



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO 83 OF 2018

ROSEMARY WANGARI MWANGI.....1ST PLAINTIFF

SERAH NJOKI KUNGU.....2ND PLAINTIFF

JOSEPH WAINAINA KUNGU.....3RD PLAINTIFF

LILIAN WAMUCIL.....4TH PLAINTIFF

RUTH WAITHERA (Suing as Administrator Ad Litem and children of the Estate of George

Kungu Wainaina – Deceased).....5TH PLAINTIFF

VERSUS

JOYCE WAMBUI KUNGU.....1ST DEFENDANT

COUNTY LAND REGISTRAR, KIAMBU.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

AYUB KAMITI GITHUKU..... 5TH DEFENDANT

EVERLYNE NJERI NDUNGU.....6TH DEFENDANT

EUNICE WANJIRU NJUGUNA.....7TH DEFENDANT

VIRGINIA WAMBUI RUHIA..... 8TH DEFENDANT

PAULINE WAMAITHA IGARIA.....9TH DEFENDANT

HENRY KINYANJUI KARANJA.....10TH DEFENDANT

AGNES WAMBUI THUNGU.....11TH DEFENDANT

RULING

1. What is before me for determination is the 7th Defendant's Preliminary Objection dated the 8/10/2021 on the following grounds;

a. This Honourable Court lacks jurisdiction to hear and determine this matter as the matter falls within the jurisdiction of the Succession Court.

b. The Plaintiffs have no legal capacity in law to bring and maintain this suit.

2. The objection is opposed by the 1st Plaintiff, Rosemary Wangari Mwangi who termed the objection as lacking in merit as the 7th Defendant's defence is that of a purchaser of the fraudulent sale by the 1st Defendant hence an unqualified as a dependant in law. Further that none of the reliefs sought in the plaint dated the 9/3/2018 require the intervention of the Succession Court to warrant the transfer of this matter to the Succession Court as pleaded by the 7th Defendant.

3. In addition, she contended that she has acquired a grant ad litem which gives her locus to prosecute the suit in this Court and it is not for the Court to interrogate whether she is a wife to the deceased or not as such an issue falls within the Succession Court. That her cause of action is the revocation of titles on account of fraud, which cause of action is properly before this Court. That she has not sought any orders with respect to the distribution of the estate of the deceased which distribution is purely in the province of the succession Court. That on conclusion of this suit it is expected that parties shall be directed to commence succession of the estate of the deceased.

4. She admitted that she has filed a suit in the Succession Court to wit **NRB HCCC Succ. Cause No 1633 of 2015 – Estate of George Kungu Wainaina** seeking reliefs against the 1st Defendant that the 1st Plaintiff and her children are dependants to the estate

of the deceased. She noted that the 1st Defendant has denied the existence of the Succession Cause lending credence to her claim that the suit lands were transferred before the estate was succeeded in law.

5. On the 7th Defendant's objection on whether or not she has legal capacity to file this suit, she contended that this objection is now resjudicata given that the same was determined by this Court vide the ruling delivered on the 17/5/2019. She urged the Court to dismiss the objection.

6. The Objection was canvassed by way of written submissions. The 7th Defendant through the law firm of **Masaviru & Ketoo Advocates** submitted that the composition of the Plaintiffs in the suit brings a legal quagmire that can only be resolved either by striking out the suit or withdrawing it altogether on account that though the 1st Plaintiff has obtained grant of letters of administration ad litem, the other Plaintiffs have none making it impracticable to sever the suit. With respect to the 7th Defendant it was their submission that she purchased her property from the 1st Defendant and not the deceased. That the Plaintiffs have no interest in the said property.

7. The 7th Defendant submitted that para 11, 17 and 22 of the Plaint makes reference to the estate of the deceased and in particular prayer D seeks that the Court directs the 1st Defendant to commence the succession proceedings with respect to the estate of the deceased. That all these issues are issues that should be dealt with by the succession Court.

8. That there is an issue as to whether the 1st Plaintiff is a wife within the meaning of Section 29 of the Succession Act, which issue should be for the succession Court to determine. That the manner in which the properties were transferred to third parties can only be properly investigated by the succession Court. The 7th Defendant submitted that the grant ad litem granted to the 1st Plaintiff is a special grant for the preservation of the estate pending the issuance of a full grant which is pending in the succession Court. Lastly that the Court should restrain from determining the matter to avoid conflicting decisions with the risk of embarrassing the two Courts.

9. The 1st Defendant submitted and associated herself with the grounds of the Preliminary Objections and the submissions of the 7th Defendant.

10. The submissions of the Plaintiffs are in opposition to the Preliminary Objection. They reiterated the averments in the Replying Affidavit dated the 2/11/2021. The Plaintiffs aver that the suit is for purposes of revoking various title deeds fraudulently acquired by the 1st Defendant and sold fraudulently to third parties including the 7th Defendant. Relying on the case of in the matter of the **Estate of Kanyeki Kimatu Deceased, CA No 129 of 2018**, the Plaintiffs submitted that the mandate of the probate Court under the law of succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts.

11. Having read and considered the objection, the written submissions and the rival arguments of the parties, the key issues for determination are; whether the Court has jurisdiction to determine the suit and secondly whether the Plaintiffs have the legal capacity to file the suit.

12. The jurisdiction of this Court is spelt out in Article 162(2) of the Constitution as read together with the Section 13 of the Environment and Land Act which is set out as follows;

“Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(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 in land; and

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

13. Pursuant to the above jurisdiction the Court is empowered to grant reliefs as set out in Section 13 (7) ELCA which include interim or permanent preservation orders including injunctions, prerogative orders, award of damages, compensation, specific performance, restitution, declaration and or costs.

14. The Plaintiffs cause of action as I can glean from the plaint is inter alia, the cancellation of alleged illegally and fraudulently transferred parcels of land being part of the estate of the late George Kungu. This is a cause of action that falls within the jurisdiction of the ELC Court. I agree with the Plaintiffs that the role of the probate Court is limited to the identification of the assets of the estate, the beneficiaries and the distribution thereon. It does not include the determination of the alleged fraud or illegality of the transfer of the titles.

15. The Court answers the issue in the affirmative.

16. The issue of the capacity of the Plaintiffs to sue was determined in the Ruling delivered on the 17/5/2019 and in my considered view is resjudicata.

17. In the end the objection is not merited and it is dismissed with costs payable by the 7th Defendant.

18. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF MARCH 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:

Plaintiff 1 – 4 – Absent

Defendant 1 – Okello

Defendant 2 – 6 – present

Defendant 7 – Muinde holding brief for Masaviru

Defendant 8 – 11 – Absent

Court Assistant - Phyllis