



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)

ENVIRONMENTAL & LAND CASE 381 OF 2011

JOSEPH KIARIE KAIGAI aka JOSEPH NGURI1ST PLAINTIFF

JOHN WALTER MBUTHIA.....2ND PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

ROSEMARY NJERI.....2ND DEFENDANT

VIRGINIA NJOKI KAIGAI.....3RD DEFENDANT

RULING

Before me is a plaint filed by the two Plaintiffs, brothers against the 1st Defendant being the Attorney General and the 2nd and 3rd Defendants who happen to be sisters of the Plaintiffs. The cause of action is a distribution of the estate of the late FrumenceKaigaiKaranja who was the father of the Plaintiffs, the 2nd and 3rd Defendant.

The suit property is Kabete/Karura/204 measuring 1.92 hectares (the suit property) which belonged to the late FrumenceKaigaiKaranja Succession proceedings over his estate were commenced and completed by the deceased's wife the now late TeresiahKabuiyahKaigai. She used the services of the Public Trustee in the subdivision of the suit property and distribution of the same to all the dependants of the late FrumenceKaigaiKaranja.

The Plaintiff's allege that the Succession proceedings were conducted without their knowledge and that these were not disclosed to them.

The Defendants disclosed in their Joint Defense that the Succession Cause was Kiambu Administration **Cause No. 127 of 1977** Estate of the late Frumence K. Gathenya. The Plaintiff's disclosed that the file for this case could not be traced.

The Defendants filed a Notice of Preliminary Objection dated 27thSeptember, 2011 on the following grounds:

1. The suit offends Order 1 Rule 13 of the Civil Procedure Rules 2010.
2. The suit offends various provisions of the Law of Succession Act as the Land Parcel Kabete /

Karura/204 was the subject of a Succession Cause of the estate of the late **FRUMENCE KAIGAI GATHENYAKiambuAdministrationCause No. 127 of 1977** and the grant has not been contended and/or challenged vide an appeal.

3. The pleadings do not disclose a reasonable cause of action as against the 2nd and 3rd Defendants as the issues raised ought to be directed to the legal representatives of the late TeresiaKabuiyaKaigai and the late FrumenceKaigaiKaranja.
4. The Plaintiff's lack *locus standi*.
5. The suit is *res judicata* in respect to the above-mentioned succession cause.
6. That the main reason why the Plaintiff's have been unhappy with the mode of subdivision of the suit land is the fact that the 2nd and 3rd Defendants being women got part of land of their late father such a reason is unconstitutional being discriminatory.
7. The suit is an abuse of the Court process as key contentions in the pleadings are clearly false and untrue.

For the above stated reasons, the 2nd and 3rd Defendants pray that the suit be struck out and/or dismissed with costs.

In response to the Preliminary Objection, the Plaintiffs in their written submissions dated 9th November, 2012 argued as follows:

- 1) Order 13 Rule 1 of the Civil Procedure Rules does make a provision that one of the Plaintiffs can swear an affidavit on behalf of the other with written authority is not fatal and the Court should proceed to look at the suit on merit and not dismiss the suit on technicalities as provide for under section 159 (d) of the Constitution.
- 2) The applicants have failed to indicate to the Court the various provisions of the Law of Succession Act that they claim have been offended and that the Plaintiff's claim is that they were kept in darkness in the Succession Cause and even the alleged **Succession File No. 127/1977Kiambu** cannot be traced.
- 3) The assertions as to whether their pleadings disclose a reasonable cause of action can only be dealt with at the full hearing after hearing all the facts.
- 4) Order 1 Rule 1 does provide that all persons may be joined in one suit as Plaintiffs in whom any right to relief of or arising out of the same transaction or series of acts and transaction arise therefore its the Plaintiff's submission that the Plaintiffs have *locus standi* as beneficiaries who are entitled to the estate.
- 5) The Succession Cause was never entered at the proprietorship section and this made it impossible for the Plaintiff's and the other beneficiaries to apply for revocation of the said grant. Moreover, this suit does not seek to challenge the order of grant issued but the fraudulent manner in which the same was conducted. In this respect, Civil Suit No. 381 cannot be *res judicata* as it is not the same as the Succession Cause.
- 6) Matter of discrimination and assertions that the Plaintiff's pleadings are false are questions of fact and not law and hence cannot be challenged by a Preliminary Objection.
- 7) The suit is not time barred as matters where fraud is alleged are not subject to limitations.

Upon considering the assertions of the 2nd and 3rd Defendants in their Preliminary Objection and the written submissions of the Plaintiff's in response thereto, this is my analysis of the same.

The suit revolves around the distribution of the suit property previously owned by the late FrumenceKaigaiGathenya. Counsel for the Plaintiff cannot deny this fundamental fact whichever way they choose to look at this suit. However, the same Counsel continue to try to wish away the fact that the subject matter of this suit being the suit property **Kabete/Karura/204** was the same subject matter property distributed under Kiambu**Administration Cause No. 127 of 1977**.

If I may draw their attention to Section 79 of the Law of Succession Act it is stated as follows:

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant all the property of the deceased shall vest in him as personal representative”

The 2nd and 3rd Defendant rightfully raised the argument that they were mere beneficiaries of the distribution of the estate of their late father by their late mother. This suit does not disclose a cause of action between the 2 Plaintiffs and the 2nd and 3rd Defendants. All of them were mere beneficiaries of the distribution of the suit property by their mother now deceased.

Accordingly, I agree with the point No. 2 of the Preliminary Objection.

The Plaintiff’s have argued that they do not contest the grant of letter of administration to their now late mother but that the distribution of the suit property was fraudulent. In answer to that, I wish to state that both the matter of grant of letter of administration as well as the mode of distribution of the estate of a deceased person are properly dealt with within the Succession Cause and not in separate suits as the Plaintiffs have tried to do in this particular case. I therefore agree with the 2nd and 3rd Defendant that this suit is *res judicata*.

In the light of the foregoing this Court upholds the Preliminary Objection in Paragraphs No. 2, 3 and 5 and proceeds to strike out the Plaint as prayed by the 2nd and 3rd Defendant with costs to the Defendants.

DELIVERED THIS 15TH DAY OF FEBRUARY, 2013 AT NAIROBI.

MARY M. GITUMBI

JUDGE