title was closed on sub division vide Court Order LDT Case No. 6 of 2009 dated 28th July, 2011 with new numbers.: 5386 –

5392 created. Further that the order referred to in the register is a Decree given on 26th July, 2011 by Hon. S. O Temu and the decision emanated from the Ngong Division Land Disputes Tribunal Case No. T C 065/01/09 where the claimant was Rose Mueni Maitha and objectors Kombe Oisesoi Tipanko, Sipei Oisesoi Tipanko and Siasai Oisesoi Tipanko. He contends that the validity of that decision, as of necessity, forms part of the issues raised in this suit among them being whether the Tribunal had jurisdiction to hear and determine the dispute and legality of their decision.

The 1st Defendant filed grounds of opposition dated 13th September, 2017 where he stated that the Court lacks jurisdiction, as this suit is Res Judicata. The application and suit are incompetent. Further that the application is frivolous, defective, misconceived and bad in law and an abuse of the court process. He stated that the Plaintiffs are not only guilty of concealment of material facts to the Court but the subject suit land is not available to the Estate of the deceased. The Plaintiffs herein do not have locus standi to prosecute the suit herein nor the said application having fraudulently obtained a grant to the estate of the deceased herein over the unavailable subject property and which grant has since been revoked and annulled. He insists there is no valid claim before court as alleged by the Plaintiffs and the sole purpose of this suit is to circumvent a decree of court of competent jurisdiction.

Both the Plaintiffs and the Defendants filed and highlighted their respective submissions to the Preliminary Objection and Notice of Motion application dated 31st August, 2017 which I have considered.

Analysis and Determination

Upon perusal of the Preliminary Objection, the written submissions and the pleadings filed herein, I find that the main issue in the Preliminary Objection is whether the Court has jurisdiction to handle the dispute at hand.

*“The ingredients of a preliminary objection are well established in the celebrated authority of **Mukhisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Company Limited, (1969) E.A. 696** as follows;*

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Section 13 of the Environment and Land Court Act provides as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

These provisions are couched in mandatory terms and give exclusive jurisdiction to the Environment and Land Court to handle all disputes relating to land and environment. I however note that the grant of letters of administration issued to the Plaintiffs on 6th June, 2013 vide Machakos Succession Cause 526 of 2011 now Kajiado Succession Cause 14 of 2015 was revoked on 14th October, 2016.

I note it is only the 1st, 3rd and 4th Plaintiffs' who sued in their capacity as administrators and beneficiaries of the estate of the Oisesoi Tipango while 2nd, 5th and 6th Plaintiffs sued as beneficiaries of the estate of the late Oisesoi Tipango. I find that the 2nd, 5th and 6th Plaintiffs who are beneficiaries of the estate of Oisesoi Tipango still have locus standi to proceed with this suit while 1st, 3rd, 4th, plaintiffs do not have it. However since the succession cause is still pending, and with the suit land being one of the issues to be determined therein, the Plaintiffs will not suffer any prejudice if the proceedings in this suit are stayed pending the hearing and determination of the Kajiado Succession Cause 14 of 2015 whose outcome has a strong impact on the instant case.

In the circumstances I will dismiss the Preliminary Objection.

In regard to the Notice of Motion application dated 31st August, 2017, I note the grant of letters of administration issued on the 6th June, 2013 vide Kajiado HCSC No. 14 of 2015 where the suit land forms part of the estate is still in dispute, was revoked on 14th October, 2016. Since the objection proceedings are pending hearing and determination, I find that in accordance with the Law of Succession Act, the suit land has not been distributed. I further note that one of the orders granted was a permanent injunction issued restraining the administrators from dealing with the properties to the estate of the deceased until further orders of the court or any other court with equal status.

Since the Notice of Motion dated 31st August, 2017 was also seeking for injunctive orders which were already granted by Justice Nyakundi, I find that there is no need of engaging in academic exercises at this juncture, as I do not foresee any prejudice the parties to this suit will suffer, as they are protected vide the succession cause, I will decline to make any further orders as sought vide the instant motion until the succession cause is determined.

The upshot of the matter is that the application dated the 31st August, 2017 is not merited and I disallow it.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 7th day of November, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

Githuka for plaintiff

Kamau for 1st defendant

Kibatia for 2nd to 5th defendants

Court Assistant Mpoye