



Ogwang & 3 others v Odak (Sued in his capacity as the legal representative and an administrator of the Estate of Zilpah Odak - Deceased) (Environment & Land Case 28 of 2021) [2024] KEELC 13674 (KLR) (10 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13674 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 28 OF 2021
GMA ONGONDO, J
DECEMBER 10, 2024**

BETWEEN

**ANDREW OTIENO OGWANG 1ST PLAINTIFF
TOM OCHOLA ODHIAMBO 2ND PLAINTIFF
GRACE AKINYI OKINDA 3RD PLAINTIFF
LUCY ATIENO OCHIENG 4TH PLAINTIFF**

AND

TOM ODAK (SUED IN HIS CAPACITY AS THE LEGAL REPRESENTATIVE AND AN ADMINISTRATOR OF THE ESTATE OF ZILPAH ODAK - DECEASED) DEFENDANT

RULING

1. This ruling in lieu of judgment is provoked by a point of law as discerned from paragraphs 12 and 20 of the plaint dated 10th February 2015.
2. It is the plaintiffs' case that they are the registered proprietors of L. R. Numbers Central Kasipul/Kamuma/5844, 5845, 5846 and 5847 respectively (the suit parcels of land herein), which parcels of land arose from the subdivision of L.R. No. Central Kasipul/Kamuma/4869. That they purchased the suit parcels of land from one John Odhiambo Odoyo (hereinafter referred to as the vendor), who succeeded the Estate of Peterlis Obondo Nyatuga (deceased).
3. The plaintiffs allege that when they sought to take possession of the suit parcels of land following the purchase, they discovered that the defendant had encroached onto the suit parcels of land on or about 2012/2013 and constructed a filling station thereon, which she has leased out to a third party.



4. On her part, the defendant contends that the suit parcels of land are superimposed upon Plot No. 38, Oyugis town. That therefore, she instituted legal proceedings at the Oyugis Senior Principal Magistrate's Court Civil Suit No. 114 of 2014, seeking to bar the plaintiffs from entering upon and/or taking possession of the suit parcels of land. The plaintiffs contend that the subordinate court at Oyugis lacks jurisdiction to hear and determine the matter. Thus, the plaintiffs sought the following orders;
 - i. Declaration that Plot Number 38, Oyugis Town, which is alluded to and forms the basis of the Defendant's claim is unknown and non-existent and that the portions claimed by and/or at the instance of the defendant falls on and/or constitutes the suit parcels of land, belonging to and registered in the names of the Plaintiffs serially and/or respectively.
 - ii. Declaration that the actions and/or omissions of the defendant of entering upon, taking possession of and building onto portions of the suit parcels of land amounts to and/or constitutes trespass.
 - iii. An order of eviction against the defendant her agents and/or servants from the suit parcels of land.
 - iv. Permanent Injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the defendant from entering upon, re-entering, trespassing onto, fencing, building structures, operating and filing satiation, interfering with and/or in any other manner dealing with the suit parcels of land, and/or any portion(s) thereof, whatsoever and/or howsoever.
 - v. Mense Profits.
 - vi. Interest on (v) hereof at Court rates.
 - vii. Costs of this suit, together with interests thereon be borne by the Defendant.
 - viii. Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.
5. At Paragraph 12 of the plaint, the plaintiffs state in part that:

“... the defendant proceeded to and filed civil proceedings vide Oyugis CMCC No. 114 of 2014, seeking to bar the plaintiffs from entering upon and/or taking possession of the suit properties...”
6. Further, at paragraph 20 thereof, the plaintiffs aver that there are pending proceedings vide Oyugis CMCC No. 114 of 2014 between the parties herein. That they could not mount a defence and/or counterclaim in that suit since that court lacks jurisdiction to hear and determine the same.
7. In her amended statement of defence and counter claim dated 4th February 2022, the defendant did not address the issue of an existing suit between the parties herein.
8. Besides, from the pleadings it is crystal clear that there exists another suit before the Senior Principal Magistrate's Court in Oyugis, involving the same parties and the same subject matter.



9. Section 6 of *Civil Procedure Act*, Chapter 21 Laws of Kenya provides for the sub-judice doctrine as follows;

“...No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed..”

10. Sub-judice is a point of law and constitutes a Preliminary Objection. It must be noted that a Preliminary Objection ought to be on a point of law; see *Mukisa Biscuits Manufacturing Ltd. case* (supra) where the Court of Appeal pronounced itself on what constitutes a preliminary objection as follows:

“...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 the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration...” (Emphasis added).

11. In the interest of justice pursuant to, inter alia, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya alongside Sections 3 and 19 of the *Environment and Land Court Act*, 2015 (2011), this court hereby orders and directs the Deputy Registrar of this court to urgently call for the original file together with at least three certified copies of the proceedings and determination, if any, in Oyugis CMCC No. 114 of 2014 for perusal to enable this court arrive at a just decision in this matter.

12. This matter is fixed for mention for directions on 5th February 2025.

13. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 10TH DAY OF DECEMBER, 2024.

G.M.A ONGONDO

JUDGE

Present

Mr. P. Ochwangi, Learned Counsel for the plaintiffs

Adongo, Court Assistant

