**No. 014/12**
**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**CIVIL CASE NO. 273 OF 2011**

**JOSEPH MUSEVU MUINGA …….....…… PLAINTIFF/APPLICANT**

**VERSUS**

**STEPHEN NDUNDA MUINGA …….....…… DEFENDANT/RESPONDENT**

**RULING**

1. The application before the Court is a Notice of Motion dated and filed on 04/10/2011 ("Application"). It is by the plaintiff, Joseph Musevu Muinga ("Applicant") seeking, in the main, for orders of restriction over the land parcel No. Mavoko Town Block 2/146 ("Suit Property").

2. The Applicant's suit and Application is straightforward and is stated in both the plaint dated 04/10/11 and Supporting Affidavit sworn by the Applicant on 04/10/11. The Applicant says that between 1964 and 1972, he and the Respondent herein, Stephen Ndunda Muinga ("Respondent"), who is his brother, together with a third brother, William Mulinga Muinga all lived and worked in Uganda. While there, they decided to repatriate some of the gains from their employment in Uganda back to Kenya where they jointly invested by buying properties. The Respondent was repatriated back to Kenya in 1972 and the Applicant remained working in Uganda until 1978 – all the time sending money to fund the purchase of further properties.

3. The Applicant says that all the properties thus funded and purchased was registered in the name of the Respondent who was to hold the same in trust for himself and his two brothers. One of these properties is the Suit Property. However, the Applicant recently realized that the Respondent was making plans to sell the Suit Property without the consent of the Applicant. Consequently, the Applicant prays for a restriction to be placed over the Suit Property to prevent the Respondent from disposing off the property pending the hearing of the suit. The main suit seeks the main prayer that the Suit Property be subdivided and transferred to each of the three brothers in accordance with the trust they established.

4. The Respondent vigorously opposes the Application, and indeed, the whole suit. Through his advocates, Kairu Mbuthia & Kiingati Advocates, he filed a Notice of Preliminary Objection, Replying Affidavit, and List of Authorities all dated 16/11/11. When the Application came up for hearing, both parties agreed to urge the Application and the Preliminary Objection simultaneously. I will therefore consider the various arguments raised by Mr. Kiingati who appeared for the Respondent together.

5. First, Mr. Kiingati argues that the suit is fatally defective and cannot be sustained because it is filed as a representative suit, yet leave of the court was not first obtained as mandatorily required by Order 1, Rule 8. That Rule provides as follows:

"(1)Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the court to be made a party to such suit."

6. Mr. Kiingati argues that it is obvious that the Applicant has brought this suit on his behalf and on behalf of his brother, Mr. William Mulinga Muinga. Since he has not obtained the leave of court before instituting the suit, it follows that his suit is fatally defective and must be dismissed at this early stage. Mr Kiingati referred me to the cases of *Moses Lesiamon Ole Mpoe & Another v. Commissioner of Lands & 4 Others* [2005] eKLR and *El Busaidy v Commissioner of Lands & 2 Others* (2002) 1KLR 508. Both are decisions of the High Court and are, therefore, merely persuasive and not binding on me. In the *Mpoe Case*, the Plaintiffs had sued on behalf of the Maasai indigenous residents of Mau Narok, Nakuru district as well as all relatives of the "original and the legitimate owners of the suit land under customary and/or native title" – literally hundreds of thousands of people if not millions. Citing the case of *Wanjiru v Standard Chartered Bank of Kenya Ltd & Another*, the Court found the suit incompetent for failure to first obtain the leave of court and struck it out.

7. Interestingly, the *El Busaidy* case reached the opposite result. In getting to that reasoned position, Justice Onyancha rhetorically asked:

What about if a party feels aggrieved alone as in this case and files a suit to assert his right even if such a right asserted may benefit other persons? Should this court stop him from accessing the court? If the Court so stops him, where else should he go to seek a remedy? Can it be validly argued that the intention of the Legislators was to deny such a party an easy access to the court of law? Or can it be argued that the legislators intended to impose on such a party a duty to stop there and start searching for or identifying the other persons who may have a similarly interest to join them in suing or to obtain their consent to sue on their behalf. In my view, a party who has a right to protect should have freedom to assert such a right event if the result of it will be that other members of that class may end up in benefitting. That is why I believe, the legislator did not use the imperative word "shall" but instead used the word "may" to qualify the word "sue". This is why also the legislator provided in sub-rule 3 that a person may apply to the court to be joined as a party if he feels that a suit filed is on his behalf or for his benefit. It would rather be so than to stop a party access to the court of law and justice.

8. I find *Justice Onyancha's* approach quite persuasive. A contextual reading of the relevant rule suggests that the rule is permissive rather than mandatory. In any event, my take from the *Mpoe Case* is that there are circumstances where the court might require a party to seek leave before suing. This is when the interest of that party is indistinguishable from that of the class of people on whose behalf he is suing i.e. where it is the collective right of the group that has been infringed.

9. I am not even certain that Order 1 rule 8 applies here. It is not so obvious, as the Respondent claims, that the Applicant is suing in a representative capacity. The fact that the suit will involve the rights of a third party which are similar to that of the Applicant does not transform the suit to be a representative one. The Applicant is simply suing for what he claims are his rights to the Suit Property. It only so happens that his rights are identical to those of the third party who will equally benefit from the action if it succeeds.

10.The second salvo Mr. Kiingati unleashes is also one of form. He urges that the suit is incompetent because it should have been originated by way of Originating Summons as required by Order 37, Rule 1(g) of the Civil Procedure Rules, and not by way of Plaint as the Applicant has done. Order 37, Rule 1(g) provides that:

(1)The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative or a deceased person, or as *cestui que* trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions –

a)…
b)…
c)…
d)…
e)…
f)…

g) the determination of any question arising directly out

of the administrating of the estate or trust.

11.With respect, Mr. Kiiingati's argument on this issue is misguided. A suit involving a trust is required to be brought by way of Originating Summons when it involves determination of questions under a deed or instrument of trust. Hence, not every suit for the declaration of a trust will have to be brought by way of an Originating Summons. In any event, I am not prepared to hold, in the circumstances of this case that the failure to sue under the prescribed form is fatal to such a suit.

12.The position would have been the same if Mr. Kiingati had lodged his objection on Order 37, Rule 12 which deals with cases brought under the Trustees Act. Our courts have held that a suit seeking determination of a trust such as this one is brought under the general law of trust and ought to be brought by way of a plaint so that any complex and contested factual matters can be ventilated and resolved (see, for example, *Francis Gitonga Macharia v Muiruri Waithaka* [1998] eKLR (Civil Appeal No. 110 of 1997) and *Nganga Kahuha v Mwangi Kahuha* High Court Civil Case No. 702 of 2003 (unreported).)

13.For his third objection, Mr. Kiiingati relies on the provisions of Order 2 Rule 10 and argues that the Applicant ought to have provided the particulars of the breach of trust and failure to do so renders the suit untenable. I would agree with Mr. Kiingati that as currently framed the Plaint is quite sparse and does not set out with the required specificity the breach of trust alleged. However, I decline to accept the invitation of Mr. Kiingati to strike out the Plaint on this basis alone. I so refuse for two reasons. First, this is raised as a Preliminary Objection and not as an application to strike out the Plaint. The effect might be the same if successful but the standards applicable are quite different. A Preliminary Objection, in the eternal words of the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696:

consists of a point of law which has been pleased, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit…[I]t is in the nature of what used to be a demurrer. It 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 or if what is sought is the exercise of judicial discretion.

14.Here, the Preliminary Objection does not assume all the facts pleaded in the Plaint as true. On the contrary, it challenges their sufficiency. It would suffice as an application to strike out the Plaint – and even then, it would contend with the judicial discretion to permit the Applicant to amend the Plaint accordingly. The right to amend the Plaint is only refused in extraordinary circumstances. Hence, while the Plaint does not state with the required level of specificity the alleged breach of trust, I refuse to strike it out as invited by the Respondent. As I will discuss below, however, this finding has a bearing on the Applicant's Application.

15.Fourthly, Mr. Kiingati argues that the suit is time-barred. He reminds the Court that by its very terms, the Plaint talks of the period of between 1964 and 1978 as the relevant period when the Suit Property was purchased. Whatever date you take as the genesis of the cause of action between those two temporal slots, one would lead to the ineluctable conclusion that more than twelve years have passed since the cause of action arose. Hence, the suit must be dismissed by virtue of section 7 of the Limitations of Action Act. This would remain so, Mr. Kiingati urges, even if one takes the date of registration of the Suit Property as the date when the cause of action arose. The Respondent was registered as the sole proprietor on 29/10/1991 and issued with a title to the Suit Property on 10/02/1992 (seea copy of the Search attached to the Applicant's affidavit and marked as "JMM 1").

16.Mr. Kiingati's argument is a formidable one but I have ultimately decided that the suit is not time-barred. First, I have looked at the various authorities supplied and I find all of them distinguishable or inapplicable to the case at hand. This is a case which involves the determination of a trust. Indeed, for the Applicant to succeed in this action, he will have, first, to persuade the Court that the trust exists. In that case, when does a cause of action arising from that trust arise? It surely does not arise when the trust was allegedly constituted or when the property was funded or purchased. It arises, in my view, when the trust is breached. And the trust is only breached when the trustee acts inconsistently with the trust. In this case, if it is, in fact, true that the land was registered in trust for the benefit of the Applicant and his two brothers, the cause of action was triggered the moment the Respondent purported to act in a manner inconsistent with that arrangement.

17.Yet this leads to the question: assuming the existence of a trust, when did the Respondent act inconsistently with the purported trust and hence triggering the cause of action? It is enough to say at this point that it is a factual matter to be determined at trial. It would be plausible to make the claim that this happened in 1991 or 1992 when the land was registered in the sole name of the Respondent. But, it is also plausible that was part of the trust arrangement between the three brothers. Suffice it to say that this is a matter for factual determination and, therefore, definitionally improper for disposal by way of Preliminary Objection (See the *El Busaidy Case*, supra).

18.Lastly, Mr. Kiingati argues that in any event the Applicant herein has not discharged the burden to be entitled to the interlocutory orders he seeks. First, Mr. Kiingati urges, the objections raised above seriously impugns any notion that the Applicant has established a prima facie case with a probability of success. Second, Mr. Kiingati points out that the Applicant has not even claimed that he would suffer any loss let alone irreparable harm if the interlocutory orders are not granted. Thirdly, the Respondent is in possession of the Suit Property and the orders sought will dispossess him and deny him his livelihood. Lastly, the Court is urged not to indulge the Applicant as he has sat on his rights since equity does not aid the indolent.

19.On these last points, Mr. Musila for the Applicant responded that the principles upon which Mr. Kiingati submitted are based on *Giella v Cassman Brown* yet that case is inapplicable here since this is not an application for injunction. The only applicable principle here is whether there will be irreparable loss if the interlocutory orders sought are not granted.

20.With respect to Mr. Musila, I am of the opinion that the *Giella* principles are applicable either directly or by analogy. Indeed, there is no difference between the orders sought by the Applicant herein and injunctive relief: the effect would be the same. It would be to elevate form over substance to use different principles in determining cases seeking "restriction" than those seeking "injunctions."

21.Has the Applicant demonstrated that he will likely succeed on the merits? While at this point I am permitted no more than a provisional view, I am not persuaded that the Applicant's case has a high probability of success as our jurisprudence requires. I have already lamented above (see paragraph 13) that the Plaint is quite sparsely drawn. Apart from lacking specificity on the trust and its breach, it also leaves a lot of gaps to be filled ostensibly by evidence at trial and too many questions unanswered. For example, the theory of the case is that the Applicant lived in Uganda between 1964 and 1978 and that he and his two brothers bought a number of properties which were all registered in the Respondent's name. Yet, the Applicant does not tell us what happened to all the other properties funded and purchased

under that arrangement since the present suit only covers one piece of property – the Suit Property. Similarly, the Applicant does not even begin to explain why, as late as 1991 when the registration of the Suit Property was effected by which time he had already been back in Kenya for more than 13 years the Suit Property was registered in the sole name of the Respondent. He also does not explain why only the Respondent has been in possession of the Suit Property for more than twelve years. Finally, the Applicant proffers no proof whatsoever that he sent money for the purchase of the Suit Property. Based on these facts, the Applicant has not established a prima facie case with a probability of success.

22.Even if I were wrong and the only relevant factor as per the Applicant's counsel is whether he would suffer irreparable harm – which is the second *Giella* factor – the Applicant would still not succeed. The evidence put on record has not demonstrated at all what irreparable injury the Plaintiff would suffer if the relief sought is not granted. It is not enough to make the bare claim from the bar that there will be irreparable harm.

23.Lastly, the balance of convenience would tilt in the direction of the Respondent. It is not contested that the Respondent is solely in possession of the Suit Property and has been in such possession since 1991. The Applicant does not make any claim that he has ever had possession of the Suit Property. On the other hand, the Respondent has placed uncontroverted evidence on the record that he not only has had sole possession but also depends on the Suit Property for his livelihood. It follows that the balance of convenience favors the Respondent.

24.In the circumstances, and for the reasons enumerated above, I hereby dismiss the Notice of Motion dated 04/10/2011 with costs.

**DATED, SIGNED** and **DELIVERED** at **MACHAKOS** this day **23RD** day of **JANUARY 2012**.

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**J.M. NGUGI**
**JUDGE**