



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 115 OF 2017

MUNYIVA MUNYAO.....1ST PLAINTIFF

MUSYOKA MUNYAO.....2ND PLAINTIFF

MUTIE MUNYAO(*suing as Personal Representatives*

of the Estate of Munyao Munandu –Deceased).....3RD PLAINTIFF

VERSUS

PRISILA MUNYIVA MATUVA (*Personal representative*

of the estate of Philip Matuva Kivuvo – Deceased).....DEFENDANT

RULING

1) What is before court for ruling is the Defendant's/Respondent's points of preliminary objection dated 3rd February, 2011 and filed in court on 7th February, 2018 wherein the Defendant has stated that:-

1. The originating summons cannot stand since the first issue can only be replied or answered to by the Deceased Ndeti Munandu and the proceedings are a nullity and the originating summons should be dismissed with costs.

2. The Applicants are not the Personal Representative of the Estate of the late Ndeti Munandu and are only Personal Representative of the Estate of Munyao Mumandu and cannot answer the first issue of the originating summons.

3. The Applicants cannot move the court to answer questions 2 and 3 of the originating summons since the major issue relate to the Estate of the Late Ndeti Munandu.

4. The declaration order sought is for plot no. 408 which does not exist and the parcel of land know as Mbooni/Liani/1078 and 1080 having nothing to do with the Defendant and so is parcels of land known as Mbooni/Liani/1058 having nothing to do with the Defendant and does not exist.

5. The Deceased Ndeti Munandu's Estate or Personal Representative have not been made a party to the originating summon and the same should be dismissed with costs.

6. The Defendant is not a trustee at all for any of the Plaintiffs and cannot be ordered to be a trustee of the parcels of land and from the abstract of the Title attached t the originating summon, there is nothing like a trust of whatever name.

7. The Defendant states that the Plaintiffs are on their father's land 1080 which is in the name of the Ndeiti Munandu and have never been on the parcels of land known as Mbooni/Liani/1079 and 1057 at all.

2) By the time of writing this ruling, it is only the Defendant/Respondent who had filed her submissions. The Defendant's counsel combined issues number 1 and 2 of the Defendant's/Respondent's points of preliminary objection and submitted that the Originating Summons cannot stand since it relates to orders to be made against Ndeiti Manandu who is now deceased, and yet he has not been made a party in this suit neither is his personal representatives nor his estate parties thus making the Originating Summons defective.

3) The counsel went on to submit that the omission of the estate or the personal representatives of Ndeiti Manandu (deceased) in the pleadings offends the mandatory provisions of Orders 1 and 2 of the Civil Procedure Rules which deal with parties to suits and pleadings generally. The counsel pointed out that the non-joinder of the deceased's estate or his personal representatives has the effect that the first question raised in the Originating Summons cannot be conveniently, effectively and completely tried and determined by the court as this issue can only be answered or defended by Ndeiti Manandu (deceased) or his personal representatives and not the Defendant/Respondent herein as he is merely a buyer and not privy to the parcel's history or its origin nor can it be answered by the Plaintiffs/Applicants herein as they have an interest in the same and are not in a position to satisfactorily lead this court in determining the question as it will culminate into an *ex parte* hearing.

4) The Defendant's counsel cited *Precedents of Pleadings 12th Edition (1975), PP 159 – 160 by I.H Jacob, Sweet and Maxwell* which provides as follows:-

“... the overriding principle governing parties to an action may be stated to be that all necessary and proper parties, but no others, should be before the court, so as to ensure that all matters in dispute in the proceedings may be effectively and completely determined and adjudicated upon.”

5) He also cited Order 2 rule 15(1) of the Civil Procedure Rules, 2010 which provides that:-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that;

a) “

b) “

c) “

d) It may prejudice, embarrass or delay the fair trial of the action; or

e) “and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be”

6) He further cited Rule 15(3) of the same Order which provides that:-

“So far as applicable this rule shall apply to an Originating Summons and a petition”

7) The counsel submitted that the second issue raised in the Originating Summons that the Defendant/Respondent holds the land in question in trust for the Plaintiffs/Applicants is farfetched and untrue. The counsel added that from the record, it is quite clear that the Defendant/Respondent is the lawful registered absolute proprietor of parcels no Mbooni/Iiani /1079 and Mbooni/Iiani/1057 and the Plaintiffs are busy bodies who have no claim known in law. The counsel further submitted that although it is true that section 26 of the Land Registration Act and the repeated Registered Land Act recognize the fact that land could be registered in the name of an individual in trust for family members, a basis must be laid in court to enable it make such a finding. The counsel cited the case of *Christopher Iddi Moto & 15 Others Vs Chiriba Nyambu Baru & Another[2014] eKLR* where O.A Angote, J while dismissing the Plaintiffs' suit held that :-

“ ... it is inconceivable that it is the sons of the deceased who would complain that the suit properties belonged to their father

when their father never filed any dispute is constructive proof that they knew they had no interest in the suit property.”

8) Regarding the third issue on the Originating Summons that seeks for a declaration that the Plaintiffs are owners of parcels number Mbooni/Iiani/1079 and Mbooni/Iiani/1057 by virtue of adverse possession, the Defendant's/Respondent's counsel submitted that the law provides, that one must be in possession of the land claimed or to have used it adversely to the proprietor's rights. The counsel further submitted that in this case, the Applicants/Plaintiffs live the greater parcels number Mbooni/Iiani/408 which no longer exists after subdivision and not on the particular parcels owned by the parcels owned by the Defendant/Respondent.

9) The counsel further submitted that the Plaintiffs/Applicants have not discharged the burden of specifically identifying the portions they have been in physical possession of as they only claim to have been living in the original Mbooni/Iiani/408 which does not exist. The counsel cited the case of *Githu Vs Ndele(1984) KLR 776* while the court observed that:-

“... the Appellants did not discharge the burden of specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit that they want decreed to them”

10) The counsel urged the court to uphold the Defendant/Respondent preliminary objection and strike off the Originating Summons with costs.

11) I have carefully read the Originating Summons together with its supporting affidavit as well as the Defendant/Respondent's point of preliminary objection. I do agree with the Defendant/Respondent's counsel that the first issue or question raised in the Originating Summons can only be answered by Ndeti Manandu (deceased) or his personal representatives and not the Plaintiffs/Applicants. I further agree with the Defendant's/Respondent's counsel that non joinder of the deceased's estate or his personal representatives in this Originating Summons has the effect that the aforementioned question cannot be conveniently, effectively and completely tried by this court.

12) I also agree with the Defendant's/Respondent's counsel that the assertion by the Plaintiffs/Applicants that the Defendant/Respondent holds the suit land in trust for them is farfetched.

13) I further agree that the issue of adverse possession cannot hold either since the applicants have not shown that they reside in land parcels Mbooni/Iiani /1079 and Mbooni/Iiani/1057 in a manner that can be said that they have dispossessed the Defendant/Respondent of it.

14) The upshot of the foregoing is that the Preliminary Objection has merits and I hereby proceed to strike out the Originating Summons with costs to the Defendant/Respondent. It is so ordered.

SIGNED, DATED AND DELIVERED AT MAKUENI THIS 19TH DAY OF DECEMBER, 2018.

MBOGO C.G,

JUDGE

IN THE PRESENCE OF:

Ms Watta holding brief for Mr. Manthi Masika for the Defendant

No appearance for the Plaintiff

Mr.Kwemboi Court Assistant.

MBOGO C.G, JUDGE

19/12/2018



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