Ayunga & 3 others v Okoth & 3 others (Enviromental and Land Originating Summons E008 of 2023) [2024] KEELC 14226 (KLR) (18 November 2024) (Ruling)

Neutral citation: [2024] KEELC 14226 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2023

GMA ONGONDO, J

NOVEMBER 18, 2024

BETWEEN

GEORGE AYUNGA ..... 1ST PLAINTIFF

JARED AYUNGA ..... 2ND PLAINTIFF

OCHIENG ODERO ..... 3RD PLAINTIFF

CRESTINA AKEYO OBIERO ..... 4TH PLAINTIFF

AND

PETER OKELLO OKOTH ..... 1ST DEFENDANT

JEREMIAH OTIENO OKOTH ..... 2ND DEFENDANT

LAND REGISTRAR MIGORI COUNTY ..... 3RD DEFENDANT

THE HON. ATTORNEY GENERAL ..... 4TH DEFENDANT

RULING

1. This ruling is in respect of the preliminary objection dated 4th November 2023 by the 2nd defendant through M/S Ken Omollo and Company Advocates for the orders;
    a. THAT the plaintiffs'/applicants herein do not have capacity to institute this application together with the suit herein.
    b. THAT therefore the said application together with the entire suit are misconceived bad in law and an abuse of the process of this Honourable court and should be dismissed with costs.
2. The preliminary objection was heard by written submissions pursuant to orders of the court given on 18th July 2024.

3. By the submissions dated 5th August 2024, Omonde Kisera learned counsel for the plaintiffs opposed the preliminary objection and supported the originating summons. It was submitted that Order 37 Rule 1 of the Civil Procedure Rules 2010 exempts the plaintiffs from the requirement of letters of Letters of Administration as this is not a substantive suit but general issues of law raised in the originating summons not yet intended to confer any right on them. That the defendant has avoided to answer the question whether he lawfully succeeded the estate of the deceased original owners of the suit land before obtaining registration of titles of the same. That the preliminary objection is grossly misconceived with no legal foundation and that it be dismissed.

4. In the submissions dated 1st August 2024, learned counsel for the 1st and 2nd defendants made reference to the originating summons dated 24th October 2023, the preliminary objection and stated the plaintiffs' case. That it is only the Letters of Administration issued in accordance of to the Law of Succession that would allow the personal representative of the deceased to commence and defend a suit on behalf of the estate of the deceased persons herein in line with section of the *Law of Succession Act* Chapter 160 Laws of Kenya. That thus, the suit be dismissed with costs to the defendants. Counsel relied on Alfred Njau-vs-City Council of Nairobi (1983) KLR 625 and Bolton-vs-Salim Khanoi (1958) EA 360, among other authorities to reinforce the submissions.

5. It must be noted that the present suit was generated by an originating summons dated 24th October 2024 under, inter alia, Order 37 Rules 1 and 2 of the Civil Procedure Rules 2010 and Article 60 of *the Constitution* of Kenya 2010 for orders and determination of the questions infra;

    a. Whether The Transfer And Registration Of L.r No. North Sakwa/kadera Kwoyo/1x2 (the Suit Land) In The Names Of The Defendants And Didacus Ayunga From The Names Of Zacharia Obiero, Mathayo Okoth And Didacus Ayunga (1St, 2Nd And 3Rd Deceased Persons Respectively, The Three Original Owners Herein) Who All Had Long Died Before 19Th September 2014 And In Whose Estates No Grant Of Letters Of Administration Have Been Issued To Date Was Lawful And Valid.

    b. Whether The Sub-division Of The Suit Land By The Defendants Into Lr No. Sakwa /kadera Kwoyo/9X5 Measuring 1.52 Hectares, 916 Measuring 0.57 Hectares And 917 Measuring 0.15 Hectares And Transfer Of The Same Respectively In The Names Of September 2014 Was Lawful And Valid Without Succession Having Been Undertaken.

    c. Whether if the questions raised in paragraphs *1* and *2* above herein are answered in the negative the said transfers and subdivisions should be revoked and the suit land returned to the suit land to be dealt with accordance with the law.

    d. Whether the dealings by the defendants with the suit land as mentioned herein above amounts to intermeddling with the Estates of the three original owners which the defendants should be punished for by this Honourable court.

    e. Whether the defendants should pay the costs of this suit

6. The 1st and 2nd defendants opposed the originating summons by their replying affidavit filed in court on 7th November 2023. They averred, inter alia;

    a. THAT they know of their own knowledge that the suit land was originally in the names of the 1st, 2nd and 3rd deceased persons.

    b. THAT they know of their knowledge that the 1st and 2nd plaintiffs are the only surviving children and/or relatives of the late George Ayunga.

c. THAT the plaintiff only concerns it that the original parcel was subdivided and registered in their respective names without taking out grant of letter of administration in respect of the estate of the 1st and 2nd deceased persons.

d. THAT from the pleadings herein, it seems that the 3rd and 4th plaintiffs are entitled to the estate of 3rd deceased person and that is why they have chosen to give the 1st plaintiff the authority to swear the affidavit on their behalf in this suit.

e. THAT they had been advised by their advocate on record Mr. Ken Omollo advocate which advice we verily believe to be correct that even if grant of letters of administration was not taken out in respect to the estate of both the 1st and 2nd deceased persons who are both the grandfather and father of the 1st defendant, the same will not prejudice the plaintiffs in any way as they are not beneficiaries of their respective estates and therefore not entitled to a share of the same.

7. Also, the 1st and 2nd defendants raised the preliminary objection as stated in paragraph *1* hereinabove.

8. Furthermore, the 1st and 2nd defendants filed grounds of opposition of even date also based on the two grounds contained in the preliminary objection.

9. In the foregone, the issues for determination are; whether; (a) the plaintiffs/applicants have capacity to institute this suit and (b) the defendants are entitled to the second prayer in the application.

10. It must be borne in mind that the preliminary objection is on points of law as I am guided by the decision in Mukisa Biscuit Manufacturing Co.Ltd-vs-West End Distributors (1969) EA 696. The same is a threshold question which calls for definitive and prompt prouncement as held in Kakuta Maimai Hamisi-vs- Peris Pesi Tobiko 7 2 others (2013) eKLR.

11. The defendants asserted that the plaintiffs filed the instant suit as beneficiaries of the estates of the 1st, 2nd and 3rd deceased persons. That they did not obtain any grant (s) of letters of administration to enable them lodge the suit.

12. The plaintiffs lamented that they are entitled to share of the estate of the deceased 1st, 2nd and 3rd deceased persons. That the defendants have sub divided the suit land, transferred and subsequently effected registration of the same long after the death of the said three original owners on 19th September 2014 without succession being undertaken in the respective estates in accordance with the *Law of Succession Act* Chapter 160 of the Laws of Kenya. This is the revelation in question numbers 1, 3 and 4 and grounds (a) to (g) of the originating summons.

13. Further, the documents which include; copies of death certificate and green card marked as 'GA 1 to 4 c' annexed to the 1st plaintiff's affidavit in support of the originating summons, reveal that the 1st, 2nd and 3rd deceased persons who were common owners of the suit land, died intestate, That no grant of letters of administration have been issued in respect of their estates.

14. Notably, the term the term 'Legal representative' is defined under section 2 of the *Civil Procedure Act* Chapter 21 Laws of Kenya. The role and duties thereof are set out under section 82 of the *Law of Succession Act* Chapter 160 Laws of Kenya.

15. The estate of the deceased person is vested in the legal representative; see Trouistik Union International and another-vs-Jane Mbeyu (1993) eKLR

16. In Omari Kaburu-vs-Industrial Credit and Development Corporation (2007) eKLR, Wanjiru Karanja J (Now, JA) held;

'.....The law is that the grant is what clothes a person with locus standi to stand in and sue on behalf of the estate of the deceased.....'

17. Similarly, in the case of Republic-vs-Attorney General and another Ex parte John Mugo (2013) eKLR, H. Ongundi J, stated;

'.....and a legal representative is a person who has been issued letters of grant. This is provided for under section 82 (a) of the *Law of Succession Act*.....the applicant can not fail to follow the procedure and hide under Article 22 (1) and (2) of *the Constitution*.....the Law of Succession is clear that it must be the legal representative.....'

18. It is worth to note that the term 'Locus standi' refers to the right to appear or be heard in court or other proceedings as noted in Alfred Njau case (supra). So, a litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in cases of intestate succession; see Rajesh Pranjivan Chudasama-vs-Sailesh Pranjivan Chudasama (2014) eKLR.

19. Order 3 rule 7 and Order 31 rules 1 and 2 of the Civil procedure Rules 2010 provide for claims by or against trustees, executors and administrators. Order 2 rule 15 and Order 24 rule 5 of the said Rules govern striking out of pleadings and determination of question as to legal representative respectively.

20. In the present suit, the plaintiffs have not demonstrated that they are the legal representatives of the estates of the 1st , 2nd and 3rd deceased persons. It is observed that the grounds of preliminary objection are in line with questions 1, 2 and 3 set out on the face of the originating summons. However, since there is no grant of letters of Administration over the estates as stated above, the suit is a non-starter. Therefore, the preliminary objection is sustainable.

21. A fortiori, this suit commenced by way of the originating summons dated 24th October 2023, is misconceived, incompetent and fails. The same, be and is hereby struck out with no orders at to costs.

22. It is so ordered.

DATED and DELIVERED at MIGORI this 18TH DAY OF NOVEMBER 2024

G M A ONGONDO

JUDGE

PRESENT;

Mr J Omonde kisera learned counsel for the plaintiffs

Tom Maurice, court assistant

Non appearance for the defendants