



Magak & another v Owuor & 6 others (Environment and Land Case Civil Suit E028 of 2022) [2024] KEELC 6879 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6879 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT E028 OF 2022
SO OKONG'O, J
OCTOBER 17, 2024**

BETWEEN

TERESA ADHIAMBO MAGAK 1ST PLAINTIFF

SUSAN AWINO MAGAK 2ND PLAINTIFF

AND

PAMELA AKINYI OWUOR 1ST DEFENDANT

ALEX INDURI 2ND DEFENDANT

ZHONGOMEI COMPANY LIMITED 3RD DEFENDANT

THE LAND SURVEYOR NYANDO 4TH DEFENDANT

LAND REGISTRAR NYANDO 5TH DEFENDANT

CHIEF LAND REGISTRAR 6TH DEFENDANT

THE ATTORNEY GENERAL 7TH DEFENDANT

RULING

1. The Plaintiffs brought this suit against the 1st and 2nd Defendants on 9th November 2022. The plaint was amended on 24th October 2023 to add the 3rd to 7th Defendants as parties to the suit. In their amended plaint dated 23rd October 2023, the Plaintiffs averred that they were the administrators of the estate of Dan Onyango Magak, deceased who died on 28th September 1997 (hereinafter referred to as “the deceased”). The Plaintiffs averred that at all material times, the deceased was and still is the registered owner of all that parcel of land known as Kisumu/Kakola/39 (hereinafter referred to as “the suit property”) while the 1st Defendant’s deceased husband one, Jack Apollo Owuor Mellitus was and still is the registered owner of all that parcel of land known as Kisumu/Kakola/7384 (hereinafter referred to as “Plot No. 7384”) which is adjacent to the suit property.



2. The Plaintiffs averred that on or about 2012, the 1st and 2nd Defendants trespassed on the suit property and hived off a portion thereof which is abutting Kisumu-Kericho Highway and put up thereon temporary structures despite protests from the Plaintiffs. The Plaintiffs averred that on or about 2020, the 1st and 2nd Defendants hived off another portion of the suit property and leased out the same to the 3rd Defendant without the knowledge or consent of the Plaintiffs. The Plaintiffs averred that in addition to the foregoing, the 1st and 2nd Defendants had also proceeded to subdivide the suit property into several smaller portions which they had fenced. The Plaintiffs averred that after the filing of the suit, they discovered that the 1st and 2nd Defendants had fraudulently excised a large portion of the suit property measuring 2.5Ha. which they amalgamated with Plot No. 7384 and now form part of Plot No. 7384. The Plaintiffs averred that following the said illegal and fraudulent excision of the said portion of the suit property and the amalgamation thereof with Plot No. 7384, the 6th Defendant fraudulently caused the 1st Defendant's deceased husband, Jack Apollo Owuor Mellitus to be registered as the owner of Plot No. 7384 on 24th August 2015 and issued a fraudulent title for the now larger Plot No. 7384 in his name on 29th February 2016 although he had died on or about 15th September 2009 in the USA. The Plaintiff averred that they also discovered that on the same date Plot No. 7384 was fraudulently registered in the name of the 1st Defendant's deceased husband, Jack Apollo Owuor Mellitus, the deceased Dan Onyango Magak was also registered as the owner of the suit property although with a reduced area a larger portion having been hived off and added to Plot No. 7384. The Plaintiffs averred that they also discovered that the excision of the said larger portion of the suit property and the amalgamation of the same with Plot No. 7384 was based on an alleged agreement of sale that was entered into on 25th July 1999 between the 1st Defendant's deceased husband, Jack Apollo Owuor Mellitus and one, Bonface Oranga Magak who was neither the registered owner of the suit property nor the administrator of the estate of the deceased owner of the property, Dan Onyango Magak who died on 28th September 1997. The Plaintiffs pleaded several particulars of fraud against the Defendants.
3. The 1st Defendant filed a defence and a counter-claim against the Plaintiffs on 13th December 2022. Save for the description of the parties, the 1st Defendant denied all the allegations contained in the Plaintiffs' plaint. Without prejudice to the said denial, the 1st Defendant averred that she was the legitimate owner of the portion of the suit property that was amalgamated with Plot No. 7384 the same having been purchased by her deceased husband from the father of the deceased, Dan Onyango Magak on 25th July 1999. The 1st Defendant urged the court to dismiss the Plaintiffs' suit with costs. In her counter-claim, the 1st Defendant averred that she took possession of the disputed portion of the suit property in 1999 and had occupied and used the same for over 20years. The 1st Defendant averred that she had acquired the said portion of the suit property by adverse possession. The 1st Defendant sought judgment against the Plaintiffs for among others, a declaration that she had acquired the disputed portion of the suit property by adverse possession and that a title in respect thereof be issued in her name.
4. The 4th to 7th Defendants filed a statement of defence dated 8th February 2024. The 4th to 7th Defendants denied all the allegations contained in the amended plaint save where the same was expressly admitted. The 4th to 7th Defendants averred that if a portion of the suit property was hived off and amalgamated with Plot No. 7384, the exercise was carried out in accordance with the law. The 4th to 7th Defendants averred that they would raise a preliminary objection to the entire suit. The 4th to 7th Defendants urged the court to dismiss the Plaintiffs' suit with costs.
5. The 1st Defendant filed a Notice of Preliminary Objection dated 29th April 2024 in which she contended that she lacked the capacity to be sued since she was not the administrator of the estate of her deceased husband, Jack Apollo Owuor Mellitus in whose name, Plot No. 7384 was registered. The



- 1st Defendant contended that the court lacked jurisdiction to determine the Plaintiffs' claim against her since the claim was incompetent and incurably defective.
6. The 4th to 7th Defendants also filed a Notice of Preliminary Objection dated 8th February 2024 in which they contended that the Plaintiffs lacked the locus standi to file this suit. The 4th to 7th Defendants contended that the Plaintiffs' suit was a nonstarter and amounted to an abuse of the process of the court.
 7. The preliminary objections by the Defendants were argued together orally on 26th September 2024. The 1st Defendant argued that the 1st Defendant had no legal standing to be sued concerning Plot No. 7384 that was registered in the name of her deceased husband. The 1st Defendant submitted that she was not the administrator of the estate of her deceased husband. The 1st Defendant urged the court to strike out the Plaintiffs' suit against the 1st Defendant. On their part, the 4th to 7th Defendants submitted that the Plaintiffs had no locus standi to bring this suit in that the suit was brought on behalf of the estate of Dan Onyango Magak deceased in respect of whose estate the Plaintiffs had not been appointed as the administrators.
 8. In their submissions in reply, the Plaintiffs submitted that they were duly appointed as the administrators of Dan Onyango Magak deceased on behalf of whose estate they had brought this suit. The Plaintiffs submitted that they had locus standi to bring the suit contrary to the 4th to 7th Defendants' contention. The Plaintiffs referred the court to a copy of the Grant of Letters of Administration Ad Litem that was issued to them on 30th September 2022 which is part of their bundle of documents. As concerns, the 1st Defendant's contention that the 1st Defendant had no locus standi to be sued, the Plaintiffs submitted that the 1st Defendant had stated in her defence and counter-claim that she was entitled to the suit property by adverse possession. The Plaintiffs submitted that the 1st Defendant having laid a personal claim to the suit property could not turn around and claim that she had no capacity to be sued.

Analysis and determination

9. I have considered the Defendants' notices of preliminary objection and the submissions by the advocates for the parties. In *Hassan Ali Joho & Another v. Suleiman Said Shabbal & 2 others* [2014] eKLR, the Supreme Court stated as follows on preliminary objections:

“To restate the relevant principle from the precedent setting case, *Mukisa Biscuit Manufacturing Co. Ltd. Vs West End Distributors* (1969) EA 696.

‘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 parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.’”

10. In *Oraro v. Mbaja* [2005] 1KLR141, the court stated that:

“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process



of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

11. It is on the foregoing principles that the Defendants’ objections to the Plaintiffs’ suit falls for consideration. I have set out earlier in the ruling the Plaintiffs’ case and the defences put forward by the Defendants. The Plaintiffs brought this suit in their capacities as the administrators of the estate of Dan Onyango Magak deceased. In their list and bundle of documents filed on 9th November 2022, the Plaintiffs have included a copy of the Limited Grant of Letters Administration Ad Litem in respect of the estate of Joseph Onyango Magak aka Dan Onyango Magak issued on 30th September 2022 to the Plaintiffs for the purposes of filing a suit. This disposes of the objection by the 4th to 7th Defendants. Having been issued with a Limited Grant of Letters Administration Ad Litem for the purposes of filing a suit on behalf of the estate of the deceased, Dan Onyango Magak, the Plaintiffs had the locus standi to file this suit.
12. As concerns the objection by the 1st Defendant, my view is this: The 1st Defendant’s deceased husband Jack Appollo Owuor Melitus died on 15th September 2009. All the alleged fraudulent and illegal activities complained of by the Plaintiffs are said to have taken place after the death of the 1st Defendant’s said husband. A portion of the suit property is said to have been hived off and amalgamated with Plot No. 7384 on 24th August 2015; 6 years after the death of the 1st Defendant’s husband. The 1st Defendant’s deceased husband could not have participated in that exercise. According to the Plaintiff, the exercise was fraudulent and the fraud was allegedly committed by the 1st and 2nd Defendants with the collusion of the 4th to 7th Defendants. The Plaintiffs have a right to sue the 1st Defendant for the alleged acts of fraud. In any event, I am of the view that the 1st Defendant’s claim that she is not the administrator of the estate of her deceased husband is not raised in good faith. A search at the Kenya Law by the court revealed that the 1st Defendant made an application for Grant of Letters of Administration in respect of the estate of her deceased husband in 2018 in the Principal Magistrate’s Court at Nyando in Succession Cause No.32 of 2018. The application was published in the Kenya Gazette Vol. CXX No. 97 of 10th August 2018. A perusal of the Nyando Succession Cause file revealed that Grant of Letters of Administration in respect of the estate of the deceased, Melitus Appollo Owuor alias Jack Melitus Owuor was issued to the 1st Defendant on 12th September 2018. The said Grant of Letters of Administration was confirmed on 16th May 2019 and an amended Certificate of Confirmation was issued to the 1st Defendant on 9th March 2023 while this suit was pending. The property that was owned by the 1st Defendant’s deceased husband, Jack Appollo Owuor Melitus which is the subject of this suit, Plot No. 7384 is part of the estate of the deceased and the same has been bequeathed to the 1st Defendant wholly. It is no wonder that the 1st Defendant has brought a counter-claim seeking a declaration that she has acquired the disputed portion of the suit property by adverse possession. This is because the 1st Defendant is now the owner of Plot No. 7384. The 1st Defendant is in the circumstances misleading the court and abusing the court process when she claims that she is not the administrator of her deceased husband’s estate and brings the present preliminary objection to strike out the Plaintiff’s suit.

Conclusion

13. The upshot of the foregoing is that I find no merit in the Defendants’ preliminary objections. The objections are dismissed with costs to the Plaintiffs.

DELIVERED AND DATED AT KISUMU ON THIS 17TH DAY OF OCTOBER 2024

S. OKONG’O



JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Oriwa h/b for Mr. Ochuka for the Plaintiffs

N/A for the 1st Defendant

Mr. Kajo for the 4th to 7th Defendants

Ms. J.Omondi-Court Assistant

