



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. E207 OF 2021

NELSON GITAHU WANUNA.....PLAINTIFF

VERSUS

PETER GITAU KARIUKI.....1ST DEFENDANT

BENSON NGIGE NDUNGU..... 2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

RULING

(In respect of a Preliminary Objection by the Defendants)

Background

1. This ruling is in respect of a Preliminary Objection raised by the 1st and the 2nd Defendants dated the 14th October, 2021.
2. The Defendants objected to the jurisdiction of the court on the grounds;-

a) That the subject matter DAGORETTI/RUTHIMITU/6 is a matter of the succession cause of the deceased Gitau Irungu and thus should be handled before the family court which dealt with the succession cause HC SUCC NO. 2889 of 2012 - in the Matter of the Estate of Gitau Irungu (Deceased) under which title to the subject matter was transmitted to the 1st and 2nd Defendants.

b) That the subject matter DAGORETTI/RUTHIMITU/2 & DAGORRETTI/ RUTHIMITU/7 are the subject matter of HC P & A 86 OF 2019 - in the Matter of the Estate of Wagachie Irungu Kiiru (Deceased) in which the plaintiff herein is the petitioner and the 1st and 2nd Defendants are objectors.

3. This case was instituted by the Plaintiff who accuses the Defendants of illegally and fraudulently acquiring, transferring and registering in their names the suit premises known as Title No. Dagoretti/Ruthimitu/2, Title No. Dagoretti/ Ruthimitu/6 and Title No. Dagoretti/Ruthimitu/7 which rightfully belongs to him. The Plaintiff avers that he is the only beneficiary of the Estate of Wagachie Irungu Kiiru – deceased who was his father. The deceased Wagachie Irungu Kiiru was the absolute registered proprietor of Title No. Dagoretti/Ruthimitu/2 and Title No. Dagoretti /Ruthimitu/7. Title No. Dagoretti/Ruthimitu/6 was registered in the name of Gitau Irungu (also deceased), who had no wife or children. Therefore his brother, Wagachie Irungu Kiiru, the father of the Plaintiff acquired the equitable ownership of that title. The Plaintiff being the legal Representative of the Estate of Wagachie Irungu Kiiru, and the only beneficiary claims that he is therefore entitled to all three parcels of land.

4. The 1st and 2nd Defendants on their part deny the allegations by the Plaintiff. The 1st & 2nd Defendants claim that they obtained a grant of letters of administration of the Estate of Gitau Irungu - deceased under succession cause Nairobi High Court Succession cause no. 2889 of 2012. The Estate of the said deceased Gitau Irungu transmitted to them the property Dagoretti/Ruthimitu/6. They are the registered owners of that parcel of land.

5. The 1st and 2nd Defendants aver that the parcels Dagoretti/Ruthimitu/2 & 7 are in the name of Wagachie Irungu Kiiru – Deceased, and are the subject of Nairobi High Court P&A 86 of 2019,- in the Matter of the Estate of Wagachie Irungu Kiiru - Deceased. The Plaintiff is the petitioner in the Succession Cause whereas the 1st & 2nd Defendants are objectors.

Courts Directions.

6. The Court directed that the Preliminary Objection be disposed of by way of written submissions. The parties complied and filed their respective submissions which the Court has had an opportunity to peruse.

Analysis and Determination

7. The 1st and 2nd Defendants object to the jurisdiction of the court to hear and determine this matter as stated in their preliminary objection. The Plaintiff in response submits that, by filing their Statement of Defence, the Defendants have already submitted themselves to the jurisdiction of this court.

8. The Plaintiff further submitted that the Defendants' preliminary objection does not qualify to be considered as such.

9. On what constitutes a Preliminary Objection, in the case of **Hassan Ali Joho & Another -Vs- Suleiman Said Shabal & 2 others SCK Petition No. 12013/2014 eKLR**, the Supreme Court restated the definition in the case **Mukhisa Biscuit Manufacturers Ltd vs West End Distributors Ltd (1969) E.A** where the Court of Appeal said that:

“...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 need to be ascertained or if what is sought is the exercise of judicial discretion.”

10. The first limb of the Preliminary objection is that parcel number **Dagorretti/Ruthimitu/6** is already in the names of the Defendants pursuant to the grant issued in Nairobi High Court Succession Cause 2889 of 2012 - In the Matter of the Estate of Gitau Irungu (Deceased).

11. The Defendants' aver that any dispute arising in respect of **Dagorretti/Ruthimitu/6** should therefore be handled by the Succession Court that issued the grant conferring ownership on the Defendants.

12. To determine validate the averments by the Defendants in respect of **Dagorretti/Ruthimitu/6**, the Court will have to be shown the certificate of confirmation of grant issued by the Succession Court and the copy of the title in the names of the Defendants before making a determination.

13. In the case of **Oraro Vs Mbaja (2005) eKLR**, the Court held that:-

“I think the principle is abundantly clear. A Preliminary Objection correctly understood, is now well identified as, and declared to be 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 a 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.”

14. **The second objection by the Defendants is that the other two parcels of land**, Dagorretti/Ruthimitu/2 & Dagorretti/Ruthimitu/7 are the subject matter of Nairobi High Court Succession Cause 86 of 2019 - in the Matter of the Estate of Wagachie Irungu Kiiru (Deceased) in which the plaintiff herein is the petitioner while the 1st and 2nd Defendants are objectors.

15. The Defendants objection is based on the provisions of Section 6 of the Civil Procedure Act which provides that:-

“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.”

16. Again, just like the averment in the 1st objection, the court needs to be supplied with some material evidence on the Succession Cause to confirm that indeed the two parcels of land are the subject-matter of that Cause. This necessarily puts the matter outside the scope of a Preliminary Objection.

17. I agree with the decision in **Henry Wanyama Khaemba –vs- Standard Chartered Bank Ltd & Another (2014) eKLR**, where the court pronounced itself as follows:-

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections.”

18. I am further persuaded by the court's holding in **George Kamau Kimani & 4 Others Vs County Government of Trans Nzoia & Another (2014) eKLR**, where the court considering an objection on the issue of res judicata stated:-

“All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are amended to enable the court to determine whether the current suit is res judicata.”

19. Similarly in this case, the Court is of the view that the issues in the Defendants' preliminary objection do not qualify to be raised as preliminary points. The best way to raise them is through a normal Application to enable the Court determine them after appraising the (affidavit) evidence.

20. Accordingly, I decline to allow the Preliminary Objection. The Preliminary Objection dated 14th October, 2021 therefore fails. It is dismissed with costs.

It is so ordered.

Dated, signed and delivered at Nairobi this 27th day of January 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Mr. Kandia h/b for Mr. Machira for the Plaintiff

Ms. Chege for the 1st and 2nd Defendants

N/A for the 3rd Defendant

Court Assistant: Hilda

M.D. MWANGI

JUDGE