



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 11 OF 2014**

**ROBELLA BETTY AYODE OMAIDO.....PLAINTIFF**

**VERSUS**

**ELIPHINEAS JACKSON EKIM OMAIDO.....DEFENDANT**

**RULING**

1. The Plaintiff Robella Betty Ayode Omaido filed an originating summons seeking determination of the following questions;-

i. Whether although the title to LR NO. 8699/7 measuring 474.7 hectares was on the 23/5/2008 registered in the name of the defendant, it was so registered or held by the defendant in trust for the plaintiff and other defendants of Jonam Omaido Mishae and Alfred Arthur Durani Martineau both deceased.

(ii) Whether the trust should now determine and an order be made that LR NO. 8699/7 or resultant reference Number(s) be partitioned among all the children of Jonam Omaido Mishae and who were all dependants of Arthur Durani Martineau both deceased in equal shares, the beneficiaries being;-

***(a) Eliphineaus Jackson Ekim Omaido***

***(b) Nobert Omaido***

***(c) Rosemary Namukula Omaido***

***(d) Robert Omaido***

***(e) Hellen Adake Omaido***

***(f) Susan Ikaredi Omaido***

***(g) Phylis Hakulei Omaido***

***(h) Catherine Akisai Omaido***

***(i) Robella Ayodo Omaido***

**(j) Esther Imoititi Omaido**

**(k) Pamla Toto Omaido**

**(l) Julie Koldede Omaido**

**(m) Gladys Atto Omaido**

**(n) Desmond Olidhe Omaido**

**(o) Anthony Sirari Omaido**

**(p) Diara Amase Omaido**

**(q) Robin Ekim Omaido**

**(r) Ronald Arapai Omaido**

**(s) Ezra Delewa Omaido**

2. Before the hearing of the originating summons a preliminary objection was taken on behalf of the defendant on the following grounds;-

***(a) That the Environment and land court has no jurisdiction to hear and determine the issues raised by the plaintiff's originating summons.***

***(b) That the plaintiff is not a person entitled to take out an originating summons under Order 37 Rule 1 of the Civil Procedure Rules 2010.***

3. Mr Githuka for the defendant argued that the plaintiff's claims in the originating summons touch on wills of two deceased persons and the issue of dependancy. He argued that these are issues which fall under the Law of Succession Act and as such, the proper court to deal with the issues is the High Court. Mr Githuka argued that the plaintiff is seeking the court to determine if those listed in the originating summons are dependants of Jonam Omaido Mishae and Arthur Durari Martineau and it will inevitably require the court to examine the wills of the two in-order to determine if those listed in the originating summons are dependants of the deceased. He argued that this is a jurisdiction of the High Court.

4. Mr Githuka further argued that the plaintiff is not one of the persons contemplated under Order 37 Rule (1) of the Civil Procedure Rules 2010 who can bring an originating summons. Order 37 Rule (1) provides as follows with regard to persons who can bring originating summons;-

***(1) The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui qui trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid .....***"

5. Mr Kraido for the plaintiff opposed the preliminary objection arguing that the same is misconceived and frivolous and that it does not meet the threshold set out in the ***case of Mukisa Biscuit Manufacturing Co.Ltd – Vs- West End Distributors Ltd [1969] EA 696***. He argued that the plaintiff is not seeking variation of any trusts and that she is only seeking a share of the estate of the deceased persons.

6. I have considered the submissions by counsel for the parties herein. Order 37 Rule 1 is clear as to who can bring out originating summons. The persons who can do so are listed and the questions which can be determined in the originating summons are listed from (a) to (g) of the same rule. The plaintiff in this originating summons is none of the persons contemplated under order 37 Rule 1 of the Civil Procedure

Rules and the questions she is seeking this court to determine are none of the questions listed under (a) to (g).

7. On the issue of jurisdiction, there is no doubt that the plaintiff is invoking the wills of Arthur Durani Martineau and Jonam Omaido Mishae. The defendant herein was registered as owner of the suit property pursuant to the said wills. The plaintiff and others who have been listed in the originating summons are seeking the reliefs on the basis that they are dependants. It is argued that there has never been any application for provision of dependants and the wills of the two deceased have never been contested. There is no way the court will address the question raised by the plaintiff without examining the wills of the two deceased persons. Under the Law of Successions Act it is the High Court and to some extent the subordinate court who have jurisdiction to determine the issues of dependancy and matters relating to probate. As for this case, it is the High Court which has exclusive jurisdiction to deal with a matter such as this one. I therefore find that the proper court to handle the issues herein is the High Court and not the Environment and land court. I find that the preliminary objection is well founded on the two grounds. Even if the plaintiff was to argue that she is claiming to be interested in the land, she will only do so based on the two wills. The question of her interest as per Order 37 Rule 11 of the Civil Procedure Rules will depend on determination of constructions of the will and declaration of her rights resulting therefrom. The court best placed to address such issue is the High Court. I uphold the preliminary objection and proceed to strike out the plaintiff's originating summons with no order as to costs.

It is so ordered.

Dated, signed and delivered at Kitale on this 3rd day of February, 2015.

**E. OBAGA**

**JUDGE**

**In the presence of Mr Githuka for defendant and Mr Kiarie for Mr Kraido for Plaintiff. Court Clerk – Kassachoon.**

**E. OBAGA**

**JUDGE**

**3/2/2015**