



**Mwendia (Suing as the personal representative of the Estate of Mwendia Gichinga Maara)
v Njuguna (Personal representative of the Estate of Njuguna Wambuthi) & another
(Environment & Land Case 16 of 2018) [2023] KEELC 21308 (KLR) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21308 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 16 OF 2018
BM EBOSO, J
OCTOBER 23, 2023**

BETWEEN

**GICHINGA MWENDIA (SUING AS THE PERSONAL REPRESENTATIVE OF
THE ESTATE OF MWENDIA GICHINGA MAARA) PLAINTIFF**

AND

**JOHN MUGAI NJUGUNA (PERSONAL REPRESENTATIVE OF THE ESTATE
OF NJUGUNA WAMBUTHI) 1ST DEFENDANT**

DISTRICT LAND REGISTRAR, KIAMBU 2ND DEFENDANT

RULING

1. The plaintiff, Geoffrey Gichinga Mwendia, instituted this suit on behalf of the estate of the late Mwendia Gichinga Maara on 22/1/2018. He sought the following reliefs against the estate of the late Njuguna Wambuthi: (i) a declaration that the plaintiff is entitled to one (1) acre of land parcel Karai/Renguti/95 by adverse possession; (ii) an order directing the Land Registrar-Kiambu to curve off one (1) acre out of land parcel Karai/Renguti/95 and register the same in the name of the plaintiff as a trustee of the beneficiaries of the estate of Mwendia Gichinga Maara; and (iii) costs of the suit.
2. The plaintiff's case was that in 1966, the late Mwendia Gichinga Maara purchased one acre out of land parcel number Karai/Renguti/95 from the late Njuguna Wambuthi at Kshs 1,200. Upon buying the land, the late Maara took possession and remained in possession of the land up to the time he died in 2014. Upon his death, he was buried on the land.
3. The plaintiff further contended that upon the death of Njuguna Wambuthi, his son, John Muigai Njuguna, obtained a grant of letters of administration but declined to excise and transfer to the estate of the late Maara the one acre that they occupy. Consequently, he initiated this suit seeking the above reliefs.



4. The estate of the late Njuguna Wambuthi filed a defence dated 6/3/2018 in which it denied the allegation that the late Maara bought one acre from the late Wambuthi out of parcel number Karai/Renguti/95. The estate added that if there was a sale agreement, the same became void and voidable for want of a consent of the Land Control Board and could not be enforced by a court of law as the limitation period of 12 years had already lapsed. The estate of Wambuthi further denied the allegation that the late Maara took possession of the land and developed a permanent home on it. The estate denied the contention that the late Maara was buried on the land. It was the case of the estate of the late Wambuthi that this court lacked jurisdiction to entertain this suit. The estate added that the suit was statute-barred.
5. On 22/9/2021, upon considering the plaintiff's notice of motion dated 14/7/2021, seeking inter alia, an order to have the pleadings be deemed to have been initiated by way of originating summons, the Deputy Registrar of this court (Hon. F. Mutuku) allowed the plea and directed the plaintiff to file an originating summons within the suit in 21 days. The plaintiff subsequently filed an originating summons dated 27/10/2021 within this suit, inviting the court to make a determination on the following verbatim questions:
 1. Whether the plaintiff is entitled to a declaration that he has acquired one (1) acre of land from parcel number Karai/Renguti/95 by way of adverse possession.
 2. Whether an order should be issued directing the District Land Registrar Kiambu to curve off one (1) acre of land from parcel number Karai/Renguti/95 and register the same in the name of the plaintiff as a trustee of the beneficiaries of the estate of Mwendia Gichinga Maara.
 3. Who should cater for the costs of this suit.
6. The estate subsequently brought a notice of preliminary objection dated 17/10/2022, inviting this court to strike out this suit in limine on the following verbatim grounds:
 1. The plaintiff lacks the locus standi to file and prosecute this suit.
 2. The suit is not properly before court.
 3. The honourable court lacks the jurisdiction to hear and determine this suit.
 4. The plaintiff is purporting to have two suits in one by filing a plaint on the one hand and an originating summons on the other hand, one cannot approbate and reprobate in the same matter and the plaintiff ought to have elected which cause of action he wanted to pursue as filing two matters with different causes of action is untenable in law.
 5. The plaint and the originating summons as drawn, filed and taken out are fatally defective in form and substance.
 6. The matter is time barred by virtue of the *Limitation of Actions Act*.
 7. The mandatory provisions of the *Government proceedings Act* have not been complied with in the matter.
 8. The plaint and the originating summons ought to be struck out with costs.



7. The preliminary objection is the subject of this ruling. It was canvassed through written submissions dated 10/2/2023, filed by M/s Nyoro Njogu & Company Advocates. The plaintiff opposed the preliminary objection through written submissions dated 14/3/2023, filed by M/s J K Gachie & Co Advocates.
8. Counsel for the defendant submitted that both the plaint and the originating summons were incompetent because they were brought by a person who did not have the locus standi to do so. Counsel contended that the estate of the late Maara had two administrators yet only one administrator brought the plaint and the originating summons. Citing the provisions of Order 31 rule 2 of the Civil Procedure Rules, counsel argued that Gichinga Mwendia lacked capacity to initiate proceedings single-handedly. Counsel contended that, for the above reason, this court lacked jurisdiction to entertain the plaint and the originating summons. Citing the words of Nyarangi JA in *Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited* [1989] KLR 1, counsel urged this court to down its tools.
9. Counsel further submitted that the filing of a plaint as well as an originating summons in the same matter is irregular and illegal because the defendant does not know which issues he is facing. Counsel added that if there was an order by the Deputy Registrar directing that the plaint should be treated as an originating summons, then the existing plaint is what should have been treated as an originating summons. Counsel contended that the new originating summons cannot “stand side by side with the plaint” in the same matter and ought to be struck out for being incompetent and fatally defective.
10. The plaintiff filed written submissions dated 14/3/2023 through M/s J. K. Gachie and Company Advocates. Counsel for the plaintiff submitted that the filing of an originating summons within this suit was done in compliance with the directions of the Deputy Registrar, hence the plaintiff cannot be faulted for that. Counsel added that non-inclusion of the second administrator of the estate of Mwendia Gichinga was curable through an amendment, adding that the plaintiff had filed an application to amend the pleadings to join the second administrator. On the contention that this suit is statute barred, counsel submitted that the plaintiff’s claim is that of adverse possession hence Section 7 of the *Limitation of Actions Act* does not apply. Counsel urged the court to dismiss the preliminary objection.
11. I have considered the preliminary objection dated 17/10/2022; the parties’ respective submissions; and the pleadings in this suit. The following are the three key issues that fall for determination in the preliminary objection: (i) Whether the filing of an originating summons within this suit renders the suit fatally defective; (ii) Whether the non-inclusion of the co-administrator of the estate of Mwendia Gichinga Maara renders this suit fatally defective; and (iii) Whether this suit is statute-barred under the *Limitation of Actions Act*. I will dispose the three issues sequentially in the above order. Before I do that, I will briefly outline the prevailing jurisprudence on the subject of preliminary objection.
12. What constitutes a preliminary objection was outlined in the case of *Mukisa Biscuit Manufacturing Co. Ltd –Vs- West End Distributors Ltd* [1969] EA 696, 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 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”



13. The first issue is whether the filing of an originating summons within this suit renders the suit fatally defective. I have read the court record relating to this suit. Through a notice of motion dated 14/7/2021, the plaintiff sought the following three orders:
1. That this honourable court be pleased to grant the plaintiff/ applicant leave to amend their plaint and include the District Land Registrar Kiambu as a party to this suit.
 2. That the draft amended plaint be deemed as duly filed and served upon the defendant upon such leave, and payment of the requisite court fees.
 3. That the pleadings/ proceedings herein be deemed to have been initiated by way of originality summons”
14. The application came up for hearing before the Deputy Registrar of this Court on 22/9/2021. The application was unopposed. Consequently, exercising jurisdiction under Order 49 rule 7(b) (vi) of the Civil Procedure Rules, the Deputy Registrar disposed the application in the following verbatim terms:
- “I have considered the notice of motion dated 14/7/2021. The same is allowed in terms of prayers 1 and 2 with costs in the cause. On prayer no 3 the plaintiff is directed to file and serve the originating summons within 21 days from today. Pretrial conference on 21/11/2021. Plaintiff to serve the notices on the defendants.”
15. It is clear from the prayers that were sought in the plaintiff’s application dated 14/7/2021 that the plaintiff did not seek to file an originating summons within this suit. All that the plaintiff sought was an order that the plaint that had been filed and was being amended be deemed to be an originating summons. The order directing the plaintiff to file an originating summons within an already existing suit was issued by the Deputy Registrar suo motto. For this reason, the plaintiff cannot be blamed for the anomaly of having an originating summons on top of a plaint.
16. Whereas I agree with the 1st defendant that there is an anomaly in this suit, I do not think it would be in the interest of justice to strike out the plaintiff’s suit on account of an originating summons that was filed in compliance with an order that was issued by the Deputy Registrar suo motto. This is an anomaly that is curable.
17. The second issue is whether the non-inclusion of the co-administrator of the estate of Mwendia Gichinga Maara is fatal to this suit. The first defendant urged the court to strike out this suit on the basis of the requirements of Order 31 rule 2 of the Civil Procedure Rules. The said framework provides as follows:
- “Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them: Provided that the executors who have not proved their testator’s will, and trustees, executors, and administrators outside Kenya, need not be made parties.”
18. My understanding of the above legal framework is that whenever there is a claim against an estate of a deceased person, all the administrators of the estate are supposed to be made defendants/ respondents. The first defendant in the suit elected to use the platform of a preliminary objection to canvass a point which requires evidence. To determine whether or not Order 31 rule 2 of the Civil Procedure Rules renders this suit fatally defective, the court would have to look at the current instruments relating to administration of the relevant estate. The responding party will be expected to tender controverting



evidence or tender appropriate evidence explaining why inclusion of a co-administrator was not possible. Indeed, Order 31 rule 2 of the Civil Procedure Rules permits exclusion of an administrator who is outside Kenya.

19. Consequently, the view I take on this point is that, this is a point that should be canvassed on the platform of a formal application that affords the parties the opportunity to tender evidence and equally affords the court the opportunity to evaluate the evidence. My finding on the second issue therefore is that this is not a question to be determined on the platform of a preliminary objection.
20. The third issue is whether this suit is statute-barred under the *Limitation of Actions Act*. The first defendant contended that this suit is statute-barred because the material contract was entered into on 15/10/1966. On his part, the plaintiff contended that the late Maara purchased and took possession of the suit property in October 1966 and enjoyed quiet possession of the suit property until his demise in June 2014. The plaintiff further contended that the late Maara was buried on the land. The plaintiff added that the suit was prompted by the 1st defendant's obtention of a grant relating to the estate of the late Njuguna Wambuthi and his refusal to convey the one acre that was in possession of the estate of the late Maara. The plaintiff sought an order of adverse possession, among other reliefs.
21. Taking the foregoing into account, I do not think a claim of title by adverse possession is subject to the limitation period prescribed under Section 7 of the *Limitation of Actions Act*. Secondly, whether or not the suit is statute-barred is a question that will call for evidence. That evidence cannot be presented on the platform of a preliminary objection. Consequently, my finding on this issue is in the negative.
22. In the end, for the above reasons, the preliminary objection dated 17/10/2022 fails and is disposed in the following terms:
 - a. The preliminary objection dated 17/10/2022 is rejected.
 - b. The direction/order issued by the Deputy Registrar of this court on 22/9/2021, including the direction/order requiring the plaintiff to file and serve an originating summons within this suit is vacated and the originating summons filed within this suit is expunged.
 - c. The application dated 14/7/2021 shall be canvassed afresh before a judge of this court.
 - d. Costs of the preliminary objection shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF OCTOBER 2023

B M EBOSO

JUDGE

