



**Muiruri (Suing on her Own Behalf and on Behalf of James Kuria  
Ngugi - Deceased) v Kamau & 3 others (Environment & Land Case  
E017 of 2021) [2022] KEELC 3900 (KLR) (22 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3900 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E017 OF 2021  
BM EBOSO, J  
AUGUST 22, 2022**

**BETWEEN**

**ESTHER WANJIKU MUIRURI (SUING ON HER OWN BEHALF AND ON  
BEHALF OF JAMES KURIA NGUGI - DECEASED) ..... PLAINTIFF**

**AND**

**RUTH WAMBUI KAMAU ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**NATHANIEL NJOROGE KAMAU (SUED IN THEIR CAPACITIES AS THE  
LEGAL REPRESENTATIVES OF THE ESTATE OF ISAAC KAMAU NDOGE -  
DECEASED) ..... 3<sup>RD</sup> DEFENDANT**

**HON. ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Background**

1. On May 6, 2021, Esther Wanjiku Muiruri took out an originating summons dated April 30, 2021, seeking the following verbatim orders:
  - 1) A declaration that Isaac Kamau Ndoge - deceased held 0.404 Ha (1 acre) out of land parcel number Kiambu Munyu/147 in trust for the applicants; that the trust be declared to be determined; and that 0.404 ha (1 acre) thereof be transferred in favor of the applicant on her own behalf and in trust for the children of James Kuria Ngugi-deceased.
  - 2) A mandatory injunction to compel the 3<sup>rd</sup> respondent to have excised 0.404 ha (1 acre) out of the suit property, and transfer the same to the applicant on her own behalf and to hold the property in trust for the children of James Kuria Ngugi-deceased.



- 3) The honorable court be pleased to permanently restrain the defendants by themselves or agents, servants or otherwise from interfering in any way with the quiet possession of the applicant's 0.404 ha (1 acre) parcel of all that property known as Kiambu Munyu/147 measuring 3.8 Ha.
  - 4) That the honorable court do order that the ruling delivered on the March 29, 2021 at Thika Senior Resident Magistrates Court in Succession Cause No 219 of 2010 ordering for the subdivision of Kiambu Munyu/147 be set aside.
  - 5) That the honorable court be pleased to issue any further orders that may be deemed to be just and expedient and in the best interest of justice.
  - 6) That the 1st and 2nd respondents pay costs of this suit.
2. The originating summons was supported by her affidavit sworn on April 30, 2021. She contended that she was the widow of the late James Kuria Ngugi who died on August 21, 2013 and the administrator of his estate. (hereinafter referred to as the "the deceased"). It was her case that during his lifetime, the deceased purchased a one (1) acre piece of land from the late Esther Muthoni Kamau in 2001. The one acre sold to the deceased was to be excised from parcel number Kiambu/Munyu/147, measuring approximately 3.8 hectares [the suit property]. At the time of purchase, the suit property was registered in the name of the late Isaac Kamau Ndoge, husband to the late Esther Muthoni Kamau. She added that Esther Muthoni Kamau was an aunt to her deceased husband. At the time of purchase, Esther Muthoni Kamau presented herself as having full authority from Isaac Kamau Ndoge to dispose the property. The deceased paid Esther Muthoni Kamau the agreed purchase price of Kshs 120,000 and he took possession of the one acre piece of land. Upon his demise in 2013, the deceased's remains were buried on the one acre piece of land.
3. She contended that the 1st and 2nd defendants subsequently initiated succession proceedings relating to the estate of the late Isaac Kamau Ndoge and obtained succession orders distributing the suit property without making provisions for the one acre that had been sold to and was occupied by the family of her late husband. Upon being served with the originating summons, the 1st respondent, Ruth Wambui Kamau, filed a notice of preliminary objection dated September 20, 2021, inviting the court to strike out the suit in limine on the following verbatim grounds:
- 1) The claim against the 1st respondent herein is an abuse of the court's process as the wrong party has been sued and the suit does not raise and or disclose any cause of action against the 1st respondent herein as she is not an administrator of the estate of the alleged vendor (deceased), namely Esther Muthoni Wanjiku and the suit herein [*sic*] is nonsuited for lack of capacity.
  - 2) That this honourable court lacks the jurisdiction to vacate and/or interfere with order of probate and administration court as in the orders of the Chief Magistrate Court at Thika Succession Cause No 219/2010 which the applicant seeks to set aside noting the specific areas of jurisdiction this court has been bequeathed with by the [\*Constitution of Kenya, 2010\*](#) and the [\*Environment and Land Court Act, 2011\*](#).
  - 3) That the mode in which the applicant has moved this court through an originating summons is improper as a court cannot only be moved in this mode in simple and straight forward issues which is not the instant case as the facts herein give rise to disputed and triable issues of fact that court must address itself to before making any such determination.



- 4) The applicant's suit herein is retrogressive as it seeks orders on an agreement which was entered into with a person who did not have capacity to contract on behalf of the deceased registered proprietor hence meant to sanctify an illegality.
  - 5) The suit is bad in law, misconceived and discloses no reasonable cause of action as against the 1st respondent thus rendering it fatally and incurably defective hence should be stricken out. [sic]
4. The 2nd respondent similarly filed a notice of preliminary objection dated September 21, 2021, inviting this court to strike out the suit against him in limine on the following verbatim grounds:
- 1) That the suit is time-barred in accordance with provisions of section 4(1) (a) of the Limitation of Actions Act, cap 22 laws of Kenya.
  - 2) That the suit is filed contrary to section 3(3) of the Law of Contract Act (cap 23 laws of Kenya) as read with section 38(1) of the Land Act (No 6 of 2021).
  - 3) That the suit is instituted contrary to section 6(1) as read with section 8 of the Land Control Act (cap 302 laws of Kenya).
  - 4) That this honourable court lacks jurisdiction to declare trust which has never existed neither determined by a competent court, and it also lacks jurisdiction to set aside a ruling delivered in Thika Succession Cause No 219 of 2010 as prayed in prayer 4.
  - 5) That the entire suit is brought in bad faith, are frivolous, vexatious and an abuse of the court process and the entire suit should be struck out with costs to the respondent.

#### **1<sup>st</sup> Defendant's Written Submissions**

5. The two preliminary objections are the subjects of this ruling. They were canvassed through written submissions. The 1st defendant filed written submissions dated January 31, 2022 through M/s Daniel Henry & Co Advocates. On whether this court has jurisdiction to entertain this suit, counsel submitted that the Chief Magistrate Court having made distribution orders in Thika CMC Succession Cause No 219 of 2010, this court does not have jurisdiction to set aside or vary orders made by the said succession court.
6. Counsel for the 1st defendant added that the suit herein does not disclose any cause of action against the 1st defendant because the 1st defendant was not privy to the alleged sale agreement between the deceased and the late Esther Muthoni Kamau. Neither was the 1st defendant a personal representative of the estate of the late Esther Muthoni Kamau. Counsel contended that the administrator of the estate of the late Esther Muthoni Kamau is the proper person who should have been joined as a defendant in the suit.
7. Counsel for the 1st defendant added that an originating summons is an improper mode for instituting a claim for determination of a complex issue such as the one in the present suit. Counsel urged the court to strike out the suit.

#### **2<sup>nd</sup> Defendant's Written Submissions**

8. The 2nd defendant filed written submissions dated January 18, 2022 through M/s Ngure Mbugua & Co Advocates. Counsel for the 2nd defendant identified the following as the issues that fell for determination in the preliminary objections:



- (i) Whether the plaintiff's suit contravenes section 3(3) of the Law of Contract Act and section 38(1) of the Land Act 2012;
  - (ii) Whether the suit contravenes section 4(1) (a) of the Limitation of Actions Act;
  - (iii) Whether the suit contravenes section 6(1) as read together with section 8(1) of the Land Control Act; and
  - (iv) Whether this court lacks jurisdiction to set aside a ruling delivered in Thika CMC Succession Cause No 219 of 2010.
9. On whether this suit contravenes section 3(3) of the Law of Contract Act and section 38(1) of the Land Act, counsel submitted that the alleged land sale contract was subject to the mandatory requirements of section 3(3) of the Law of Contract Act and section 38(1) of the Land Act which require that all contracts disposing an interest in land should be in writing and should be signed by the parties thereto. Citing the decision in John Michael Wanjao v Alubala Abenayo Andambi [2011] eKLR, counsel urged the court to strike out the suit on the above ground.
  10. On whether the suit contravenes section 4(1) of the Limitation of Actions Act, counsel submitted that the plaintiff's suit is a claim founded on contract and is statute-barred under section 4(1) of the Law of Contract Act because it was filed in 2021 and seeks to enforce a land sale contract allegedly entered into in 2001.
  11. On whether the suit contravenes section 6(1) as read together with section 8(1) of the Land Control Act, counsel submitted that the alleged land sale contract of 2001 required consent of the Land Control Board and because no consent was obtained, the alleged land sale contract became void upon expiry of six months from the date of the agreement.
  12. On whether this court lacks jurisdiction to set aside a ruling delivered in Thika CMC Succession Cause Number 219 of 2010, counsel submitted that the only avenue available to a party aggrieved by a decision made by the Chief Magistrate Court in a succession cause is an appeal to the High Court. Counsel urged the court to strike out the suit on the above grounds.

### **Plaintiff's Submissions**

13. The plaintiff filed two sets of written submissions, both dated March 12, 2022, in answer to the two notices of preliminary objection. The first set of written submissions relates to the preliminary objection by the 1st defendant. On the 1st defendant's contention that she is non-suited and that there is no reasonable cause of action against her, counsel for the plaintiff submitted that because the 1st defendant is a beneficiary of the estate of the late Isaac Kamau Ndoge, he is likely to be affected by the orders sought in the originating summons, hence he is a necessary party to this suit. Counsel cited order 1 rule 9 of the Civil Procedure Rules and argued that no suit is liable for defeat on the ground of misjoinder or non-joinder.
14. On the 1st defendant's contention that this court lacks jurisdiction to entertain this suit, counsel cited article 162(2)(b) of the Constitution and argued that this court is the proper court to deal with disputes relating to use, occupation and title to land. Counsel contend that the issue raised in the originating summons is outside the jurisdiction of a succession court.
15. On the contention that the originating summons is not the proper platform on which to ventilate the claim in this suit, counsel submitted that under order 37 rule 1 of the Civil Procedure Rules, the plaintiff is properly before this court. Counsel further cited article 159 of the Constitution and urged the court to focus on substantive justice as opposed to procedural technicalities.



16. On the 1st defendant's contention that the suit is retrogressive because it was entered into by a person who did not have capacity to do so, counsel for the plaintiff cited the decision in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 and contended that this is a factual issue that requires evidence and cannot be canvassed on the platform of a preliminary objection.
17. On the 2nd defendant's contention that this suit is statute-barred under section 4(1) of the *Limitation of Actions Act*, counsel submitted that this suit is not based on contract and contended that depositions made in relation to the contract of 2001 were merely intended to demonstrate the circumstances under which the deceased entered the suit property. Counsel advanced the same argument in response to the 2nd respondent's contention that the suit is a non-starter by dint of the provisions of section 3(3) of the *Law of Contract Act*.
18. In response to the 2nd defendant's contention that the contract of 2001 was void and unenforceable, counsel relied on the Court of Appeal decision in the case of *Peter Mbiri Michuki v Samuel Mugo* and the decision in *Mwangi & another v Mwangi* [1986] KLR 328. Counsel argued that the rights of a person in possession or occupation of land are equitable and are binding on the land. Counsel contended that through the originating summons, the plaintiff seeks a declaration of a constructive trust.
19. On the 2nd defendant's contention that this court lacks jurisdiction to declare a trust, counsel cited section 13(7) of the *Environment and Land Court Act* and submitted that this court has jurisdiction to make declaratory orders.

### **Analysis and Determination**

20. I have considered the grounds advanced in the two notices of preliminary objection. I have also considered the relevant legal frameworks and jurisprudence. I will dispose the two objections sequentially, starting with the grounds raised in the 1st defendant's notice of preliminary objection.
21. The first ground advanced in the 1st defendant's notice of preliminary objection is that the claim against the 1st defendant is an abuse of the process of the court as a wrong party has been sued and the suit does not raise and/or disclose any cause of action against the 1st defendant. I have looked at the originating summons and the supporting affidavit. I have also looked at the 1st defendant's response to the originating summons. Through the originating summons, the plaintiff seeks a declaration that the late Isaac Kamau Ndoge held one (1) acre out of land parcel number Kiambu/Munyu/147 in trust for the late James Kuria Ngugi. The plaintiff contends that the late Ndoge's first wife, Esther Wambui Kamau, sold the land to the late James Kuria Ngugi in 2001, with the consent of the late Ndoge. The deceased plaintiff was given the land in 2001 and lived there up to the time of his death. He was buried on the land. It is alleged that his family lives on the one acre.
22. From the response filed by the 1st defendant, it does emerge that the 1st and 2nd defendants are the joint administrators of the estate of the late Ndoge. It does also emerge that the two defendants are the beneficiaries of the estate of the late Ndoge in equal shares. The suit property is one of the assets to be shared by them equally.
23. From the above circumstances, it is apparent that the two defendants are necessary parties because the declaration sought in this suit cannot be considered or made in their absence. It should be made clear, however, that whether or not there was a trust between the late Ndoge and the late Ngugi is a matter that calls for evidence.
24. The 1st defendant urges this court to dismiss the plaintiff's suit for non-joinder of the estate of the late Esther Wambui Kamau who is alleged to have sold part of the suit property to the late Ngugi. Whereas



I agree with the 1st defendant that the estate of the late Esther Wambui Kamau is a necessary party in these proceedings, for the purpose of enabling the court adjudicate and settle all questions arising in the dispute, I do not think non-joinder of the estate is a proper basis for striking out the suit in limine. Order 1 rule 9 of the *Civil Procedure Rules* discourages courts against striking out suits on grounds of misjoinder or non-joinder. I will in the circumstances not be quick to strike out the suit at this stage. It should, however, be made clear that it is the responsibility of the plaintiff to initiate an appropriate application for joinder of the estate. Consequently, the first ground of objection in the 1st defendant's notice is rejected.

25. The second ground of objection in the 1st defendant's notice of preliminary objection is that this court lacks jurisdiction to vacate and/or interfere with orders of a probate and administration court. The question as to the proper court where to ventilate a claim relating to title to land in a scenario where the land in question is the subject of a succession cause has gained frequency in our courts since the promulgation of the *Constitution of Kenya, 2010*. There is now near consensus that succession courts only distribute land that has no contestation over title. In instances where third parties are laying claims of title to land that is the subject of a succession cause, the approach which our succession courts have adopted is to stay confirmation/distribution proceedings relating to the specific land and refer the third party claimants to the relevant land court for determination of the question of title to that land. Where a certificate of confirmation has been issued but the land is still available, claimants are expected to seek stay or preservative orders in the relevant succession courts and proceed to ventilate their substantive claims in the relevant land courts. The stay/ preservative orders serve to preserve the land, pending the determination of the question of title by the land courts. Should the third party claimant be successful in the land court, he is expected to move the succession court for an order setting aside any confirmation or distribution order that may have been issued in the succession cause in relation to land that has been adjudged by the land court as not belonging to the estate of the deceased.
26. Needless to emphasize, a land court would be reluctant to issue orders to third parties in a matter where, during trial, it is not demonstrated that the land that has been the subject of succession is still available or has been preserved appropriately.
27. Given the above approach which courts have adopted, I do not think it would be proper for this court to shut the plaintiff out of the seat of justice on the basis of *ex parte* succession orders without the benefit of a trial. I will reject the second ground of objection for the above reasons.
28. The third ground of objection in the 1st defendant's preliminary objection is that an originating summons is not the appropriate platform on which to ventilate the issue in this suit. At this stage, the plaintiff contends that there exists a trust and she seeks a declaration to that effect under order 37 of the *Civil Procedure Rules*. In my view, it is only after trial that the court will be in a position to determine whether the orders sought in the originating summons can be properly granted under order 37 of the Civil Procedure Rules. It is premature for the court to pronounce itself on the appropriateness of an originating summons in the circumstances of this suit. I will reject that limb of objection on the above ground.
29. The fourth ground of objection is that the suit herein is retrogressive because it seeks orders on an agreement which was entered into with a person who did not have capacity to contract on behalf of the registered proprietor. This is an issue that would fall for determination based on evidence. The 1st defendant elected to ventilate her objection on the platform of a preliminary objection. The court will wait to receive evidence before pronouncing itself on the issue.



30. The fifth ground of objection in the 1st defendant's preliminary objection is a replica of the 1st ground. I have already analyzed and pronounced myself on it. For the above reasons, I do not find merit in the 1st defendant's preliminary objection. I now turn to the 2nd defendant's preliminary objection.
31. The first ground of objection in the 2nd defendant's notice of preliminary objection is that the plaintiff's suit is statute-barred under section 4(1)(a) of the [Limitation of Actions Act](#). I have considered the gist of the originating summons. It seeks a declaration of a trust in relation to a one acre portion of the suit property. The estate of the late Ngugi contends that it does not seek to enforce the contract of 2001. It is its case that, as occupier of the one acre portion of the suit property, it seeks a declaration of trust in relation to the one acre. It is its case that the contract of 2001 is merely a piece of evidence on how the deceased entered the land.
32. Section 20 of the [Limitation of Actions Act](#) excludes claims founded on trust from the general limitation periods prescribed under the Act, including section 4(1) of the Act. Whether or not there is merit in the plea for declaration of a trust is a triable issue. I will, in the circumstances, reject the first ground of objection in the 2nd defendant preliminary objection for the above reasons.
33. The second ground of objection in the 2nd defendant's preliminary objection is that this suit contravenes section 3(3) of the [Law of Contract Act](#) and section 38(1) of the [Land Act](#). The third ground is that this suit contravenes Section 6(1) as read together with Section 8 of the [Land Control Act](#). The two grounds will be disposed simultaneously.
34. I have observed that the plaintiff seems to be ventilating a claim founded on an alleged trust. That being her case, it would be unsafe to shut her out of the seat of justice on the basis of section 3(3) of the [Law of Contract Act](#) and section 38(1) of the [Land Act](#).
35. Similarly, section 6(1) of the [Land Control Act](#) cannot be invoked to shut the plaintiff out of the seat of justice in a claim for declaration of a trust.
36. Even if the above findings were wrong, the current framework in section 3(3) of the [Law of Contract Act](#) came into force in 2003. It cannot apply to a 2001 land sale contract. Similarly, the current framework in section 38 of the [Land Act](#) came into force in 2012. It can not be applied to a 2001 land sale contract.
37. The first limb of the fourth ground of objection is that this court lacks jurisdiction to declare a trust. I do not agree with the 2nd defendant's contention that this court lacks jurisdiction to declare a trust. The broad jurisdiction of this court is granted by article 162(2)(b) of the [Constitution](#). That broad jurisdiction is elaborated under section 13 of the [Environment and Land Court Act](#). The framework in the [Act](#) gives this court jurisdiction to issue declaratory orders. The contention that this court lacks jurisdiction to issue a declaratory order relating to an alleged trust relating to land is a misconception of the law.
38. The second limb of the 2nd defendant's fourth ground of objection is that this court lacks jurisdiction to set aside a ruling rendered in a succession cause. I have rendered myself on the approach which our courts have considered appropriate when dealing with claims of title relating to land that is the subject matter of a succession cause. All I would add is that this court remains alive to the fact that once a third party claim relating to title to land is determined by a land court, it is the responsibility of the third party claimant to move the succession court for an appropriate order varying any succession orders that may have been issued in relation to the land.
39. For the above reasons, I do not find merit in the 2nd defendant's preliminary objection.



40. In the end, the 1st defendant's preliminary objection dated September 20, 2022 and the 2nd defendant's preliminary objection dated September 21, 2022 are both rejected for lack of merit. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 22ND DAY OF AUGUST 2022**

**B M EBOSO**

**JUDGE**

In the Presence of: -

Ms Nyamu for the 1st Respondent

Ms Oluoch for the 2nd Respondent

Court Assistant: Ms Osodo

