



REPUBLIC OF KENYA



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**Gitau v Nguti (Environment & Land Case 191 of 2015)
[2022] KEELC 2717 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2717 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 191 OF 2015**

SM KIBUNJA, J

MAY 18, 2022

BETWEEN

EVANSON NGUTI GITAU PLAINTIFF

AND

JACINTA WANJIRU NGUTI RESPONDENT

RULING

1. The Defendant/Applicant approached the court by way of the notice of motion dated the October 4, 2021 seeking for orders that: -
 - i. The Honourable Court be pleased to strike out the suit herein with costs.
 - ii. Costs of this application be provided for.

The application is based on the three (3) grounds *inter alia* that by virtue of the [Limitation of Actions Act](#), the action is time barred, because the suit was filed 38 years after the alleged rights of the Plaintiff had been extinguished, and the suit is therefore an abuse of the court process. The application is supported by an affidavit sworn by Jacinter Wanjiru Nguti, the Defendant/Applicant, on the October 4, 2021, wherein she among others deposed that the main suit was instituted on behalf of the estate of the late Tirus Gitau who died in 1977, against the Defendant as the legal representative of Evanson Kamanda Nguti; that upon the demise of Tirus Gitau, his 4 wives petitioned vide Eldoret P & A No. 5 of 1984 and they never raised any issue of ownership of L.R. No 10018, the suit property herein; that going by the succession documents in relation to the above two estates of the late Tirus Gitau and Evanson Nguti, the said estates had been administered for more than 18 years; that as such this suit should be dismissed for being in breach of the [Limitation of Actions Act](#).

2. The application is opposed by Evans Nguti Gitau, the Plaintiff/Respondent, through his replying affidavit sworn on October 14, 2021 wherein he inter alia deposed that he is the administrator of the estate of Tirus Gitau, and that he brought to this court's attention the decision of Hon. H. Omondi



of January 22, 2021 which concerned the probate aspect of the instant dispute; that the Applicant had the opportunity to ventilate issues of limitation of actions before Hon. Omondi in a succession setting, but did not do so; that the applicant was frustrating the property rights of the estate of Tirus Gitau in the suit property which question needed to be determined in order for the succession suit to proceed.

3. The Applicant filed a supplementary affidavit sworn on December 15, 2021 wherein he *inter alia* reiterated the contents of the supporting affidavit; dismissed the averments of the respondent as lacking basis; that the respondent had illegally trespassed onto the suit property without any justification; and that the allegations on poisoning among others were baseless.
4. That following directions of December 8, 2021 on filing and exchanging submissions, the learned counsel for the defendant and plaintiff filed their submissions dated the January 10, 2022 and February 4, 2022 respectively.
5. The following are the issues for the court's determinations;
 - a. Whether the defendant has established that the suit is time barred.
 - b. Who should pay the costs of the application.
6. The court has carefully considered the grounds on the application, affidavit evidence by both parties, submissions by the learned counsel, the superior courts decisions cited thereon, and come to the following conclusions;
 - a. That the question on whether the suit is statute time barred requires rehashing of certain aspects of this dispute outside this court as evident primarily in the succession suit before the High Court. In Succession Cause 36 of 2002, the petitioner in the matter of the estate of Evanson Nguti Kamanda (deceased) was the defendant/applicant herein. She Petitioned for and obtained letters of administration in 2004, which were confirmed the same year. Subsequently, she distributed the estate which included land L.R. No. Soy Farm 10018 measuring 703 acres. It is this property that the plaintiff/respondent herein, acting as the administrator of the estate of Tirus Gitau Nguti (deceased brother to Evanson Nguti Kamanda) sought to reclaim in part by filing the application of 13th November 2019 before the High Court, seeking for determination of among other issues, the share of the estate of Tirus Nguti Gitau in the suit property. In doing so, he claimed that Tirus Gitau Nguti had interest in the suit property L.R. No. Soy Farm 10018 measuring 703 acres. He alleged that the defendant/applicant herein, who is the administratrix of the estate of Evanson Nguti Kamanda pursuant to succession cause 36 of 2002, had concealed the interest of Tirus Gitau Nguti in the suit property and proceeded to administer the whole of it for the sole benefit of the estate of Evanson Nguti Kamanda. In response, the defendant, in her replying affidavit in response to the plaintiff's application in succession cause No. 36 of 2002 stated at paragraph 5 that: -

“That I am informed by my advocate on record, which information I verily believe to be true and correct, that the Honourable Court lacks jurisdiction to entertain this matter as issues raised revolve on trust, title, occupation and use of land which is a preserve of the Environment and Land Court.”

She questioned the jurisdiction of the High Court in a succession cause to determine the question of ownership of the suit property. She also raised the issue of the action being time barred, considering the claims raised by the plaintiff/respondent had been brought more than 38 years since the death of the deceased, Tirus Gitau Nguti, and more than 13 years after the grant was confirmed way back in 2004 over the estate of Evanson Kamanda Nguti.



- b. That it is noteworthy that while all the above was taking place, the jurisdiction of this court had been triggered in the instant suit concerned with the civil aspects of the suit property, and the dispute between the two estates of Evanson Kamanda Nguti and Tirus Gitau Nguti. The High Court determined the application through its ruling of January 22, 2021 and it's apparent the court was faced with is a situation where the High Court's and Environment and Land Court's Jurisdictions had been triggered concurrently. The discomfort arising from this situation was well noted by the High Court in its ruling of January 22, 2021 wherein the Court cited the Court of Appeal, and held that;

“The Court of Appeal has directed to this dilemma of parties moving from the civil court to succession courts on the same issue and advises filing of separate civil suit in ownership of property disputes in *Leonard Kimantbi Mwanthi v Rukaria M'twerandu M'iriungi* (2013) eKLR that;

“The litigation in this matter has seen parties litigate for the same subject matter both under the civil procedure and the law of succession. We must state this is a procedure that causes confusion as there is a clear justification and sound reasoning why legislature separated both regimes. This case is a clear demonstration that when both regime of law are applied interchangeably, a simple matter for example of succession of a deceased estate becomes protracted and parties keep hovering from civil court to succession cause’.”

In determining these two issues, Limitation of Actions and Jurisdiction, Hon Omondi J, (as she then was), appreciated that indeed the determination of the plaintiff/respondent's application would require pronouncement on the property rights of the two estates. She further noted that statutes pertaining to land and environment were the applicable law and principles. The High Court further held that: -

“I share the position taken by the court in in *Re Estate of Wilson Mutyaavyu Ndunda*, Machakos High Court Succession Cause No. 321 of 2003, regarding the issue as to the appropriate forum for determination of disputes relating to succession of a deceased's estate involving questions of title to land assets, and held as follows:

“... that in matters of succession disputes touching on land, the 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.”

However, without deciding, it would appear that the Environment and Land Court is more suited of the two courts for the hearing and determination of the question of beneficial ownership of the suit property asserted by the Objectors and denied by the administrators, and which really turns on construction of contracts of sale of land alleged by the parties. The determination of the interested parties' right to property is simply a matter of application of succession law and it depends on the finding of the court on the question of beneficial ownership of the suit property.”

The High Court went further and held that:

“Whereas the matters herein have been confused, I find that this court has no jurisdiction to determine the issue on the share of the suit property that either of the estates is entitled to as that jurisdiction is vested with the Environment and Land Court under *the Constitution*



2010. It is worth noting that the dispute on the share that is available for each party is the subject of ELC No. 191 of 2015, which is the right forum for the determination of civil suits resulting from the suit property.”

The High Court therefore ceded Jurisdiction over this aspect of the dispute to this court. On the question of Limitation of Actions, the Court stated:

“I therefore find the argument that the matter is filed out of reasonable time for no justification is an issue that can only be comprehensively addressed once the Environment and Land Court makes a determination on the issue of ownership, for to do otherwise at this point would be short-circuiting the matter which is pending before the Environment and Land Court.”

- c. That having set out the background of this matter as above, then this court is the one to adjudicate the question of the extent the interest in the suit land is shared between Evanson Nguti Kamanda and Tirus Kamanda. This is the court that is to determine the various interests in the suit property since this is the Court with the appropriate Jurisdiction to do so, under Article 162 (2) b of *the Constitution*, 2010 and section 13 of the *Environment and Land Court Act* No. 19 of 2011. That once that is done, the question of whether this property was administered correctly would then re-trigger the Jurisdiction of the High Court in Succession Cause 36 of 2002. It is then that the court would be able to adjudicate the question of whether a dispute arising from the administration of the estate of Evanson Nguti Kamanda would be time barred can properly be raised and adjudicated upon. That equally, the question of time is an issue which the succession court is still seized with, and capable of adjudicating over. In fact, the court awaits this Court’s determination on the different interests of the two estates in the suit property, before addressing the issue of time. This is evidenced in the orders of the High Court issued on January 22, 2021 and captured in the order as extracted on March 23, 2021 which *inter alia* states:

It is Hereby Ordered

1. That the argument that the matter is filed out of reasonable time for no justification is an issue that can only be comprehensively addressed once the Environment and Land Court makes a determination on the issue of ownership, for to do so otherwise at this point would be short-circuiting the matter, which is pending before the Environment and Land Court.”
- d. That in view of the foregoing, I find that the defendant’s application to be premature and to have been raised before the wrong forum.
- e. That in terms of section 27 of the *Civil Procedure Act*, the plaintiff is entitled to the costs of the application.
7. That flowing from above, the court finds the defendant’s notice of motion dated the October 4, 2021 to be without merit and is hereby dismissed with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 18TH DAY OF MAY, 2022

S.M.KIBUNJA,J.

ELC ELDORET.



In the Virtual Presence of;

Plaintiff: Absent.....

Defendant: Absent.....

Counsel: Ms. Adongo for Angu for Plaintiff

Ms. Kibet for Kibii for Defendant

Court Assistant: Oniala

S.M.KIBUNJA,J.

ELC ELDORET

