



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

E.L.C CASE NO. 9 OF 2012

MARY WAMURANGO NUMBI PLAINTIFF

VERSUS

MICHAEL MWITHI MAMBO 1ST DEFENDANT

LUCY WAIRIMU MAMBO 2ND DEFENDANT

RULING

By a plaint filed herein on 7th November 2012, the plaintiff sought from the defendants who are sued as the legal administrators of the Estate of the late Justus Daniel Mambo, a declaration that the deceased held land parcel No. MUTIRA/KIRIMUNGE/205 in trust for the plaintiff and that the trust be determined so that the plaintiff gets 10 acres out of land parcel No. MUTIRA/KIRIMUNGE/205 and 5 acres in MUTIRA/KAGUYU/197.

Simultaneously with the filing of that plaint, the plaintiff filed a Notice of Motion seeking orders restraining the defendants, their servants and agents from evicting them from the said land parcel No. MUTIRA/KAGUYU/197 until this suit is determined and further, that the status quo on land parcel No. MUTIRA/KAGUYU/197 and MUTIRA/KIRIMUNGE/205 be determined such that the plaintiff and her family occupy land parcel No. MUTIRA/KAGUYU/197 until this suit is determined.

When the Notice of Motion came up for hearing, the defendants filed a Notice of Preliminary Objection on the following points of law:-

1. ***That there is pending before the High Court in Nairobi, Succession Cause No. 1190 of 1991 between the same parties in respect of the same subject matter filed by the plaintiff against the defendants which is yet to be heard and determined***
2. ***That the defendants remain the bone fide owners of the property MUTIRA/KAGUYU/197 by virtue of the grant of the Court in High Court Succession Cause No. 1190 of 1991.***
3. ***That these proceedings are an abuse of the process of the Court and a back-door attempt to grab the defendants' property.***

The above Preliminary Objection is the subject of this ruling.

Counsels have made submissions on the same and I have considered them together with the pleadings herein.

It is conceded by the plaintiff that indeed there is pending in Nairobi High Court Succession Cause No. 1190 of 1991 between the same parties and involving the same subject matter. In her submission

in that regard, Ms Thungu for the plaintiff has stated as follows:-

“For the avoidance of any conflicting decisions concerning the two cases as they touch on the same subject matter, the applicant has deemed it necessary to apply for stay of the Nairobi Succession Cause No. 1190/91 so that the Court can hear this case first. We annex herewith the application for stay of proceedings in the Nairobi Succession Cause No. 1190/91”.

The plaintiff herein is the applicant in High Court Succession Cause No. 1190 of 1991 and indeed the application to stay that succession cause and proceed with this suit has been annexed though it is not clear at this stage whether the stay has been granted. I shall revert to this later but clearly the first ground in the Preliminary Objection is well merited.

I do not see how the second ground can be an issue for a Preliminary Objection. It is stated that the defendants remain the bone fide owners of the property MUTIRA/KAGUYU/197 by virtue of the grant. The plaintiff's claim, as I understand it, is that there is a trust in her favour which this Court should determine. The issue of whether or not a trust exists is an issue to be determined on the evidence. As was stated in **MUKHISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A 696**, a Preliminary Objection 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. At this stage, the ownership of the subject matter and whether or not a trust exists are issues for trial. The second Preliminary Objection therefore fails.

The third Preliminary Objection is that this suit is an abuse of the process and a back-door attempt to grab the defendant's property. A pleading is an abuse of the process where it is frivolous or vexatious or both. No doubt a Court has inherent jurisdiction to dismiss a pleading that is only meant to waste both the Court and the other party's time and expenses and which lacks bona fides. However, as was held in **YAYA TOWERS LTD VS TRADE BANK LTD CIVIL APPEAL NO. 35 OF 2000**

“A plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial”

And in the same case, the Court went on to state as follows:-

“No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment”

In the well known case of **D.T. DOBIE & CO. (KENYA) LTD VS MUCHINA 1982 K.L.R 1**, the Court of Appeal held as follows:-

“A Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally, a law suit is for pursuing it”

The above authorities are binding on me and looking at the plaintiff's pleading, I do not discern anything in it to show that it is an abuse of the Court Process. If anything, it is my view that it raises triable issues. That objection is clearly not well founded.

The defendant's advocate has also raised in his submissions some grounds which are not really part of the Notice of Preliminary Objection raised on 13th December 2012 and this is that these proceedings are not properly before the Court and are defective since they contravene **Order 37 Rule 1 of the Civil Procedure Rules 2010** as they should have come by way of an Originating Summons and in this regard, Mr. Onduso for the defendants has cited the following cases:-

1. **GEORGE KIGOYA VS ATTORNEY GENERAL OF UGANDA 1966 E.A. 463**
2. **SALOME NAMUKASA VS YOZEFU BUKYA 1966 E.A 433**

In both those cases, the High Court in Uganda struck out applications that did not comply with the Rules. These cases are of course of only persuasive value to me. The Court of Appeal in **NJENGA CHOGERA VS MARIA KIMANI & TWO OTHERS C.A CIVIL APPEAL NO. 322 OF 2003 (NBI)** considered a situation such as the one prevailing in this case where a claim in trust was brought by way of a plaint and not by Originating Summons and held that a wrong procedure would not invalidate the proceedings. The Court cited with approval the decision in **KANYI VS MUTHIORA 1984 K.L.R 712** wherein a claim in trust was also commenced by way of a plaint. That authority is binding on me and therefore the Preliminary Objection citing want of form is not well founded and I reject it.

As mentioned earlier, the Preliminary Objection that there is Nairobi High Court Succession Cause No. 1190 of 1991 pending between the same parties and in respect of the same subject matter herein was conceded and is therefore well founded. **Section 6 of the Civil Procedure Act** provides that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit which is pending in another Court. There is no doubt that this suit is caught up by Section 6 of the Civil Procedure Act. However, the remedy is not to strike out or dismiss this suit as suggested by Mr. Onduso in his submissions. The remedy is to stay this suit and await the order that will be made in Nairobi High Court Succession Cause No. 1190 of 1991. Indeed the marginal notes in **Section 6 of the Civil Procedure Act** read “**Stay of Suit**”

This suit is accordingly stayed. Each party shall meet their own costs of this application.

B.N. OLAO

JUDGE

9TH SEPTEMBER, 2013

9/9/2013

Coram

B.N. Olao – Judge

CC - Muriithi

Ms Mukuha for Thungu for Plaintiff – present

Ms Kiragu for Onduso for Defendant – present

COURT: Ruling delivered this 9th day of September, 2013 in open Court.

B.N. OLAO

JUDGE

9TH SEPTEMBER, 2013

