



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.51 OF 2014

NGUGI NDIBI WAMUTUAPLAINTIFF

VERSUS

MARTINE OLE KUSAI.....1ST DEFENDANT

JACKSON LONGISA NGURUMWA.....2ND DEFENDANT

JULIUS TAPATIT KOROS.....3RD DEFENDANT

RULING

(Suit for recovery of a share said to have been sold to the plaintiff by a deceased person; land in name of a third party; estate of deceased being under Administration by the Public Trustee; mandate to recover the land vested in the Administrators of the estate; plaintiff has no capacity; suit struck out with costs for want of capacity)

1. This suit was commenced by way of plaint filed on 19 February 2014 which plaint was amended on 21 February 2014. In the suit, the plaintiff has pleaded that he is the beneficiary of a 1/3 portion of the land parcel Narok Cis Mara/Enabelibel Engeneetia/183 (the suit land). That land parcel was initially registered in the names of three persons as proprietors in common. Of these three persons was one Kingori Ole Lolakupai who held a 1/3 share of the property. It is averred that through a will dated 17 August 1989, Ole Lolakupai bequeathed his 1/3rd share of the suit land to the plaintiff. Through a succession cause filed at the Molo Magistrate's Court as Molo Succession Cause No. 14 of 2005, the 1st defendant applied for a grant of letters of administration for the estate of the late Ole Lolakupai. He was granted letters of administration which were confirmed on 29 August 2006. However, vide an application filed in the High Court in Nakuru High Court Succession Cause No. 108 of 2009, the grant of the 1st defendant was nullified. It is pleaded that despite the nullification, the 1st defendant proceeded to register the 1/3rd share of the late Ole Lolakupai into his name and later transferred the property to the 2nd and 3rd defendants. In the suit, the plaintiff inter alia wants a cancellation of the title in the names of the 2nd and 3rd defendants.

2. Together with the suit, the plaintiff filed an application for injunction to restrain the defendants from dealing with the property pending the hearing of the suit. The defendants replied to the application and also filed a preliminary objection. In the preliminary objection, the defendants have contested the competency of the suit on the principal ground that the plaintiff has no capacity to file this suit since he is merely beneficiary but not the executor of the will of Ole Lolakupai.

3. I directed that the application for injunction be heard alongside the preliminary objection and both counsels filed written submissions. I have gone through these submissions.

4. The bone of contention is the capacity of the plaintiff to file this suit. I have gone through the affidavits on record. The plaintiff does not hold any letters of administration for the estate of the late Ole Lolakupai. The will of Ole Lolakupai is being executed by the Public Trustee who were appointed executors in the will. Indeed through a grant issued on 15 May 2013, the Public Trustee were appointed to be the personal representatives of the estate of Ole Lolakupai.

5. It is trite law that only a personal representative may file suit on behalf of the estate of a deceased person. The plaintiff cannot claim the property in issue directly. The same must first vest in the estate of Ole Lolakupai after which the plaintiff can now claim his share. The suit to have the property revert back to the estate of Lolakupai can only be filed by the personal representative of Ole Lolakupai and no one else. It is the personal representative of the deceased who has capacity to collect all the free property belonging to a deceased person. This is set out in the Law of Succession Act, specifically Section 82 (a) which provides as follows :-

S. 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;

6. Considering the above, I have little choice but to strike out the plaintiff's suit with costs. It is not therefore necessary to consider the application for injunction for it falls together with the suit.

7. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 16th day of February, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:-

No appearance on part of M/s Ocheo Onduso & Company Advocates for the plaintiff

No appearance on part of M/s Githui & Company Advocates for defendant.

CA : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU