



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC CASE NO. 476 OF 2015

MARY WAITHERA GIKIMA.....1ST PLAINTIFF

KENNETH NJOROGE GIKIMA.....2ND PLAINTIFF

VERSUS

KARIUKI WAIRAGU.....1ST DEFENDANT

GACHUHI KAMENYA.....2ND DEFENDANT

MICHAEL WARIU GAKIMA.....3RD DEFENDANT

LEGORN FEEDS INTERNATIONAL LTD.....4TH DEFENDANT

RULING

The 1st, 2nd and 3rd Defendants raised a Preliminary Objection against this entire suit and the Plaintiffs' Notice of Motion dated 16th April 2015 so as to have both struck out on the grounds that:-

1. The Plaintiffs' suit is entirely about claim of ownership of L.R. No. 4953/33/IX (I.R No. 7529) (hereinafter referred to as the "suit property") allegedly owned by the late Njoroge Gikima who died on 23rd January 1982, that to date there has never been any grant of probate petitioned and issued to the Plaintiffs or to his alleged wife the late Mirriam Waithera Njoroge who died on 12th August 2011 and that the Plaintiffs are therefore busy bodies without locus standi and/or capacity to institute this suit.
2. Further to 1 above, the Plaintiffs lack any legal capacity to lay any claim not only to the suit property but also to the entire estate of the deceased.
3. This suit and the Application are therefore incompetent, a legal muddle, vexatious, frivolous and an abuse of the court process and should be struck out right away with costs.

The Notice of Preliminary Objection has been opposed by the Plaintiffs who filed the Supplementary Affidavit sworn by the 1st Plaintiff, Mary Waithera Gikima, in response to the Notice of Preliminary Objection wherein she averred as follows:

1. That the Preliminary Objection was totally misconceived and misplaced as the Plaintiffs herein sought and obtained the Court's leave to institute this suit vide Nairobi HC Probate and Administrative **Cause Number 645 of 2012** issued on 4th May 2012.
2. That the Judgment in **Thika Chief Magistrates Civil Case No. 1123 of 2000** dated 3rd August 2009 compels the 1st and 2nd Defendants to transfer the suit property to the Plaintiffs' grandmother Mirriam Waithera Gikima and therefore the Plaintiffs are the successors in title.
3. That the Plaintiffs have obtained a limited grant in relation to the estate of their said grandmother.
4. That the purported transfer of the suit property is muddled in irregularities and criminality and was orchestrated by parties whose interest in the suit property had ceased to exist in law and had no capacity to transact.
5. That the issues raised by the Defendants are *res judicata* the same having been fully determined in the decision of the court vide **Thika CMCC No. 1123 of 2012** and that their interest in the suit property were effectively extinguished in the court's judgment.
6. That the Defendants preferred an Appeal which they have since abandoned.
7. That the transfer of the suit property by the Defendants was fraudulent in that the 1st and 2nd Defendants did not have the capacity in law to transact with the suit property.

Parties canvassed the Preliminary Objection by way of written submissions. The Defendants in their written submissions dated 2nd July 2015 stated that the Plaintiffs do not have capacity to file this suit because they do not have letters of administration issued in their favour for the estate of Njoroge Gikima so as to lay claim on the suit property. The Defendants further stated that the reasons the Plaintiffs filed this suit was because they had a will by Mirriam that bequeathed them the suit property. They contended that the property did not belong to Mirriam and had never at any one time been registered in the name of Mirriam Waithera Njoroge.

The 4th Defendant in its submissions stated that the late Mirriam Njoroge could not bequeath that which was not in her possession. They stated that the suit property belonged to Njoroge Gikima and was never the property of Mirriam Njoroge and could never be given away as her property. They further submitted that upon the demise of Mirriam on 12th August 2011, the estate of her late husband Njoroge Gikima was left without a legal representative and substitution ought to have been applied for. Further, they submitted that adverse possession interests can only be claimed on private land and not the suit property which is leasehold for 99 years with annual rent payable to the Government. Further, they stated that the Limited Grant given to the Plaintiffs was for the purpose of defending the appeal filed by the 1st and 2nd Defendant against an order made by the Chief Magistrate and not for filing this suit. The 4th Defendant further submitted that the suit property was registered in its name as from 16th February 2015 and therefore adverse possession cannot accrue against it.

In their submissions, the Plaintiffs stated that when the court in **Thika Magistrates Court Case No. 1123 of 2000** declared Mirriam Waithera as the owner of the suit property, it meant that the suit property was hers. They submitted that the court did not state that the suit property devolves to the estate of Njoroge Gikima. They emphasized that if the court order read that the suit property be transferred to the estate of the late Njoroge Gikima, then there would have been need to substitute the grant upon the demise of the late Mirriam Waithera. They submitted that it was on this basis that the Plaintiffs obtained a grant in relation to the estate of Mirriam Waithera and therefore have the capacity to sue and bring this suit. They prayed that the Preliminary objection be dismissed.

I have considered the pleadings filed in this suit by the parties. In essence, the Preliminary Objection raised by the Defendants is on the Plaintiffs' capacity to sue them in this suit. To understand the gist of

this suit better, I will recapture the events of the **Chief Magistrate's Court at Thika in Civil Case No. 1123 of 2000**. The suit at the Magistrates court was instituted by Karuki Wairagu and Gachuhi Kamenya against Mirriam Waithera Njoroge. The Plaintiffs in this suit wanted a declaration that the suit property was owned by three persons namely the two plaintiffs and the Late Njoroge Gikima but the Defendant Mirriam Waithera Njoroge the wife of the Late Njoroge Gikima resisted the Plaintiffs' claim and stated that the three were in a partnership which was later dissolved and the properties they had acquired were divided amongst themselves. The partners agreed to transfer the suit property to Mirriam's husband on condition that he cleared a loan they had received jointly against the suit property. An agreement was executed to that effect. Mirriam stated that being the administratrix of her late husband's estate, she cleared the loan balance and wanted the suit property transferred to her. The Plaintiffs withdrew their claim against her and what was left for determination was the counterclaim the Defendant had filed. The court made its findings and ordered that the suit property be transferred to Mirriam Njoroge by the Plaintiffs. The court stated in the terms that, "***The Plaintiffs are hereby ordered to execute the relevant transfer documents in respect of L.R No 4953/33/IX in favour of the defendant forthwith***". This was the Judgment delivered by the court on 3rd August 2009. Being dissatisfied by this decision, Kariuki Wairagu and Gichuhi Kamenya appealed in **Civil Appeal No. 578 of 2010** but that appeal seemed to have been abandoned. Therefore, the decision of the Magistrate's court is valid as it has not been challenged before any court of law either by appeal, review or by setting aside. However, rather than transfer the suit property to Mirriam Njoroge as ordered by the court, the 1st 2nd and 3rd Defendant herein sold the suit property to the 4th defendant vide an agreement dated 15th September 2014 at a consideration of Ksh 34,000,000/=.

Having stated a brief overview of the case, I will now make a determination on whether the Defendants' Preliminary Objection should be upheld by this court. A preliminary objection is a point of law which when taken could dispose of the suit. A preliminary objection was defined in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd -vs.- West End Distributors Ltd (1969) E.A. 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... The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop..."

In the Court of Appeal case of **George Oraro -vs. - Barak Mbaja [2005] 1 KLR 141** Ojwang, J. (as he then was) held that,

"The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined 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 processes of evidence. Any assertion, which claims to be a preliminary objection, 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

The Plaintiffs herein are the grandchildren of the late Mirriam Waithera Njoroge in whose favour the Magistrates court ruled regarding the ownership of the suit property. Accordingly, as at 3rd August 2009 when judgment was delivered, the suit property belonged to her. When she died on 12th August 2011, she left a will bequeathing the suit property to the Plaintiffs. It is by this will that the Plaintiffs obtained

Limited Grant of Letters of Administration ad Litem on 4th May 2012 in respect of the estate of their late grandmother. This Letters of Administration ad Litem was specifically for the purpose of filing suit. Those letters of administration did not indicate which suit to be filed but indicated “.....*but limited only for the purpose of filing suit*”. The Defendants have strenuously objected to the Plaintiffs being representatives of the estate of the late Miriam Waithera Njoroge, claiming that the late Mirriam did not own the suit property and therefore could not bequeath the same to the Plaintiffs. That is the main issue standing for determination in this present suit. For purposes of the Preliminary Objection raised by the Defendants, my finding that the same has no merit as it is evident that the Plaintiffs were indeed granted authority by the court through the Letters of Administration Ad Litem dated 4th May 2012 to file suit, as they have done in this case, as the legal representatives of the estate of the late Mirriam Njoroge. Accordingly, the Defendants’ Preliminary Objection is hereby dismissed with costs to the Plaintiffs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF AUGUST 2016.

MARY M. GITUMBI

JUDGE