



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E105 OF 2020**

TERESIA NYAMBURA.....1<sup>ST</sup> PLAINTIFF  
STEPHEN WANYEE GATHUKU.....2<sup>ND</sup> PLAINTIFF  
FRANCIS KIRANGU GATHUKU.....3<sup>RD</sup> PLAINTIFF  
VINCENT MUIGAI GATHUKU.....4<sup>TH</sup> PLAINTIFF

**-VERSUS-**

VIRGINIA WAITHERA GATHUKU.....1<sup>ST</sup> DEFENDANT  
SUSAN MUTHONI GATHUKU.....2<sup>ND</sup> DEFENDANT  
KIBATHI GATHUKU.....3<sup>RD</sup> DEFENDANT  
ROSEMARY WANJIKU.....4<sup>TH</sup> DEFENDANT  
TERESIA NYAMBURA.....5<sup>TH</sup> DEFENDANT  
DOREKAS WACHEKE WANYEE.....6<sup>TH</sup> DEFENDANT

**RULING**

1. This is the Notice of Motion dated 28<sup>th</sup> August 2020 brought under sections 3, 3 and 63(c) of the Civil Procedure Act, Cap 21, Laws of Kenya and Order 45 rules 2(1) and (2) and order 40 Rule (1) and (4) of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

2. It seeks orders:-

**1. Spent.**

**2. Spent.**

**3. Spent.**

**4. That this honourable court be pleased to issue orders of a temporary injunction restraining the Defendants/Respondents from charging, leasing, transferring or in any way interfering with the suit property pending the hearing and determination of this suit;**

**5. That the cost of this application be provided for.**

3. The grounds are on the face of the application and are set out in paragraphs (1) to (6).

4. The application is supported by the affidavit sworn by Teresia Nyambura Gathuku, Stephen Wanyee Gathuku, Francis Kiragu Gathuku and Vincent Muigai Gathuku the Plaintiffs/Applicants herein sworn on the 28<sup>th</sup> August 2020.

5. In response to the Application the Defendants/Respondents filed a notice of preliminary objection dated 5<sup>th</sup> May 2021.

6. The Court with the consent of parties directed that the Preliminary Objection be heard first. The court also directed that the same be canvassed by written submissions.

7. The Plaintiffs'/Respondents submits that this court ought to refuse the invitation by the Defendants to dismiss this suit as doing so will allow the Defendants to hide under the provisions of Section 7 and 8 of the Limitation of Actions Act and enjoy the benefits of their fraudulent acts.

8. The Plaintiffs' failure to accompany a copy of summons with their plaint whilst filing suit is not detrimental to their suit at all. They have put forward the cases of **Sealink Holdings Ltd vs Barclays Bank of Kenya Ltd [2021] eKLR; Mohammed Ali Abdalla vs Morris Guchura Njagi [2016] eKLR.**

9. They also submit that the orders sought are proper as per the Amended plaint.

10. Further that this matter is properly brought before this court as the claim is for land that belongs to the deceased. They pray that the preliminary objection be dismissed with costs.

11. It is the Defendants/Respondents submissions that the suit is fatally defective as the Plaintiffs did not file summons together with the plaint. That to date the Plaintiffs have neither extracted nor served the said summons eleven (11) months after filing suit. They have put forward the case of **Nzamba Kavili vs Kenya Commercial Bank Limited [2021] eKLR.**

12. They further submit that a party is bound by his/her pleadings. The prayers sought in the Amended plaint are declaratory prayers. There is no injunctive or preservative prayer sought. They have put forward the cases of **Sunrise Properties Limited vs Fifty Investments Limited [2007] eKLR; IEBC & Another vs Stephen Mule & 3 Others [2014] eKLR; Raila Odinga & Another vs IEBC & 20 Others [2017] eKLR.** The prayers in the notice of motion are not anchored in the plaint or the Amended plaint and the application ought to be dismissed with costs.

13. They further submit that these proceedings are time barred and should be dismissed with costs.

14. The Plaintiffs plaint and Amended plaint are riddled with Succession and Probate claims. The suit ought to have been filed in the High Court Family Division. They pray that the application and the suit be dismissed with costs.

15. I have considered the grounds of the preliminary objection, rival submissions and the authorities cited. The issue for determination is whether this preliminary objection is merited.

16. I have gone through the ruling of Honourable Justice A. Muchelule in High Court Succession Cause No 30 of 1979. In paragraph 9 he states:-

**“What is open to the Applicants is to sue to recover the deceased estate from whoever has acquired it without due process. A suit to recover land can only be in a court created under Section 13 of the Environment and Land Court Act and Article 162(2)(b) of the Constitution. But that would have to be after the acquisition of capacity to sue under Section 82(a) of the Law of Succession Act”.**

17. The Plaintiffs/Applicants admit in Paragraph 8 to 11 of the affidavit in support that they have not been granted Letters of Administration to be able to institute this suit. In my view they lack capacity to institute this suit against the Defendants/Respondents. This issue was not raised in the preliminary objection but it is an issue that ought to have been raised.

18. It is the Defendants'/Respondents' case that this suit is time barred as per Section 7 of the Limitation of Actions Act. That from paragraph 7 of the Amended Plaint the cause of action arose in 1980. It is 28 years after the Limitation period had lapsed. The Plaintiffs/Applicants on the other hand rely on Section 26 of the Act, to state that time starts running from when the fraud was discovered.

19. It is clear from the Amended plaint that the Plaintiffs/Applicants became aware of the alleged fraud in 1980 which makes this suit time barred.

20. Another ground of objection is that the suit is fatally defective for failure to comply with order 5 rule 1 (3) and 5 of the Civil Procedure Rules.

**Order 5 rule 1 (3)** provides that:-

**“Every summons shall be accompanied by a copy of the plaint.”**

**Sub rule (5) provides that:-**

**“Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule.”**

21. It should be noted that sub rule (5) is set in mandatory terms that a plaint shall be filed together with summons. The Plaintiffs/Applicants admit that they did not file the summons together with the plaint. To date they have neither extracted nor served the said summons eleven (11) months after filing suit.

22. This court in **Nzamba Kavili vs Kenya Commercial Bank Limited [2021] eKLR** dismissed the Plaintiff’s suit for failure to demonstrate that summons had been effected on the Defendants.

In the instant suit, to date no summons have been served on the Defendants/Respondents.

23. It is also clear that in prayer no (3) of the notice of motion the Plaintiffs/Applicants seek orders of temporary injunction. I have gone through the plaint and Amended plaint and I see no prayer for injunctive or preservative orders. I rely on the case of **IEBC & Another vs Stephen Mule & 3 Others [2014] eKLR** where the Court of Appeal stated thus:-

**“As the authorities do accord with our way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings, which in turn limits the issues upon which a trial court may pronounce”.**

24. However, as to the ground that the suit is filed before the wrong court, my view is that the matter is before the correct court except for the reasons stated above. This is because the Environment and Land Court Act and Article 162(2) (b) of the Constitution gives this court jurisdiction.

25. In conclusion, I find merit in the preliminary objection and the same is upheld. The notice of motion dated 28<sup>th</sup> August 2020 and the entire suit are hereby struck out with costs to the Defendants/Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH, 2022**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Ms K. Wambui Kimani for the Plaintiffs

No appearance for the 1<sup>st</sup> Defendant

Mr. Mureithi for the 2<sup>nd</sup> – 6<sup>th</sup> Defendants

Steve - Court Assistant