



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO 632 of 2017

VIRGINIA WAMUHU KAMITI 1st PLAINTIFF

LUCY WANGARI KAMITI 2nd PLAINTIFF

VERSUS

LYDIAH NYAMBURA MAHINDA 1st DEFENDANT

(sued as the personal representative of the estate of the

Late Henry Wangombe Kamiti)

PAUL NDICHU 2nd DEFENDANT

JAMES MAHIANYU GACHIE 3rd DEFENDANT

ACK ST PAUL'S WAKURU PARISH 4th DEFENDANT

CHIEF LAND REGISTRAR, NAIROBI 5th DEFENDANT

THE HON ATTORNEY GENERAL..... 6th DEFENDANT

RULING

1. Before this Court for determination is the 1st Defendant's Notice of Preliminary Objection dated 29th August, 2018 and the 4th Defendant's Notice of Motion Application dated 5th March, 2018. In the Notice of Preliminary Objection, the 1st Defendant averred as follows:

i. That intestate and testamentary succession to, and the administration of the estates of the deceased persons are governed by the Law of succession Act which under Section 47 gives the high court jurisdiction to deal with any matter arising under the Act. The High Court in this regard has concurrent jurisdiction to her and determine disputes of succession relating to land.

ii. That there is no prohibition for claims by third parties to deceased persons properties being lodged in the succession cause of a deceased person.

iii. That the matter herein violates the clear provisions of Article 162(2) as read with Article 165(5) of the Constitution, which confers and limits the jurisdiction of the High Court, and by extension the Environment and Land Court to matters assigned to the respective courts as it seeks to have the Environment and Land Court exercise supervisory jurisdiction over the High Court.

iv. That the matter herein contravenes the provision of Section 6 of the Civil Procedure Act as the matter herein is sub judice Nakuru High Court Succession Cause No 331 of 2015-In the matter of the Estate of Henry Wangombe Kamiti.

2. The Preliminary Objection was canvassed by way of written submissions. None of the other Defendants filed submissions with respect to the Preliminary Objection having all indicated their support of the same.

Submissions

3. In support of the Preliminary Objection, the 1st Defendant, through her counsel submitted that the issues raised in the suit relate to intestate and testamentary succession to, and the administration of estates of deceased persons governed by the **Law of Succession Act** and that **section 47** of the Act gives the High Court jurisdiction to determine such matters.

4. It was submitted by counsel for the 1st Defendant that before distribution of the estate pursuant to **section 71** of the **Law of Succession Act**, the court must satisfy itself that the beneficiaries are the legitimate beneficiaries of the estate and this requires the court to hear evidence from the concerned parties; that the Plaintiffs are claiming an interest in the suit properties which are registered in the names of and form part of the estate of Henry Wangombe Kamiti and that their claim of interest over the property is pending before the succession court.

5. Counsel submitted that no evidence has been adduced to the effect that the succession court cannot determine this matter and that the Plaintiff is seeking to have this court supervise the succession court despite the fact that the two courts have concurrent jurisdiction. Counsel cited the case of **Salome Wambui Njau (Suing as an Administratrix of the Estate of Peter Kiguru Njuguna (Deceased)) vs Caroline Wangui Kiguru [2013] eKLR** where the court held that in matters of succession touching on land, the Environment and Land Court and the High Court have concurrent jurisdiction and the question of which court is best suited to determine the matter depends on the circumstances of the case.

6. Counsel also cited the case of **Mecklina Kirigo M'murithiu vs Mary Gantuku Simukiri & 2 others [2016] eKLR** where the court took the position that there is no absolute prohibition against third party claims being litigated in a succession cause depending on the circumstances of the case.

7. Counsel submitted that the Plaintiffs' claim is an interest in the property arising from their entitlement under their father's estate, the allegation being that the properties registered in the deceased's name was for their benefit and does not form part of the estate; that the High Court has jurisdiction to determine whether an asset forms part of the estate and in what proportions and that this suit seeks to oust the jurisdiction of the High Court.

8. Counsel submitted that this matter violates the principle of *sub judice* as set out under **Section 6** of the **Civil Procedure Rules** and that this matter is *sub judice* **Nakuru HC Succession Cause No. 331 of 2015-In the matter of the Estate of Henry Wangombe Kamiti**. Reliance was placed on the case of **Muturi Investments Ltd vs National Bank of Kenya[2006]eKLR** where the court having examined the pleadings before it was of the view that the two actions had a common question of law and fact and hence the documents which were to be relied upon would also require similar interpretation.

9. Counsel also relied on the case of **Thiba Mining Hydro Co Ltd vs Joseph Karu Ndigwa(2013)eKLR** where the court stated that it is not the form in which the suit is framed that determines whether it is *sub judice* or not, but the substance of the suit.

10. The Plaintiffs through their counsel filed submissions on 29th July, 2021. Counsel submitted that other than the decision of the Court of Appeal in **Charo vs Republic [2015] eKLR** the *locus classicus* case in Kenya on the question of jurisdiction is the **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Limited [1989] KLR I** where Nyarangi JA, emphasized that jurisdiction is everything and that this court ought to be guided by the Supreme Court case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank and 2 others, [2012] eKLR**, where the learned Judges held that a court can only exercise jurisdiction as conferred by the Constitution or other written law and cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

11. According to counsel, this court's jurisdiction is set out under **Article 162(2)** of the **Constitution of Kenya, 2012** as read together with **Section 13** of the **Environment and Land Court Act** and that the instant suit seeks cancellation of title to land and declaratory orders as to ownership of the suit property, amongst others, which fall squarely within the court's jurisdiction as set out in the Constitution and the **Environment and Land Act**. Reliance was placed on the case of **John Kimani Njenga vs. Margaret Wanjiru Kanyiri & 2 others [2015] eKLR**, where the Environment and Land Court held that the prayer for cancellation of title was an issue touching on title to land and within the jurisdiction of the court.

12. Counsel submitted that the authorities of **Salome Wambui Njau (Suing as the Administratrix of the Estate of Peter Kiguru Njuguna (Deceased)) vs Caroline Wangui Kiguru [2013] eKLR** and **Mecklina Kirigo M'murithiu vs Mary Gantukusi Mukiri & 2 Others [2016] eKLR** relied on by the 1st Defendant advance the position that the Environment and Land Court and the High Court have concurrent jurisdiction and the question of which court is best suited depends on the circumstances of each case.

13. It was further submitted that the cases of **Muturi Investments Limited vs National Bank of Kenya (supra)** and **Thiba Mining Hydro Co. Ltd vs Joseph Karu Ndigwa (supra)** used by the 1st Defendant with respect to *sub judice* are untenable as there is no issue before this that Court is also an issue in the Family Court. Reliance was placed on the case of **Republic vs Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR** which was quoted in **ASL Credit Limited vs Abdi Basid Sheikh Ali & another [2019] eKLR** which reiterated the principles of *sub judice*.

14. In conclusion, the Plaintiffs' counsel urged the court to find that it has jurisdiction and to dismiss the 1st Defendants preliminary objection.

The 4th Defendant's Application dated 5th March, 2018

15. In the Application dated 5th March, 2018, the 4th Defendant is seeking for the following orders;

- i. ***That the Plaintiffs' suit against the 4th Defendant be struck out for not disclosing a justiciable cause of action against it.***

ii. That the Plaintiffs' case against the 4th Defendant is otherwise an abuse of the process of the court.

iii. That costs of this cause be in the suit.

16. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of Mary Wanjiku Kiyo, the Vice-chairlady of the 4th Defendant dated 5th March, 2018. The 4th Defendant's Vice chair deponed that the Plaintiffs do not have a justiciable cause of action against the 4th Defendant; that whereas the Plaintiffs' claim is against the estate of their late brother Henry Wangombe, the 4th Defendant did not purchase the impugned parcel from the said Henry Wangombe but from one James Mahianyu Gachie and that the 4th Defendant is a bona-fide purchaser for value and has been in open occupation of the suit property with the full knowledge of the Plaintiffs.

17. It is the 4th Defendant's case that the Plaintiffs' claim has not been brought in good faith; that the Plaintiffs are litigious in nature as evidenced by the many cases they have filed including Succession cause no. 331/2015 and 1700/2000 and that the Plaintiffs have not disclosed material facts and have been guilty of laches.

18. In response to the 4th Defendant's Application, the Plaintiffs filed a Replying Affidavit sworn by the 1st Plaintiff on her behalf and on behalf of the 2nd Plaintiff dated 2nd May, 2018 and grounds of opposition dated 25th November 2021. The 1st Plaintiff deponed that she, together with the 1st Plaintiff, are the rightful owners of the suit property being Dagoretti/Kangemi/1738 and that a portion of the said land is occupied by the 4th Defendant.

19. It was averred by the 1st Plaintiff that the property occupied by the 4th Defendant was fraudulently transferred by their late brother Henry Wangombe to the 2nd & 3rd Defendants who in turn transferred it to the 4th Defendant.

20. The 1st Plaintiff deponed that the parcel of land occupied by the 4th Defendant forms part of the subject matter; that they have a justifiable cause of action against the 4th Defendant; that there is no bad faith on the part of the Plaintiffs as they are merely protecting their legal rights of ownership of the suit property; that they trusted their brother to sub-divide their late father's property on their behalf and that they only became aware of his fraud after his demise.

21. In the grounds of opposition, the Plaintiffs averred that the 4th Defendant having allegedly purchased part of the suit property cannot claim that there is no nexus between it and the Plaintiffs; that any order issued by the Court in respect of the suit property would definitely affect the 4th Defendant and that the 4th Defendant does not hold any title deed and has not produced any documentation to prove that it was an innocent purchaser for value.

Submissions

22. The 4th Defendant, through its counsel, filed submissions in support of the application dated 29th November, 2021. Counsel submitted that whereas the Plaintiff's claim against the 4th Defendant is that they have fraudulently obtained and occupy a portion of the suit property, the 4th Defendant is a bona fide purchaser for value without notice and that the 4th Defendant has been in open, uninterrupted occupation of the suit with the full knowledge of the Plaintiffs.

23. It was submitted that at no point during the purchase and occupation of the suit property did the 4th Defendant have any dealings with the Plaintiffs and that there can be no justiciable cause of action by the Plaintiffs against the 4th Defendant.

24. With respect to the Plaintiffs' assertions that one cannot give a better title than they have, counsel submitted that the transaction between themselves and the 3rd Defendant falls within the exceptions of the *nemo dat quod non habet* rule because the 3rd Defendant had a valid title and was in possession of the suit property at the time of the sale.

25. The Plaintiffs, through their counsel filed submissions on the 25th November, 2021. Counsel submitted that it is sufficient that there is a nexus between the 4th Defendant and the suit property; that the Plaintiffs are entitled to the property which is in the possession of the 4th Defendant and that the suit property was fraudulently transferred by the deceased brother to the 2nd and 3rd Defendants who sold it to the 4th Defendant.

26. It was submitted by the Plaintiff's counsel that any orders made by the Court touching on the suit property would affect any party claiming ownership of the suit property, or a part thereof, such as the 4th Defendant and that as such, the 4th Defendant is a necessary party.

27. Counsel for the Plaintiff placed Reliance on the case of *Erinyit Eporon Nguruka & 4 others v National Land Commission & 6 others [2019] eKLR* where the court stated that the fact that the question for determination was whether the purported sale, transfer, alienation and/or allocation of the suit property or part hereof to the 7th defendant was done in compliance of the law, and if not whether the possession of a good title alone made the 7th Defendant a necessary party to the suit.

28. According to counsel, the 4th Defendant cannot benefit from the exceptions under the *nemo dat* rule as they are not bona fide purchasers for value without notice as defined by the Court of Appeal in *Weston Gitonga & 10 others vs Peter Rugu Gikanga & Another [2017]*; that for one to be considered a bona fide purchaser for value without notice, they must pass the test set out by the Ugandan Court of Appeal case in *Katende vs Haridar and Company Limited* as cited by the court in *Lawrence P. Mukiri vs Attorney General & 4 Other (2013) eKLR*.

29. Counsel submitted that the 4th Defendant has not exhibited any title deed or any documentation proving that it is an innocent purchaser

for value; that the 3rd Defendant's title (the vendor to the 4th Defendant) was not valid having been fraudulently obtained; that the 3rd Defendant was well aware that he had not acquired a clean title and that the 4th Defendant had a duty to undertake due diligence and satisfy itself that the 3rd Defendant as the vendor had an apparent valid title.

Analysis and Determination

30. Having considered the pleadings and submissions herein, the court finds that the main issues for determination are;

- i. *Whether the Preliminary objection is merited?*
- ii. *Whether the 4th Defendant is a necessary party to this suit?*
- iii. *What are the appropriate orders to issue?*

31. The 1st Defendant's Preliminary Objection is based on two grounds. First, that this court does not have jurisdiction to hear and determine the suit, because the same is a dispute that falls within the jurisdiction of the High Court and second, that the suit is *sub judice* Nakuru High Court Succession Cause No 331 of 2015-In the matter of the Estate of Henry Wangombe Kamiti.

32. The essence of a Preliminary Objection was succinctly set out by the Court of Appeal in the *locus classicus* case of **Mukisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors (1969) EA 696 at 700** where Law, JA stated that:

“...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.”

33. Sir Charles Newbold P added at page 701 as follows:

“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.”

34. The Supreme Court addressed its mind on this issue in the case of **Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015] eKLR** wherein it stated:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”

35. It is apparent from the foregoing that a Preliminary Objection should raise pure points of law, argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. Further, a preliminary objection should be capable of disposing off the suit.

36. In determining whether the 1st Defendant's Preliminary Objection passes this test, this Court will be guided by the findings in the case of **Oraro v Mbaja [2005] eKLR** where the Court held that;

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

37. It is trite law that where the jurisdiction of a court to hear a dispute before it is challenged, the court must determine that question at once, and should it find that it lacks jurisdiction, it should down its tools. This position was set down by the court in the case of **The Owners of Motor Vessel ‘Lillian S’ vs Caltex Oil (Kenya) Ltd (supra)**. The question of jurisdiction is dispositive in nature and does not require probing evidence. Therefore, this court finds and holds that the issue of jurisdiction herein is a Preliminary Objection.

38. The second limb of the Preliminary Objection is that the same is *sub judice*. Section 6 of the **Civil Procedure Act** sets out the threshold for holding that a suit is *sub judice*. The Applicant is required to satisfy the court that the parties are the same in both matters or are litigating under the same title and that the subject matter in question is the same in the two suits. This argument is no doubt a point of law and can properly be raised by way of preliminary objection.

39. It is trite that jurisdiction is everything. The centrality of jurisdiction was succinctly captured by Nyarangi, J.A. in **Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited (supra)**

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”

40. Similarly, the Supreme Court in **Kalpna H Rawal & 2 others vs Judicial Service Commission & 2 others [2016] eKLR** cited with

approval the decision in Supreme Court of Nigeria Supreme Case No. 11 of 2012 Ocheja Emmanuel Dangana vs Hon. Atai Aidoko Aliusman & 4 Others where Walter Samuel Nkanu Onnoghen, JSC expressed himself as follows: -

“...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...”

41. The jurisdiction of a court flows from the Constitution and or statute or both. This position was affirmed by the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR where it pronounced itself thus:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

42. It is the 1st Defendant’s contention that the instant suit is a succession dispute disguised as a land matter and that this court does not have jurisdiction to hear and determine the same. On their part, the Plaintiffs contend that the dispute revolves around ownership of land and that this is the proper court to make that determination.

43. **Article 162(2) (b) of the Constitution** provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. To give effect to **Article 162 (2) (b)** of the Constitution, Parliament enacted the **Environment & Land Court Act. Section 13(2)** of the said Act provides as follows:-

“2. 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 inland; and*
- (e) any other dispute relating to environment and land.”*

44. The Law of Succession Act in section 47 provides for the jurisdiction of the High Court in respect of matters falling under the Act as follows:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

45. The jurisdiction of the Environment and Land Court vis a vis the High Court with respect to succession matters was considered by Nyamweya J. in Mbula Muoki Ndolo & Another vs Kenya Power and Lighting Company Limited [2017] eKLR as follows:

“In Salome Wambui Njau (suing as Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v Caroline Wangui Kiguru, ELC (2013) eKLR, I held that in matters of succession disputes touching on land, Environment and Land Court Pursuant to Article 162(2) of the Constitution and the High Court as the Succession Court under Section 47 of the Law of Succession Act would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which court is best suited to hear and determine the dispute.”

46. Similarly, the court in In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR had this to say;

“.....The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have

elaborate rules on suits by and against executors and administrators.

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court’s work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.

47. This suit was commenced by way of an Amended Plaint dated 20th November, 2017 wherein the Plaintiffs sought, *inter-alia*, for a declaration that they are the rightful owners of the suit properties; an order declaring the transfers of Dagoretti/Kangemi/1738 and Dagoretti/Kangemi/1739 to the 3rd and 1st Defendants null and void; an order of rectification of the register in respect of Dagoretti/Kangemi/1738 and Dagoretti/Kangemi/1739 and substituting the deceased and the 3rd Defendants names with the Plaintiffs and for permanent injunctive and eviction orders against the Defendants.

48. Briefly, the Plaintiffs’ case is that they are the *bona-fide* owners of the suit properties herein being the parcels of land known as Dagoretti/Kangemi/1738 and Dagoretti/Kangemi/1739 having acquired the same as inheritance from their late father, Joseph Muiruri Kangungu and that on 1st of September, 2001, a certificate of confirmation of grant was issued in Nakuru High Court Succession Cause No 497 of 2000 where the parcel of land Dagoretti/Kangemi/209 was to be held by the 1st Defendant (deceased) and his mother in trust for all the heirs including the Plaintiffs.

49. According to the Plaintiffs, after the original title for Dagoretti/Kangemi/209 got lost, the deceased 1st Defendant caused a new title to be issued in his names; that the parcel of land Dagoretti/Kangemi/209 was sub-divided into four parcels being Dagoretti/Kangemi/1737, Dagoretti/Kangemi/1738, Dagoretti/ Kangemi/1739 and Dagoretti/Kangemi/1740 and that the deceased colluded with the 5th Defendant to have himself registered as the sole proprietor of the suit properties.

50. According to the Plaintiffs, the 1st Defendant fraudulently sold some of the sub divisions to the 2nd and 3rd Defendants who later fraudulently transferred a portion of the suit property to the 4th Defendant. It is the Plaintiffs’ case that the said transfers were based on illegalities within the meaning of **Section 26** of the **Land Registration Act**. The Plaintiffs have sought for an order cancelling the titles that were issued in favour of the Defendants and declaratory orders as to the ownership of the suit property.

51. Having carefully studied the pleadings, it is abundantly clear to this court that the main point of contention is the ownership of the suit property. The Plaintiffs, as I understand them, are not claiming the suit property as beneficiaries of the deceased 1st Defendant’s estate. According to the Plaintiffs, the succession court has already dealt with the issue of the distribution of the Estate of their late father. The Plaintiffs are seeking to impeach the title held by the deceased 1st Defendant pursuant to **Section 26** of the **Land Registration Act, 2012**.

52. As was held in the case of *In Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR*, the **Law of Succession Act**, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested in the estate of the deceased. The Plaintiff has not asked this court to do any of those functions.

53. Indeed, disputes as between the estate of a deceased person and third parties need not be determined within the succession cause. The legal infrastructure in place provides for a resolution elsewhere, and upon a determination being made by the civil court, the decree or order can be made available to the probate court, if need be, for implementation.

54. From the filed pleadings, it is apparent that the suit property is outside the realm of the succession court, the same having been sold off to two subsequent buyers. One of the purchasers, the 4th Defendant, is seeking to rely on the defence of a bona fide purchaser for value without notice, a question which undoubtedly involves the application of the law on title to land and which this court is competent to determine. That being the case, it is the finding of this court that this court is vested with jurisdiction to determine this suit.

55. On the issue of whether this suit is *sub judice*, **Section 6** of the **Civil Procedure Act** provides as follows:

“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 are 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.”

56. The 1st Defendant has submitted that this suit is *sub-judice* **Nakuru High Court Succession Cause No 331 of 2015-In the matter of the Estate of Henry Wangombe Kamiti.** Whereas admittedly an objection on the grounds of *sub judice* can be properly raised as a Preliminary Objection, the objection has not been properly invoked in this instance.

57. Having not pleaded the issue of *sub judice* in their defence and noting that the pleadings in Nakuru High Court Succession Cause No 331 of 2015 have not been placed before this court, this court is unable to make a determination in that respect.

58. In any event, and as I have stated above, the issues in the succession cause must have been strictly in respect to the distribution of the estate of the deceased, and not the alleged fraudulent registration of the suit property in favour of the 1st Defendant, and the subsequent transfer of the same land to the 2nd, 3rd and 4th Defendants. The upshot of the foregoing is that the 1st Defendant's Preliminary Objection fails.

59. It is the 4th Defendant's assertion that it is not a necessary party to this suit because there is no nexus between it and the Plaintiffs; that it is an innocent purchaser for value without notice; that the Plaintiffs are guilty of laches and that any rights they may have had in respect to the suit property have been extinguished.

60. **Order 1 Rule 3** of the **Civil Procedure Rules** provides as follows;

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise”.

61. The Plaintiffs claim is for ownership of the properties known as Dagoretti/Kangemi/1738 and Dagoretti/Kangemi/1739. The 4th Defendant has admitted it purchased a portion of parcel of land known as Dagoretti/Kangemi/1738; that by virtue of that purchase, it is the legal owner of that portion land, and that it is an innocent purchaser for value.

62. For one to be considered a bona fide purchaser for value as the 4th Defendant claims to be, certain elements must be met. The question of whether or not these elements have been met can only be determined at trial. That being the case, it is clear that the 4th Defendant is a necessary party to this suit, more so if it wishes to protect its stake to the parcel of land it purportedly purchased.

63. Indeed, and as correctly submitted by the Plaintiffs, any determination with respect to the proprietorship of the suit property will have an impact on the 4th Defendant's claim of ownership of the land. This court therefore finds that the 4th Defendant is a necessary party in these proceedings.

64. The 4th Defendant contends that the Plaintiffs herein are guilty of laches and do not deserve the protection of the court; that pursuant to **Section 26** of the **Limitation of Actions Act**, they were obligated to institute this suit immediately they discovered the alleged fraud by their deceased brother, which would have been in 2006, and that having failed to do so, they waived any rights they had.

65. The Plaintiffs have maintained that they discovered the fraud relating to the sale of Dagoretti/Kangemi/1738 after succession proceedings were initiated in respect of their deceased brother's estate, the same having been filed in 2015.

66. Considering that the suit property was sold to the 4th Defendant in 2016 and this suit filed in 2017, and in the absence of any evidence to show that the alleged fraud was discovered earlier than alleged by the Plaintiffs, the court is unable to make a finding that the Plaintiffs are guilty of laches.

67. In conclusion, it is this court's finding that the 1st Defendant's Notice of Preliminary Objection dated 29th August, 2018 and the 4th Defendant's Notice of Motion Application dated 5th March, 2018 are devoid of merit and the same are hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF FEBRUARY, 2022.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Gikonyo for the Plaintiffs

Mr. Ibwave for 1st Defendant

Court Assistant - Okumu