



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**E.L.C.A NO. 18 OF 2014**

**Formerly Kerugoya E.L.C.A No. 1 of 2013**

**JOHN KINYUA KIVUTI.....APPELLANT/RESPONDENT**

**VERSUS**

**KANYI NJIRU.....1<sup>ST</sup> RESPONDENT (DECEASED)**

**JOSEPH NYAGA NJIRU.....2<sup>ND</sup> RESPONDENT/APPLICANT**

**PETER NDWIGA NJIRU.....3<sup>RD</sup> RESPONDENT/APPLICANT**

**ZACHARIA NJERU NJIRU.....4<sup>TH</sup> DEFENDANT/APPLICANT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT/APPLICANT**

**RULING**

1. This is a ruling on preliminary objection dated 14.8.2021. The objection was filed by the Appellant/Respondent and it targets the application filed by the Applicants dated 23<sup>rd</sup> June, 2020. The objection is premised on three (3) grounds as follows:-

- i) This Honourable Court does not have jurisdiction to hear and determine the instant application.*
- ii) The instant application is vexatious, scandalous, flivorous and an abuse of the court process.*
- iii) The instant application is statute barred by section 7 of the Limitations of Actions Act, Cap 22 Laws of Kenya.*

The parties in the suit and the application are **JOHN KINYUA KIVUTI** as the Appellant/Respondent while **KANYI NJIRU, JOSEPH NYAGA NJIRU, PETER NDWIGA NJIRU, ZACHARIA NJERU NJIRU** and **THE HON. ATTORNEY GENERAL** are the Respondent/Applicants.

2. In the Notice of Motion, the plaintiffs sought orders for cancellation of entry Nos. 2, 3 and 4 entered on the register of Land Parcel No. Kagaari/Kanja/226 and further for the court to direct that proper succession be filed in respect of the estate of Njiru Gacima.

3. It was alleged that Reuben Kivuti Wainaina was the respondent in the suit but upon his demise he was substituted with his son Joseph Nyaga Njiru. It is claimed that the original respondent had filed Embu Civil Case No. 281 of 2001 which is said to have been struck out. Upon the demise of Reuben Kivuti, the respondent is said to have filed Embu Civil suit No. 18 of 2002 which suit and subsequent appeal were both dismissed. The applicants were of the view that it in the interest of justice to allow the application in order for them to enjoy the fruits of the court's judgment.

4. The applicants expressed their willingness to now utilize the parcel of land Kagaari/Kanja/226 and to subdivide it to their children. They contended that the records at the land registry indicated that vide a succession cause which according to them was filed without their consent, the land had exchanged hands and other entries were entered which were prejudicial to their right. They were of the view that the names of Kanyi Njiru, their mother and Reuben Kivuti both deceased, and who had been given a share of the land be cancelled from the register, as they were not entitled to any share.

5. The application was opposed by way of replying affidavit and preliminary objection. In the replying affidavit it was argued that the application was frivolous, scandalous, vexatious and an abuse of the court process. The court was said to lack jurisdiction to hear and determine the matter and further that the orders sought were statute barred by Section 7 of the Limitations of Actions Act, Cap 22 Laws of Kenya. It was claimed that the appeal arose from Civil Case No. 18 of 2002 where the deceased father had filed a suit seeking to have the land subdivided and that in the said suit the applicant had not filed a counterclaim or a cross appeal. According to the respondents the prayers sought ought to have been filed in a counterclaim and the applicants were accused of sleeping on their right and were attempting to raise a counterclaim through the backdoor. The court's duty is said to have ended upon determination of the suit.

6. The preliminary objection was canvassed by way of written submissions. The applicants filed their submissions on 30.7.2021. According to them, their application seeks to annul the grant in Runyenjes Succession Cause No. 57 of 1975 to enable them file proper succession. It was submitted that the respondent had filed a suit in the year 2011 seeking to subdivide the suit parcel of land into 6 portions where the respondent was to get 5/17 share while the others were to get 3/17 share of the land. It is argued that when the succession cause was filed, the children of Njiru Gacima (deceased) were young and hence did not know what was going on but when they became of age they declined to sign the application to subdivide the land.

7. They submitted that as a result, suits were filed by the respondent's father and upon his demise the respondent also sued seeking to get his father's share of the suit parcel of land. However, the suits are said to have been dismissed by the court and an appeal thereafter was also dismissed. It was argued that the succession proceedings were a sham and that they were seeking to file it afresh. The court was urged to allow the application for the applicants to file a proper succession for the Estate of Njiru Gacima.

8. The respondents on their part filed their submissions on 13.10.2021. They reiterated the grounds in the preliminary objection and averred that the issues raised in the application arise from a succession cause. It was submitted that the court's jurisdiction was provided under article 162(2)(b) of the constitution. The respondent further relied on Section 13 of the Environment and Land Court which granted the court original and appellate jurisdiction to determine disputes under Article 162(2)(b) of the constitution.

9. It was submitted that the court has powers to hear and determine applications brought under Articles 42, 69 and 70 of the constitution and also to determine appeals from subordinate courts and tribunals on matters within its jurisdiction. With regard to the court's jurisdiction to handle land matters, reliance was also made on Section 128 and 150 of the Land Act 2012. The respondent submitted that the application was a succession matter and that the court had no jurisdiction to deal with succession disputes. It was argued that the entries on the green card complained of were as a result of a succession cause.

10. According to the respondent, the cause of action arose in the year 1979 when his father bought land and the suit had been brought 42 years later. He argued that the application has been overtaken by events and is in contravention of Section 7 of the Limitation of Actions Act. Ultimately, the court was urged to dismiss the application with costs as it was an abuse of the court process and it lacked merit.

11. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants filed supplementary submissions on 1<sup>st</sup> December 2021. They justified the filing of the application before this court by stating that the Environment and Land court had jurisdiction to determine land matters. According to them, the cause of action is not time barred as the suit property has been subject to numerous cases for decades which they claimed the appellant had failed to disclose. It is the applicant's assertion that they have not slept on their rights and the court has jurisdiction to hear and determine the application.

12. I have considered the objection as raised, the submissions by the parties, and the suit in general. A preliminary objection was described in the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd**. (1969) EA 696, where it was held as follows:

*“So far as I am aware, a Preliminary Objection consists of a pure 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.....“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 has to be ascertained or if what is sought is the exercise of judicial discretion.*

13. In the case of **JSK v WKW [2019] eKLR** it was stated that

*“For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit”.*

14. Guided by the above cases, a preliminary objection ought to raise a pure point of law which cannot be raised if any fact has to be ascertained. The respondent has raised three grounds of objection and in my view ground 2 of the objection is not on a point of law.

15. On the first ground it is said that the Court lacks jurisdiction to hear and determine the application. It is the respondent's assertion that the matter before the court is a succession matter. It was further argued that the entries on the green card were as a result of a succession cause and that this court is vested with jurisdiction to hear and determine environment and land matters.

16. The applicants had submitted that their application sought annulment of the grant in Succession Cause no.57 of 1975 to enable them file proper succession. They also gave a history of the suits instituted by the respondent and his father which they claimed were all dismissed by the court. In their supplementary submissions, they seemed to abandon the issue of succession and argued that the court had jurisdiction to determine land matters. They argued that their application sought cancellation of entries in land title Kagaari/Kanja/226 to enable them file for proper succession.

17. I have looked at the application as filed. The applicants seek four prayers but the prayers I can consider to be a target of the preliminary objection are prayers 1 and 2. Prayer 1 seeks cancellation of entries 2,3 and 4 entered on the register of land parcel Kagaari/Kanja and an order for the land to revert back to the original owner Njiru Gacima. On whether the court has jurisdiction to grant the orders sought herein, I am guided by the provisions of Section 13 of the Environment and Land Court Act which affirms the court's jurisdiction to hear and determine disputes under Article 162(2)(b) of the Constitution. Section 13(2) of Environment and Land Court Act provides as follows;

*“In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes*

*(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

*(b) relating to compulsory acquisition of land;*

*(c) relating to land administration and management;*

*(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

*(e) any other dispute relating to environment and land.*

18. Further Section 80 of Land Registration Act grants the court powers to rectify entries made on a title. Section 80 of the Land Registration Act provides as follows;

*Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.*

*(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.*

19. From the provisions of the Environment and Land Court Act read together with the provision of the Land Registration Act alluded to above, the law is clear that this court has powers to determine issues relating to land matters and such powers extend to making orders for rectification of the register. Though contested by the respondent, it is evident that the subject matter of the said prayer is a land related issue, which essentially vests this court with jurisdiction to determine it. Without making a determination on the merits of the prayers sought, I find that this court has jurisdiction to hear and determine the application before it in view of prayer 1 of the application.

20. With regard to the second prayer, the applicant seeks that the court orders that proper succession cause be filed in respect of the Estate of Njiru Gacima. As stated above, the courts powers are as provided under Section 13 of the Environment and Land Court Act. Though the court's powers are not exhaustive, the orders sought for filing of a proper succession cause do not fall within the court's ambit as provided under the said Act.

21. It is trite law that the court has inherent powers to determine suits in the interest of justice. However, even then, the orders sought therein cannot be granted in this court as the jurisdiction for such matters is with the High Court which deals with Succession disputes. The said prayer therefore cannot be sustained before this court. That notwithstanding, the parties will note that the court has already determined that it has jurisdiction to hear and determine prayer 1 of the application and it therefore follows that the court has jurisdiction to determine the application with exception to prayer 2 of the said application.

22. On the third ground of the preliminary objection, it is argued that the application is statute barred by section 7 of the Limitations of Actions Act. The said Section 7 provides as follows;

*“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”*

23. The respondent submitted that his father bought the suit land in the year 1978 and the transfer was registered in the year 1979. It is his position therefore that the cause of action arose in the year 1979. According to him, the application has been overtaken by events and is statute barred and in contravention of Section 7 of the Limitation of Actions Act.

24. The applicants on their part have disputed that the cause of action is time barred and have argued that the suit property has been subject to numerous court cases which fact they aver the respondent has failed to disclose to the court. It is their affirmation that the court has jurisdiction to hear and determine the application before it.

25. I have looked at the application filed vis a vis the pleadings by the parties. The subject suit of land Kagaari/Kanja/226 was jointly registered in the name of Reuben Kivuti Wainaina, Kanyi Njiru, Joseph Nyaga Njiru, Peter Ndwiga Njiru and Zakaria Njeru Njiru in the year 1979. In the year 2002, one of the joint registered owners, Reuben Kivuti Wainaina, instituted a suit before the court in Embu Civil suit No. 18 of 2002 seeking orders for subdivision and demarcation of the suit land into 5 portions and that title deeds be issued to the registered owners. The said suit was dismissed by the court via a ruling delivered on 18.4.2013. An appeal was then filed before the court in Kerugoya 308 of 2013 which was then transferred to Embu under Embu Appeal No. 18 of 2014 and via a judgment delivered on 23<sup>rd</sup> March 2015 the

appeal was also dismissed by the court.

26. I note that the suit parcel of land was the subject matter in all the suits filed before the court and it is trite law that time for limitation stops running during the pendency of a suit. Nevertheless, the application before the court seeks to have cancellation of entries made in the register pursuant to the court's ruling and judgment, the latter having been delivered in the year 2015. The application essentially seeks to give life to the court's judgment. In my view the application is governed under Section 4(4) of the Limitation of Actions Act. The said Section provides that an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered. The judgment herein was delivered in 2015. From the said date to the filing of the application in the year 2020 only five years have lapsed. In view of my findings above, the application is therefore not statute barred or subject to the limitation as contemplated under Section 7 of the Limitations of Actions Act.

27. The upshot of the foregoing is that the preliminary objection lacks merit and is dismissed with costs to the respondent.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 26<sup>TH</sup> DAY OF JANUARY, 2022.**

In the presence of Rose Njeru for Nkini for respondent/applicant and Kathungu for appellant/respondent.

CA: Leadys

**A.K. KANIARU**

**JUDGE**

**26.01.2022**