



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.74 OF 2012

JULIUS OMONDI ODENY.....PLAINTIFF

(Suing as the Administrator of the estate of

WALTER ODENY AGINA (Deceased)

VERSUS

THE CLERK COUNTY

COUNCIL OF SIAYA.....1ST DEFENDANT

BEN OKINDA ALWANDA.....2ND DEFENDANT

THERESIA MWENI.....3RD DEFENDANT

RULING

1. **Julius Omondi Odeny**, hereinafter referred to as the Plaintiff, suing as the administrator of the estate of the Late **Walter Odeny Agina**, commenced these proceedings against **The County Clerk County Council of Siaya, Ben Okinda Alwanda** and **Theresa Mweni**, hereinafter referred to as 1st to 3rd Defendants, through the plaint dated 12th October 2012 filed contemporaneously with a notice of motion of even date. The counsel for the Plaintiff appeared before the court exparte on 12th October 2012 and obtained interim orders of injunction against the Defendants in respect of "**Plot No.20 or the purported plot number 21 and 22 Ramula Market**" pending the hearing and determination of the notice of motion. The interim orders have been extended severally and are still in force.
2. M/S S.O. Madialo & Co. Advocates filed a memorandum of appearance dated 25th October 2012 for the Defendants. M/S Bruce Odeny & Co. Advocates for the Plaintiff requested for interlocutory judgment vide their letter dated 15th January 2013. M/S S.O. Madialo & Co. Advocates filed grounds of opposition dated 18th February 2013 for the 1st and 2nd Defendants and statement of defence for the Defendants dated 8th May 2013. M/S Bruce Odeny & Co Advocates for the Plaintiff filed a reply dated 1st May 2013 to the defence and further affidavit sworn by the Plaintiff on 25th June 2013.
3. Then M/S S.O. Madialo & Co. Advocate filed a notice dated 24th September 2014 to raise a preliminary objection on points of law on behalf of the 1st Defendant being a non-existent entity. Both counsel have filed writtensubmission on the preliminary objection which are as summarized below;

a) **DEFENDANTS' COUNSEL'S SUBMISSIONS:**

i) That in answer to the Plaintiff's notice of motion dated 12th October 2012, the Defendants counsel filed grounds of opposition in which they among others challenged the Plaintiff's capacity to sustain the suit and application without first obtaining grants of letters of administration for the estate of **Walter Odeny Agina**.

ii) That in an effort to address the issue of capacity the Plaintiff filed a further affidavit sworn on 25th June 2013 annexing a copy of a grant obtained in **Maseno P.M.C Succession Cause No.91 of 2012** on 5th February 2013 and issued on 7th February 2013. That the suit and notice of motion having been filed on 12th October 2012 before the Plaintiff obtained the grant, were a nullity.

iii) That counsel referred the court to **Kisumu ELC Petition No.5 of 2015. Eunice Dolis Sande -V- The Siaya County Government & 3 Others** where this court upheld a preliminary objection that the Petitioner had no capacity to file the petition over the suit land on behalf of the estate of a deceased without first obtaining the grant and asked that the suit and notice of motion be struck out.

b) PLAINTIFF'S COUNSEL SUBMISSIONS:

i. That the written submission filed by the Defendants counsel in support of their preliminary objection is at variance with the ground set out in the notice dated 24th September 2014.

ii) That instead of the Defendants counsel submission addressing the ground of 1st Defendant being a non-existent entity as was set out in the notice, it addressed their grounds of opposition dated 18.2.2013 to the Plaintiff's notice of motion dated, 12th October 2012 without directions having been taken on that.

iii) That the Defendants have not filed any written submission in respect of the notice to raise preliminary objection dated 24th September 2014.

iv) That this suit was filed in 2012 and by then the 1st Defendant was in existence as it was before the national election of 4th March 2013, which ushered in the County governments. That **Section 59 of the Urban areas and Civic Act** Chapter 275 of the Laws of Kenya provides how the suits already commenced by or against the former Local Authorities were to be continued and therefore 1st Defendant was properly suited.

v) That the issue as to whether or not the Plaintiff had a grant prior to the filing of this suit was not an issue to be canvassed under the notice to raise a preliminary objection dated 24th September 2014, and the preliminary objection should be dismissed with costs. The counsel for the Plaintiff further submitted that the suit herein was filed after the grant was obtained.

vi) That the preliminary objection raised by the Defendants do not meet the threshold set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd -V - West end Distributors Ltd 1969** E.A. 696 where the court stated as follows:

" a preliminary objection is the nature of what used to be demurren. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be raised, if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points of law by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuse issues. This improper practise should stop."

4. 4. 4. The issues for the court's determination as follows;

a) Whether the 1st Defendant is a non-existent entity and if so whether the suit against it should be struck out.

b) Whether the issue of capacity of the Plaintiff to file this suit not having been a ground in the notice

dated 24th September 2014 can be a ground of preliminary objection.

c) Who pays the costs.

5. The court has carefully considered the notice of intention to raise preliminary objection, rival written submissions by counsel and come to the following findings;

a) That the Plaintiff commenced this suit through the Complaint dated and filed on 12th October 2012 in which he describes himself at the heading and paragraph 1 as suing as the administrator of the estate of the late **Walter Odeny Agina**, deceased. That the Plaintiff filed the notice of motion also dated 12th October 2012 seeking for injunctive orders against the Defendants. That a person attains capacity to sue for the estate of a deceased person following the acquisition of a grant in accordance with the provisions of Section the Law of **Succession Act Chapter 160 Laws of Kenya**.

b) That the Plaintiff did not attach to his list of documents dated 12th October 2012 or annex to the supporting affidavit sworn on 12th October 2012 a copy of the grant under which he acquired capacity to sue as administrator of the estate of **Walter Odeny Agina**, deceased. That the counsel for the Defendant picked that issue in their reply to the notice of motion when filing their grounds of opposition dated 18th February 2013 in accordance with **Order 51 Rule 14** of Civil Procedure Rules which allows a Respondent to file one or a combination of either a replying affidavit, grounds of opposition or preliminary objection to an application. That the notice of intention to raise preliminary objection dated 24th September 2014 may be taken to have been a further reply to the notice of motion in addition to the grounds of opposition filed earlier.

c) That the statement of defence dated 8th May 2013 at paragraph 3 and 10 notice of motion and the Defendants were therefore in order to submit on that ground ones counsel agreed to have the preliminary objection dealt with first. The issue of capacity to sue is an issue of law.

d) That it is in order for a party who has raised several grounds to pursue only one or more of the grounds and leave or abandon the others. That in such situation the court pronounces itself on the grounds pursued. That in this case the ground the Defendants pursued is whether or not the Plaintiff had capacity to file this suit through the complaint dated and filed on 12th October 2012.

e) That in answer to the Defendants counsel's submission that the Plaintiff had no capacity to file and prosecute the suit and notice of motion as administrator of **Walter Odeny Agina**, deceased, the Plaintiff's counsel submitted that "**This suit was filed after the grant was obtained.**"

f) That further to the finding on (b) above and possibly in an effort to respond to the Defendant's grounds of opposition, the Plaintiff filed a further affidavit pursuant to leave obtained on 8th June 2012 that was sworn on 25th June 2013 to which he annexed a copy of a grant obtained in **Maseno PMC Succession Cause NO.91 of 2012** and marked "**JOO-1**". That contrary to the plaintiff's counsel's submissions that the Plaintiff had obtained the grant before filing the suit, the copy of the grant annexed to the further affidavit clearly shows that the grant to **Julius Omondi** was made on 5th February 2013 and issued on 7th February 2013.

g) That the complaint and notice of motion dated and filed on 12th October 2012 were therefore filed more than three months before the Plaintiff obtained the grant that clothed him with capacity to file and defend suit for the estate of the late **Walter Odeny Agina**, deceased. That it follows that the Plaintiff commenced this suit while without capacity, which is an issue of law, and without it the suit and any application grounded on such a suit must be struck out as it cannot be sustained.

h) That Plot **No.20 Ramula**, which is the subject matter of this suit, was according to the pleadings filed herein, including paragraph 4 of the complaint, registered in the names of the deceased, **Walter Odeny Agina**. That the Plaintiff, **Julius Omondi Odeny**, has not disclosed any recognizable legal interest over the said plot independent of being a beneficiary of the estate of the late **Walter Odeny Agina**.

i) That taking all the facts as pleaded, the court finds that the Plaintiff, **Julius Omondi Odeny**, had no capacity to file the plaint and notice of motion dated and filed on 12th October 2012 for failure to have obtained a grant in accordance with the **Law of Succession Act** in respect of the estate of the registered legal owner of **Plot No.20 Ramula**.

6. That for reasons set out above, the court uphold the preliminary objection raised by the Defendants counsel' on the plaintiff lack of capacity. The plaint and notice of motion dated and filed on the 12th October 2012 are hereby struck out with costs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 22ND DAY OF JUNE 2016

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr Odeny for Applicant/Plaintiff

M/S Kyamazima for Respondent/Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/6/2016

22/6/2016

S.M. Kibunja J

Oyugi Court Assistant

Parties absent

Mr Odeny for the Applicant

M/S Kyamazima for the Respondent

Court: Ruling delivered in open court in presence of Mr Odeny and M/S Kyamazima Advocates for Respondents respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/6/2016